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(Civil, Criminal & Revenue)

BY

D. V. CHITALEY & N. RAMARATNAM
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PREFACE

No apology is needed for the publication of this Digest, which is a consolidated one covering the half century from 1901 to 1950. It will be easily appreciated that the bulk of our current case-law is contained in the decisions of this period. It is not necessary to expatiate at length on the virtues of consolidation, as otherwise, one will have to refer to a large number of publications for the same point.

On the importance of case-law, the late Sir William Holdsworth wrote: "Codes are lifeless things compared with the living law evoked by the decision of cases which turn upon the actual happenings in the lives of human beings; and each individual case, which lays down living law based upon these actual happenings, can only cover a very small fraction of the field of law."

In the Preface to the Corpus Juris (American), the following passage occurs: "Often the particular application or illustration stated will precisely fit the state of facts in his (the lawyer's) own case, and the argument of reason and logic may be fortified by pointing out that in prior litigated cases the rule has been applied in the manner contended for. No lawyer is content to depend alone upon his own reason and knowledge. Few have the presumption to assume that they would, unaided by the experience of the past, present all arguments that could be made in any case as to the application of a general rule. Precedents are valuable the same as experience is valuable. Reported decisions are valuable the same as history and science are valuable.... There is more wisdom in the many than in the few. Lawyers should get wisdom from all sources, and in preparing a brief in an important case, should not stop until they find every case that has been decided upon the subject in question. (The Value of Precedents by J. W. McLoud in 28 Am Law Rev. 218)."

It can be seen from the above quotations how superficial is the oft-heard criticism against the growth of case-law in our country.

The enormous growth of case-law makes a Digest an indispensable publication for the legal profession. No doubt, we have now got in the field excellent commentaries and text books in which the decisions bearing on the respective subjects are exhaustively dealt with. But in our opinion, Commentaries and Digests are complementary to each other, and neither can dispense with the other.

In the first place, commentaries dealing exhaustively with the case-law bearing on the respective subjects do not cover the entire field of law. In the next place, the point of view and the mode of treatment and dealing with the case-law in a Digest and a Commentary are entirely different. The approach, in each case, is, as it were, from opposite ends. Each system has its own special usefulness to the lawyer. If a lawyer is on the hunt for a parallel precedent, for a case on all fours, he naturally turns to a Digest. If he wants to study the principles bearing on a point, he first thinks of a Commentary or a text book. However exhaustive a Commentary may be, in point of case-law, the emphasis is more on the

underlying principles than on the facts and features of each case which are available only in a Digest. Though a Commentary may give a more correct insight into the legal position and the over-all state of case-law on any question, a Digest has to be resorted to for picking out the particular case which comes closest to the matter on hand.

Further, it has to be remembered that in a Commentary, the case-law is seen *as interpreted* by the Author. In a Digest, the reader has, as it were, a direct access to the case-law and he may bring to bear upon his study of the case-law his own point of view and may thereby be enabled to draw a conclusion which not only did not occur to the Author but was contrary to the Author's conclusion. In any case, a Digest will enable the reader to test the correctness of the conclusions set forth in the commentaries, before he proceeds to study the actual reports after he has selected the decisions for study by the above process.

As regards the special features of the present publication, the first point to be mentioned is that it is a Digest of full head-notes and not merely of short, truncated statements of the law. Separate points decided by a case are digested separately and are not jumbled up together in the same note.

Where the decisions bear upon statutory provisions they have been digested under the appropriate statutory headings. But care has been taken to give topical headings also in proper places with cross-references to the respective statutory headings.

Where the number of cases under a section or heading is very large, they are sub-divided into sub-headings. In such cases a synopsis of the headings and sub-headings also is given.

Where a decision overrules or reverses a previous ruling, this is noted under the decision.

Other features are like those of the well-known Digests published by the Madras Law Journal Office and All India Reporter hitherto, with which the Bar and Bench are already familiar and which they appreciate so much.

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ABBREVIATIONS

REPORTS

A.I.R. 1914 All., Bom., etc. ... All India Reporter, Allahabad, Bombay, etc., sections of the respective years.
A. M. L. J. ... Ajmer-Merwara Law Journal.
Agra. H. C. R. ... Agra High Court Reports.
All. or I. L. R. All. ... Indian Law Reports, Allahabad Series.
All. L. Jour. ... Allahabad Law Journal.
All. W. N. ... Allahabad Weekly Notes.
All. W. R. ... Allahabad Weekly Reporter.
I. L. R. Assam ... Indian Law Reports, Assam Series.
Avadh W. N. ... Avadh (or Oudh) Weekly Notes.
B. R. ... Bihar Reports.
Beng. L. R. ... Bengal Law Reports.
B. L. J. R. or Bihar L. J. R. ... Bihar Law Journal Reports.
Bom. or I. L. R. Bom. ... Indian Law Reports, Bombay Series.
Bom. H. C. R. ... Bombay High Court Reports.
Bom. L. R. ... Bombay Law Reporter.
Bom. P. J. ... Bombay Printed Judgments.
Bur. L. Jour. ... Burma Law Journal.
Bur. L. R. ... Burma Law Reports.
Bur. L. Tim. ... Burma Law Times.
Cal. or I. L. R. Cal. ... Indian Law Reports, Calcutta Series.
Cal. L. Jour. ... Calcutta Law Journal.
Cal. L. R. ... Calcutta Law Reports.
Cal. W. N. ... Calcutta Weekly Notes.
Cal. W. N. (D. R.) ... Calcutta Weekly Notes (Dacca Reports).
C. P. L. R. ... Central Provinces Law Reports.
Cr. App. Rep. ... Cohen's Criminal Appeal Reports.
Cr. or Cri. L. Jour. ... Criminal Law Journal.
I. L. R. Cut. ... Indian Law Reports, Cuttack Series.
Cut. L. T. ... Cuttack Law Times.
E. P. ... East Punjab.
I. L. R. E. P. or East Punj. ... Indian Law Reports, East Punjab Series.
F. C. R. ... Federal Court Reports.
F. L. J. ... Federal Law Journal.
I. L. R. Hyd. ... Indian Law Reports Hyderabad Series.
Ind. App. ... Law Reports, Indian Appeals.
Ind. Cas. ... Indian Cases.
I. R. or Rul. ... Indian Rulings or Ruling.
I. T. R. ... Income Tax Reports.
J. & K. ... Jammu & Kashmir.
J. & K. L. R. ... Jammu & Kashmir Law Reports.
J. L. R. or Jaipur L. R. ... Jaipur Law Reports.
I. L. R. Kar. ... Indian Law Reports, Karachi Series.
K. B. ... (Law Reports) King's Bench Division.
(L. J.) K. B. ... Law Journal Reports, King's Bench.
K. L. T. or Ker. L. T. ...Kerala Law Times.
I. L. R. Lah. ... Indian Law Reports, Lahore Series.
Lah. L. Jour. ... Lahore Law Journal.
Lah. L. T. ... Lahore Law Times.
L. R. A. ... Law Reporter, Allahabad.
Low. Bur. Rul. ... Lower Burma Rulings.
Luck. or I. L. R. Luck. ... Indian Law Reports, Lucknow Series.
Madh. B. or M. B. ... Madhya Bharat.
I. L. R. Madh. B. ... Indian Law Reports Madhya Bharat Series.
Madh. B. L. J. ... Madhya Bharat Law Journal
Madh. B. L. R. ... Madhya Bharat Law Reporter.
Mad. or I. L. R. Mad. ... Indian Law Reports, Madras Series.
Mad. H. C. R. ... Madras High Court Reports.
Mad. L. Jour. ... Madras Law Journal.
Mad. L. Tim. ... Madras Law Times.
Mad. L. W. ... Madras Law Weekly.
Mad. W. N. ... Madras Weekly Notes.
M. L. R. or Marwar L. R. ... Marwar Law Reporter.
Moo. Ind. App. ... Moore's Indian Appeals.
Moo. P. C. C. ... Moore's Privy Council Cases.
Mys. ... Mysore.
I. L. R. Mys. ... Indian Law Reports, Mysore Series.
Mys. H. C. R. ... Mysore High Court Reports.
Mys. L. J. ... Mysore Law Journal.
I. L. R. Nag. ... Indian Law Reports, Nagpur Series.
Nag. L. Jour. ... Nagpur Law Journal.
Nag. L. R. ... Nagpur Law Reports.
N.-W. P. H. C. R. ... North-West Provinces High Court Reports.
Oudh Cas. ... Oudh Cases.
Oudh L. Jour. ... Oudh Law Journal.
Oudh L. R. ... Oudh Law Reports.
Oudh S. C. ... Oudh Select Cases.
Oudh W. N. ... Oudh Weekly Notes.
Pak. Cas. ... Pakistan Cases.
Pak. L. R. Lahore ... Pakistan Law Reports, Lahore.
Pat. or I. L. R. Pat. ... Indian Law Reports, Patna Series.
Pat. L. Jour. ... Patna Law Journal.
Pat. L. Tim. ... Patna Law Times.
Pat. L. W. ... Patna Law Weekly.

Pat. W. N. ... Patna Weekly Notes.
I. L. R. Patiala ... Indian Law Reports, Patiala Series.
Pepsu L. R. ... Pepsu Law Reports.
I. L. R. Punj. ... Indian Law Reports, Punjab Series.
Pun. L. R. ... Punjab Law Reporter.
Pun. Re. ... Punjab Records.
Pun. W. R. ... Punjab Weekly Reporter.
I. L. R. Raj. ... Indian Law Reports, Rajasthan Series.
R. L. W. or Raj. L. W. ... The Rajasthan Law Weekly.
Rang. or I. L. R. Rang. ... Indian Law Reports, Rangoon Series.
Rang. L. R. ... Rangoon Law Reports.
Rat. or Rat. Un. Cr. C. ... Ratanlal's Unreported Criminal Cases.
R. D. ... Revenue Decisions.
Sau. ... Saurashtra.
Sau. L. R. ... Saurashtra Law Reporter.
Sind L. R. ... Sind Law Reporter.
S. C. J. ... Supreme Court Journal.
S. C. R. ... Supreme Court Reports.
Suth. W. R. ... Sutherland's Weekly Reporter.
I. L. R. Trav. Co. or T. C. ... Indian Law Reports, Travancore-Cochin Series.
T. C. L. R. or Trav. Co. L. R. ... Travancore-Cochin Law Reports.
T. L. J. or Trav. L. J. ... Travancore Law Journal.
U. P. L. R. ... United Provinces Law Reports.
Upp. Bur. Rul. ... Upper Burma Rulings.
Vind.-Pra. or V. P. ... Vindhya Pradesh.
Weir. ... Weir's Criminal Rulings.

Other Abbreviations.

A. C. ... Appellate Jurisdiction, Civil.
A. Cr. ... Appellate Jurisdiction, Criminal.
App. ... Appendix or Appeal.
Appr. ... Approved.
Art. ... Article.
B. R. ... Board of Revenue.
C. A. ... Court of Appeal.
Civ. ... Civil.
Cl. ... Clause.
Cons. ... Considered.
Cr. ... Criminal.
Diss. ... Dissented.
Dist. ... Distinguished.
D. B. ... Division Bench.
Expl. ... Explained.
F. A. ... First Appeal.
F. B. ... Full Bench.
F. C. ... Federal Court.
Foll. ... Followed.
Illu. ... Illustrations.
Jour. ... Journal.
L. P. ... Letters Patent.
N. ... Note.
No. ... Number.
O. ... Order.
O. C. ... Original Jurisdiction, Civil.
O. Cr. ... Original Jurisdiction, Criminal.
Over. ... Overruled.
P. ... Page.
Pr. ... Para.
Pt. ... Point.
P. C. ... Privy Council.
Pre. ... Preamble.
R. ... Rule.
Ref. ... Referred or Reference.
Rel. on. ... Relied on.
Rev. ... Revenue.
S. ... Section.
S. A. ... Second Appeal.
S. B. ... Special Bench.
S. C. ... Supreme Court.
S. N. ... Short Notes of cases.
V. ... Volume Number.

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1941	1942	1943	1944	1945	1946	1947
22	23	24	25	26		
1948	1949	1950	1951	1952		

(I. L. R.) Allahabad

1	2	3	4	5	6
1875-1877	1878–1880	1881	1882	1883	1884
7	8	9	10	11	12	13
1885	1886	1887	1888	1889	1890	1891
14	15	16	17	18	19	20
1892	1893	1894	1895	1896	1897	1898
21	22	23	24	25	26	27
1899	1900	1901	1902	1903	1904	1905
28	29	30	31	32	33	34
1906	1907	1908	1909	1910	1911	1912
35	36	37	38	39	40	41
1913	1914	1915	1916	1917	1918	1919
42	43	44	45	46	47	48
1920	1921	1922	1923	1924	1925	1926
49	50	51	52	53	54	55
1927	1928	1929	1930	1931	1932	1933
56	57	58				
1934	1935	1936				

From 1937 citation by year

Allahabad Law Journal

1	2	3	4	5	6	7
1904	1905	1906	1907	1908	1909	1910

Allahabad Law Journal *(contd.)*

8	9–10	11	12	13	14	15
1911	1912	1913	1914	1915	1916	1917
16	17	18	19	20	21	22
1918	1919	1920	1921	1922	1923	1924
23	24	25	26			
1925	1926	1927	1928			

From 1929 citation by year.

Allahabad Weekly Notes

1	2	3	4	5	6	7
1881	1882	1883	1884	1885	1886	1887
8	9	10	11	12	13	14
1888	1889	1890	1891	1892	1893	1894
15	16	17	18	19	20	21
1895	1896	1897	1898	1899	1900	1901
22	23	24	25	26	27	28
1902	1903	1904	1905	1906	1907	1908

Allahabad Weekly Reporter

1935 AWR
1935

Citation by year.

(I. L. R.) Assam

1	2	3	4	5	6	7
1949	1950	1951	1952	1953	1954	1955

Bengal Law Reports

1	2–3	4–5	6–7	8–9	10–11	12–13
1868	1869	1870	1871	1872	1873	1874
14–15						
1875						

Bihar Law Journal Reports

1	2	3	4
1953	1954	1955	1956

Bihar Reports

1	2	3	4	5	6	7
1935	1936	1937	1938	1939	1940	1941
8	9	10	11	12	13	
1942	1943	1944	1945	1946	1947	

(I. L. R.) Bombay

1	2	3	4
1875–1877	1877–1878	1878-1879	1879–1880
5	6	7	8	9	10
1880–1881	1881–1882	1883	1884	1885	1886
11	12	13	14	15	16	17
1887	1888	1889	1890	1891	1892	1893
18	19	20	21	22	23	24
1894	1895	1896	1897	1898	1899	1900
25	26	27	28	29	30	31
1901	1902	1903	1904	1905	1906	1907

(I. L. R.) Bombay *(contd.)*

32	33	34	35	36	37	38
1908	1909	1910	1911	1912	1913	1914
39	40	41	42	43	44	45
1915	1916	1917	1918	1919	1920	1921
46	47	48	49	50	51	52
1922	1923	1924	1925	1926	1927	1928
53	54	55	56	57	58	59	60
1929	1930	1931	1932	1933	1934	1935	1936

From 1937 citation is by year.

Bombay High Court Reports

1	2	3	4
1862–1863	1864–1866	1866–1867	1867–1868
5	6	7	8	9	10
1868–1869	1869	1870	1871	1872	1873
11	12				
1874	1875				

Bombay Law Reporter

1	2	3	4	5	6	7
1899	1900	1901	1902	1903	1904	1905
8	9	10	11	12	13	14
1906	1907	1908	1909	1910	1911	1912
15	16	17	18	19	20	21
1913	1914	1915	1916	1917	1918	1919
22	23	24	25	26	27	28
1920	1921	1922	1923	1924	1925	1926
29	30	31	32	33	34	35
1927	1928	1929	1930	1931	1932	1933
36	37	38	39	40	41	42
1934	1935	1936	1937	1938	1939	1940
43	44	45	46	47	48	49
1941	1942	1943	1944	1945	1946	1947
50	51	52	53	54		
1948	1949	1950	1951	1952		

Bombay Printed Judgments.

1	2	3	4
1872–1874	1875–1877	1878–1880	1881–1883
5	6	7	8
1884–1887	1888–1890	1891–1893	1894–1896
9	10		
1897–1898	1899–1900		

Burma Law Journal

1	2	3	4	5	6
1922	1923	1924	1925	1926	1927

Burma Law Reports

1948 Bur L R / 1948 Citation by year

Burma Law Times

1	2	3	4	5	6	7
1908	1909	1910	1911	1912	1913	1914
8	9	10	11	12	13	
1915	1916	1917	1918	1919	1920	

(I. L. R.) Calcutta

1	2	3	4	5
1875-1876	1876–1877	1877–1878	1879	1880
6–7	8	9	10	11	12–13	14
1881	1882	1883	1884	1885	1886	1887
15	16	17	18	19	20	21
1888	1889	1890	1891	1892	1893	1894

(I. L. R.) Calcutta *(contd.)*

22	23	24	25	26	27	28
1895	1896	1897	1898	1899	1900	1901
29	30	31	32	33	34	35
1902	1903	1904	1905	1906	1907	1908
36	37	38	39	40	41	42
1909	1910	1911	1912	1913	1914	1915
43	44	45	46	47	48	49
1916	1917	1918	1919	1920	1921	1922
50	51	52	53	54	55	56
1923	1924	1925	1926	1927	1928	1929
57	58	59	60	61	62	63
1930	1931	1932	1933	1934	1935	1936

From 1937 citation is by year.

Calcutta Law Journal

1–2	3–4	5–6	7–8	9–10	11–12	13–14
1905	1906	1907	1908	1909	1910	1911
15–16	17–18	19–20	21–22	23–24	25–26
1912	1913	1914	1915	1916	1917
27–28	29–30	31–32	33–34	35–36	37–38
1918	1919	1920	1921	1922	1923
39–40	41–42	43–44	45–46	47–48	49–50
1924	1925	1926	1927	1928	1929
51–52	53–54	55–56	57–58	59–60	61–62
1930	1931	1932	1933	1934	1935
63–64	65–66	67–68	69–70	71–72	73–74
1936	1937	1938	1939	1940	1941
75–76	77–78	79–80	81		82
1942	1943	1944	1945–46		1947–48
83–84	85–86	87–88	89–90		
1949	1950	1951	1952		

Calcutta Law Reports

1–2	3–4	5–6	7–8	9–11	12–13
1878	1879	1880	1881	1882	1883

Calcutta Weekly Notes

1	2	3	4	5	6	7
1897	1898	1899	1900	1901	1902	1903
8	9	10	11	12	13	14
1904	1905	1906	1907	1908	1909	1910
15	16	17	18	19	20	21
1911	1912	1913	1914	1915	1916	1917
22	23	24	25	26	27	28
1918	1919	1920	1921	1922	1923	1924
29	30	31	32	33	34	35
1925	1926	1927	1928	1929	1930	1931
36	37	38	39	40	41	42
1932	1933	1934	1935	1936	1937	1938
43	44	45	46	47	48	49
1939	1940	1941	1942	1943	1944	1945
50	51	52	53	54	55	56
1946	1947	1948	1949	1950	1951	1952
57	58	59	60			
1953	1954	1955	1956			

Central Provinces Law Reports

1	2	3	4	5	6	7
1888	1889	1890	1891	1892	1893	1894
8	9	10	11	12		14
1895	1896	1897	1898	1899	1900	190
15	16	17				
1902	1903	1904				

Company Cases

1	2	3	4	5	6	7
1931	1932	1933	1934	1935	1936	1937
8	9	10	11	12	13	14
1938	1939	1940	1941	1942	1943	1944
15	16	17	18	19	20	21
1945	1946	1947	1948	1949	1950	1951
22						
1952						

Criminal Law Journal

1	2	3–4	5–6	7–8	9–10	11
1904	1905	1906	1907	1908	1909	1910
12	13	14	15	16	17	18
1911	1912	1913	1914	1915	1916	1917
19	20	21	22	23	24	25
1918	1919	1920	1921	1922	1923	1924
26	27	28	29	30	31	32
1925	1926	1927	1928	1929	1930	1931
33	34	35	36	37	38	39
1932	1933	1934	1935	1936	1937	1938
40	41	42	43	44	45	46
1939	1940	1941	1942	1943	1944	1945
47	48	49	50	51	52	From
1946	1947	1948	1949	1950	1951	

1952 citation is by year

ILR (Cuttack)

1 / 1949 — Citation by year

Cuttack Law Times

5	6	7	8	9	10	11
1939	1940	1941	1942	1943	1944	1945
12	13	14	15	16	17	18
1946	1947	1948	1949	1950	1951	1952

ILR Hyderabad

ILR 1951 Hyd / 1951 — Citation by year

Hyde's Reports

1-2 / 1897

Income-tax Reports

1	2	3	4	5	6	7
1933	1934	1935	1936	1937	1938	1939
8	9	10	11	12	13	14
1940	1941	1942	1943	1944	1945	1946
15	16	17	18	19–20		21–22
1947	1948	1949	1950	1951		1952

(L. R.) Indian Appeals

IA (Sup Vol)	1	2	3
1872	1873-1874	1874–1875	1875–1876
4	5	6	7
1876–1877	1877–1878	1878–1879	1879–1880
8	9	10	11
1880–1881	1881–1882	1882–1883	1883–1884
12	13	14	15
1884–1885	1885–1886	1886–1887	1887–1888
16	17	18 19	20 21
1888–1889	1890	1891 1892	1893 1894

(L. R.) Indian Appeals *(contd.)*

23	23	24	25	26	27	28
1895	1896	1897	1898	1899	1900	1901
29	30	31	32	33	34	35
1902	1903	1904	1905	1906	1907	1908
36	37	38	39	40	41	42
1909	1910	1911	1912	1913	1914	1915
43	44	45	46	47	48	49
1916	1917	1918	1919	1920	1921	1922
50	51	52	53	54	55	56
1923	1924	1925	1926	1927	1928	1929
57	58	59	60	61	62	63
1930	1931	1932	1933	1934	1935	1936
64	65	66	67	68	69	70
1937	1938	1939	1940	1941	1942	1943
71	72	73	74	75	76	
1944	1945	1946	1947	1948	1949	

Indian Cases

1–4	5–8	9–12	13–17	18–21	22–25
1909	1910	1911	1912	1913	1914
26–31	32–36	37–42	43–48	49–53	54–58
1915	1916	1917	1918	1919	1920
59–64	65–70	71–77	78–84	85–91	92–98
1921	1922	1923	1924	1925	1926
99–106	107–112	113 120		121–128	129–134
1927	1928	1929	1930		1931
135–140	141–146	147–152	153–158		159–165
1932	1933	1934	1935		1936
166–172	173–178	179–184	185–190		191–196
1937	1938	1939	1940		1941
197–203	204–209	210–215	216–221		222–227
1942	1943	1944	1945		1946
228–230					
1947					

Indian Jurist

1	2	3	4	5	6	7
1877	1878	1879	1880	1881	1882	1883
8	9	10	11	12	13	14
1884	1885	1886	1887	1888	1889	1890
15	16	17				
1891	1892	1893				

Indian Rulings

IR 1929	IR 1930	IR 1931	IR 1932	6
1929	1930	1931	1932	1933–1934
7	8		9	10
1934–1935	1935–1936		1936–1937	1937–1938
11	12		13	14
1938–1939	1939–1940		1940–1941	1941–1942
15	16		17	18
1942–1943	1943–1944		1944–1945	1945–1946
19				
1946–1947				

Jammu & Kashmir Law Reports

7	8	9	10
1948–49	1949–50	1950–51	1951–52
11			
1952–53			

(I. L. R.) Karachi

ILR 1939 Kar / 1939 — Citation by year.

Kerala Law Times

1949 K L T / 1949 — Citation by year.

Knapp's Reports, Privy Council

1	2	3
1829-31	1831-34	1834-36

(I. L. R.) Lahore

1	2	3	4	5	6	7
1920	1921	1922	1923	1924	1925	1926
8	9	10	11	12	13	14
1927	1928	1929	1930	1931	1932	1933
15	16	17	From 1937 to 1947 citation			
1934	1935	1936	by year			

(Pak. L. R.) Lahore

Pak. L. R. 1948 Lahore	
1948	Citation by year.

Lahore Law Journal

1	2	3	4	5	6	7
1919	1920	1921	1922	1923	1924	1925
8						
1926						

Law Reporter, Allahabad

1	2	3	4	5	6	7
1920	1921	1922	1923	1924	1925	1926
8	9	10	11	12	13	14
1927	1928	1929	1930	1931	1932	1933
15	16	17				
1934	1935	1936				

Lower Burma Rulings

1	2	3	4
1900-1902	1903-1904	1905-1906	1907-1908
5	6	7	8
1909-1910	1911-1912	1913-1914	1915-1916
9	10	11	
1917-1918	1919-1920	1921-1922	

(I. L. R.) Lucknow

1	2	3	4	5	6	7
1926	1927	1928	1929	1930	1931	1932
8	9	10	11	12	13	14
1933	1934	1935	1936	1937	1938	1939
15	16	17	18	19	20	21
1940	1941	1942	1943	1944	1945	1946
22	23					
1947	1948					

(I. L. R.) Madhya Bharat
Citation by year from 1952

Madhya Bharat Law Journal
Citation by year from 1952

Madhya Bharat Law Reporter
Citation by year from 1952

(I. L. R.) Madras

1	2	3	4-5	6
1876-1878	1878-1880	1881	1882	1883
7	8	9	10	11	12	13
1884	1885	1886	1887	1888	1889	1890
14	15	16	17	18	19	20
1891	1892	1893	1894	1895	1896	1897
21	22	23	24	25	26	27
1898	1899	1900	1901	1902	1903	1904
28	29	30	31	32	33	34
1905	1906	1907	1908	1909	1910	1911
35	36	37	38	39	40	41
1912	1913	1914	1915	1916	1917	1918
42	43	44	45	46	47	48
1919	1920	1921	1922	1923	1924	1925

(I. L. R.) Madras *(contd.)*

49	50	51	52	53	54	55
1926	1927	1928	1929	1930	1931	1932
56	57	58	59	From 1937 citation		
1933	1934	1935	1936	is by year.		

Madras High Court Reports

1	2	3	4
1862-1863	1864-1865	1866-1868	1868-1869
5	6	7	8
1869-1870	1870-1871	1871-1874	1874-1875

Madras Law Journal

1	2	3	4	5	6	7
1891	1892	1893	1894	1895	1896	1897
8	9	10	11	12	13	14
1898	1899	1900	1901	1902	1903	1904
15	16	17	18	19	20	21
1905	1906	1907	1908	1909	1910	1911
22-23	24-25	26-27	28-29	30-31	32-33	
1912	1913	1914	1915	1916	1917	
34-35	36-37	38-39	40-41	42-43	44-45	
1918	1919	1920	1921	1922	1923	
46-47	48-49	50-51	52-53	54-55	56-57	
1924	1925	1926	1927	1928	1929	
58-59	60-61	62-63	64-65	66-67	68-69	
1930	1931	1932	1933	1934	1935	
70-71						
1936	From 1937 citation is by year.					

Madras Law Times

1	2	3-4	5-6	7-8	9-10	11-12
1906	1907	1908	1909	1910	1911	1912
13-14	15-16	17-18	19-20	21-22	23-24	
1913	1914	1915	1916	1917	1918	
25-26	27-28	29	30-31	32-33	34-35	
1919	1920	1921	1922	1923	1924	

Madras Law Weekly

1	2	3-4	5-6	7-8	9-10	11-12
1914	1915	1916	1917	1918	1919	1920
13-14	15-16	17-18	19-20	21-22	23-24	
1921	1922	1923	1924	1925	1926	
25-26	27-28	29-30	31-32	33-34	35-36	
1927	1928	1929	1930	1931	1932	
37-38	39-40	41-42	43-44	45-46	47-48	
1933	1934	1935	1936	1937	1938	
49-50	51-52	53-54	55	56	57	
1939	1940	1941	1942	1943	1944	
58	59	60	61	62	63	64
1945	1946	1947	1948	1949	1950	1951
65						
1952						

Madras Weekly Notes

1910 MWN	
1910	Citation by year.

Moore's Indian Appeals

1	2	3	4
1836-1837	1837-1841	1841-1846	1846-1851
5	6	7	8
1851-1854	1854-1857	1857-1859	1859-1861
9	10	11	12
1861-1863	1863-1866	1866-1867	1867-1869
13	14		
1869-1870	1870-1872		

Mysore Law Reports

1	2	3	4	5	6	7
1878	1879	1880	1881	1882	1883	1884

Mysore Law Reports *(contd.)*

8	9	10	11	12	13	14
1885	1886	1887	1888	1889	1890	1891
15	16	17	18			
1892	1893	1894	1895			

Mysore Chief Courts Reports

1	2	3	4	5	6	7
1896	1897	1898	1899	1900	1901	1902
8	9	10	11	12	13	14
1903	1904	1905	1906	1907	1908	1909
15	16	17	18	19	20	21
1910	1911	1912	1913	1914	1915	1916
22	23	24	25	26	27	28
1917	1918	1919	1920	1921	1922	1923
29	30	31	32	33	34	35
1924	1925	1926	1927	1928	1929	1930

Mysore High Court Reports

36	37	38	39	40	41	42
1931	1932	1933	1934	1935	1936	1937
43	44	45	46	47	48	49
1938	1939	1940	1941	1942	1943	1944
50	51	52	53	54	55	
1945	1946	1947	1948	1949	1950	

From 1951 citation is by year.

(I. L. R.) Mysore

ILR (1951) Mys. citation by year.

Mysore Law Journal

26	27	28	29	30
1948	1949	1950	1951	1952

(I. L. R.) Nagpur

ILR 1936 Nag — Citation by year.
1936

Nagpur Law Journal

1	2	3	4	5	6	7
1918	1919	1920	1921	1922	1923	1924
8	9	10	11	12	13	14
1925	1926	1927	1928	1929	1930	1931
15	16	17	18	19	20	
1932	1933	1934	1935	1936	1937	

From 1938 citation is by year.

Nagpur Law Reports

1	2	3	4	5	6	7
1905	1906	1907	1908	1909	1910	1911
8	9	10	11	12	13	14
1912	1913	1914	1915	1916	1917	1918
15	16	17	18	19	20	21
1919	1920	1921	1922	1923	1924	1925
22	23	24	25	26	27	28
1926	1927	1928	1929	1930	1931	1932
29	30	31				
1933	1934	1935				

North-West Provinces High Court Reports

1	2	3	4	5	6	7
1869	1870	1871	1872	1873	1874	1875

Oudh Cases

1	2	3	4	5	6	7
1898	1899	1900	1901	1902	1903	1904

Oudh Cases *(contd.)*

8	9	10	11	12	13	14
1905	1906	1907	1908	1909	1910	1911
15	16	17	18	19	20	21
1912	1913	1914	1915	1916	1917	1918
22	23	24	25	26	27	28
1919	1920	1921	1922	1923	1924	1925
29						
1926						

Oudh Law Journal

1	2	3	4	5	6	7
1914	1915	1916	1917	1918	1919	1920
8	9	10	11	12	13	
1921	1922	1923	1924	1925	1926	

Oudh Law Reports

1934 OLR — Citation by year.
1934

Oudh Weekly Notes

1	2	3	4	5	6	7
1924	1925	1926	1927	1928	1929	1930
8	9	10	11			
1931	1932	1933	1934			

From 1935 citation is by year.

(I. L. R.) Patna

1	2	3	4	5	6	7
1922	1923	1924	1925	1926	1927	1928
8	9	10	11	12	13	14
1929	1930	1931	1932	1933	1934	1935
15	16	17	18	19	20	21
1936	1937	1938	1939	1940	1941	1942
22	23	24	25	26	27	28
1943	1944	1945	1946	1947	1948	1949
29	30	31				
1950	1951	1952				

Patna High Court Cases

1917 PHCC — Citation by year.
1917

Patna Law Journal

1	2	3	4	5	6
1916	1917	1918	1919	1920	1921

Patna Law Reports

1	2	3
1923	1924	1925

Patna Law Times

1	2	3	4	5	6	7
1920	1921	1922	1923	1924	1925	1926
8	9	10	11	12	13	14
1927	1928	1929	1930	1931	1932	1933
15	16	17	18	19	20	21
1934	1935	1936	1937	1938	1939	1940
22	23	24	25	26	27	28
1941	1942	1943	1944	1945	1946	1947
29	30					
1948	1949					

Patna Law Weekly

1	2–3	4–5
1916	1917	1918

Patna Weekly Notes

1936 PWN — Citation by year.
1936

Pepsu Law Reports

1	2	3
1949	1950	1951

I. L. R. (Patiala)

From 1952 citation by year.

(I. L. R.) Punjab or East Punjab

1 (E P)	2 (E P)	3	4	5
1948	1949	1950	1951	1952

Punjab Law Reporter

1900 PLR / 1900 Citation by year upto 1923 and then

27	28	29	30	31	32	33
1926	1927	1928	1929	1930	1931	1932
34	35–36	37	38	39	40	41
1933	1934	1935	1936	1937	1938	1939
42	43	44	45	46	47	48
1940	1941	1942	1943	1944	1945	1946
49	50	51	52	53	54	
1947	1948	1949	1950	1951	1952	

Punjab Records

1872 PR / 1872 Citation by year.

Punjab Weekly Reporter

1905 Pun W R / 1905 Citation by year.

(I. L. R.) Rajasthan

1	2
1951	1952

Rajasthan Law Weekly

1	2	3
1950	1951	1952

(I. L. R.) Rangoon

1	2	3	4	5	6	7
1923	1924	1925	1926	1927	1928	1929
8	9	10	11	12	13	14
1930	1931	1932	1933	1934	1935	1936

Rangoon Law Reports

1937 RLR / 1937 Citation by year up to 1947.

Saurashtra Law Reporter

1	2	3	4	5
1948	1949	1950	1951	1952

Sind Law Reporter

1	2	3	4	5	6	7
1907	1908	1909	1910	1911	1912	1913
8	9	10	11	12	13	14
1914	1915	1916	1917	1918	1919	1920
15	16	17	18	19	20	21
1921	1922	1923	1924	1925	1926	1927
22	23	24	25	26	27	28
1928	1929	1930	1931	1932	1933	1934
29	30	31	32			
1935	1936	1937	1938			

Supreme Court Appeals
(C W N Supplement)
Citation by year from 1952

Supreme Court Journal
Citation by year from 1951

Supreme Court Reports

1	2	3
1950	1951	1952

Sutherland's Weekly Reporter

1	2–4	5–6	7–8	9–10	11–12	13–14
1864	1865	1866	1867	1868	1869	1870
15–16	17–18	19–20	21–22	23–24	25	26
1871	1872	1873	1874	1875	1876	1877

Travancore-Cochin Law Reports

1949 / 1949 Citation by year.

(I. L. R.) Travancore-Cochin
Citation by year from 1951

United Provinces Law Reports

1	2	3
1919	1920	1921

Upper Burma Rulings

1 Cri: 1892–1903 — 2 Civ: 1892–1903 From 1904 citation by year upto 1913 and then 2 / 1914-1916

3	4
1917–1920	1921–1922

THE FIFTY YEARS' DIGEST
1901--1950

(Civil, Criminal & Revenue.)

VOLUME III

CIVIL P. C. (5 of 1908)

——S. 49.

See also Civil P. C., O. XXI, Rr. 16 and 18.

1. **Scope.**
2. **Cross decrees.**
3. **Knowledge of equity.**

1. Scope.

——S. 49, O. XXI, R. 18 — Which prevails.

Order XXI, R. 18 and S. 49 are not inconsistent; but if there is any inconsistency, S. 49 shall prevail. AIR (Vol 24) 1937 All 351: 1937 ALJ 258: 1937 ALR 521: 1937 AWR 191: ILR (1937) All 553: 169 Ind Cas 385 (DB).

——Restitution claim against decree-holder — Whether equity is available to judgment-debtor against the assignee of the decree-holder.

The principle which is embodied in S. 49 is the same as that enacted in Section 132, T. P. Act of 1882, and the right of set-off is an equitable right, and if the judgment-debtor has the right to set up a cross-decree under O. XXI, R. 18 of the Code, he has this right also against the transferee of the decree-holder.

Even if during the life-time of the decree-holder the order for sale in execution of the decree which has been assigned over to another was made on the principle analogous to res judicata, it is no longer open to the assignor's legal representatives to contend that execution cannot proceed for the entire sum in respect of which it is sought to bring about a sale of the property.

Where the judgment-debtor had applied to claim restitution against his decree-holder who had assigned his decree to another who had notice of the claim, and in execution of the decree by the assignee, had contended that the assignee's right was subject to his claim for restitution:

Held, that the mere claim for restitution was not an equity which was available to the judgment-debtor and that the right of set-off was not in existence on the date when the application for execution was made. AIR (Vol 20) 1933 Cal 865: 37 CWN 758: 149 Ind Cas 927 (DB).

——Execution of Decree.

It is the decree-holder on record who is entitled to execute the decree. The transferee of a decree will be entitled to execute the same only when he has been brought on the record and the transferee will be entitled to the benefits arising from the execution only when he takes out execution of the decree: AIR (Vol 14) 1927 Rang 55: 99 Ind Cas 309: 4 Rang 426: 5 Bur LJ 181.

——Benami purchase.

The right of the assignee of a decree to execute the decree cannot be made conditional upon equities which the mortgagor judgment-debtors may have against the mortgagee judgment-debtors for whom he is said to be the benamidar. AIR (Vol 12) 1925 Pat 449 : 86 Ind Cas 564 : 4 Pat 120 (DB).

——Consideration for assignment.

Consideration for assignment partly unpaid — Assignee's right to execute parties' intention. AIR (Vol 12) 1925 Pat 449: 86 Ind Cas 564: 4 Pat 120 (DB).

——Effect of.

Section 49 relates only to the stage of execution and has no application to a suit for damages. A transferee from a decree-holder executing a decree in spite of adjustment, is not inferentially a trustee for the judgment debtor for the decree amount. AIR (Vol 6) 1919 Mad 424: 42 Mad 338: 36 MLJ 376: 9 LW 443: (1919) MWN 248: 50 Ind Cas 584. (FB)

——Assignee of decree — Position of — Equities.

An assignee of a decree stands in no better position than the assignor as regards equities existing between the original parties to the judgment and takes the decree subject to all the equities and defences subsisting at the time of assignment which the judgment-debtor could have asserted against the judgment-creditor, notwithstanding that the assignee might have had no notice thereof. (1910) 12 CLJ 312: 7 Ind Cas 55 (DB).

——S. 49, (S. 233 of the old Code) — Sale of properties by one Company judgment-debtor to another.

——S. 233, C. P. C.,, is inapplicable to the case where one Limited Company, judgment-debtor, sells its properties to another Company, there being in the case no death of the judgment-debtor. (1903) 30 C 961.

2. **Cross decrees.**

——**Set-off — Assignment of his rights under money decree by G to M against B and M — B assigning to S rights under his decree against M and others — Execution by S against M and others — M claiming set-off of decretal amount assigned to him by G — M held entitled to such set-off as equity possessed by M against B could not be affected by assignment by B to S.**

There was a money decree in favour of one G against B and M. Subsequently a decree against M and others was passed in favour of B. Rights under his decree were assignd by G to M and by B to S. S put in an execution application of his decree against M and other judgment-debtor. M was allowed to set-off the decretal amount due under the decree assigned to him by G against the decretal amount claimed by S:

Held, that there could be no doubt that before S came on the scene there was a decree which M could execute against B. There was another decree which B could execute against M. The judgment-debtors in both the decrees were jointly and severally liable, so that every one of them was liable to pay the entire decretal amount. If S had taken no assignment of the decree in favour of B, there could be no doubt that a set-off of the nature contemplated by O. XXI. R. 18 would have been allowed. There could also be no doubt that M had an equity enforceable against B. The assignment by the latter of his own decree would, having regard to the provisions of Section 49, affect such equity, in favour of M. The set-off was properly allowed to M and if S had any grievance in consequence of the equity in favour of M being enforced against him, he had his remedy against his assignor. AIR (Vol 24) 1937 All 351: 1937 ALR 521: 1937 AWR 191: ILR (1937) All 553: 1937 ALJ 258: 169 Ind Cas 385 (DB).

——**Scope — Application by transferee for transfer of decree to other Court for execution — Court if can go into question of equities.**

Upon an application by the transferee of a decree for the transfer of the decree for execution from one Court to another, the question whether a set-off can be taken into consideration or not can only arise at the time when a decree is actually being put into execution. Therefore the Court to which the application for transfer is made cannot go into the questions of equities under S. 49, and dismiss the application on such ground as the decree is actually put into execution in transferee Court if at all it is transferred. AIR (V 24) 1937 Cal 570 : 174 Ind Cas 936 (DB).

——**Decree in partition suit in plaintiff's favour — Plaintiff executing indenture in favour of solicitors for their costs — Indenture — Assignment of decree — Application for transfer of decrce for execution as assignees.**

Plaintiff obtained a decree in a partition suit. He executed an indenture in favour of the solicitors for satisfying the costs which they had incurred in the suit. It purported to assign full benefit in certain sums recoverable by the plaintiff from the defendants under the decree in the partition suit. Upon an application by the solicitors as assignees of the decree for the transfer of the decree to other Court for execution:

Held, on construction that there were no words in indenture which purported to assign the decree or which could be properly regarded as an assignment of a decree nor were there any words assigning the other decrees enumerated in the document or any of them. What the document did was to assign the benefit of a debt due from the defendant to the plaintiff. The solicitors therefore could not apply for the transfer of the decree as assignees. AIR (V 24) 1937 Cal 570 : 174 Ind Cas 936 (DB).

——Assignee of decree having knowledge of suit pending against assignor — Purchase of decree is subject to the right of the judgment-debtor to claim a set-off when he comes to execute the decree. AIR (Vol. 23) 1936 Pesh 33: 161 Ind Cas 45.

——**Set-off — Benami — Assignment of decree — Transaction benami — Execution in name of assignee — Judgment-debtor's decree against decree-holder — Both executions at same time — Decrees, if can be set-off.**

An assignee of a decree can issue execution in his own name even though the transaction of assignment is 'benami'.

The benamidar holds the decree subject to the equities which the judgment-debtor might have enforced against the original decree-holder and, therefore, where the judgment-debtor holds a decree against the original decree-holder at the same time the execution is issued against him by the benamidar, he is entitled to a set-off. (1936) 163 Ind Cas 618: 39 CWN 1073.

——**Assignor — Cross decree against.**

One R obtained a decree against G on 9-2-1922 and the same day assigned it to one C. On 13-6 22 G filed a regular suit against the assignor and obtained a decree on 30-8-22. He deposited the decretal amount of Rs. 148-10-0 due under the decree which was assigned to C and then got it attached in execution of his own decree. The applicant C applied to have the attachment raised.

Held, that the case was governed by S. 49 and the attachment was right. 75 Ind Cas 752: 19 NLR 164: AIR (Vol 11) 1924 Nag 46.

3. **Knowledge of equity.**

——The transferee of an actionable claim takes it subject to all liabilities and equities to which the transferor was subject, whether the transferee had any knowledge of them or not. This principle of S. 132 of T. P. Act applies to S. 49, Civil P. C., also.

Where, therefore, a decree was transferred before the amount of mesne profits was ascertained, it was held that the transferee took the decree subject to the right to set off mesne profits in favour of the judgment-debtor irrespective of the fact that the transferee had knowledge of the same or not. AIR (Vol 32) 1945 Mad 381 : ILR (1946) Mad 30: 1945 MWN 238: 58 LW 186: (1945) 1 MLJ 438 (DB).

——R holding decree against G who subsequently instituting suit against R — Pending this suit R assigning decree to another person — The assignee applying for execution — During execution G getting decree against R and claiming set-off for amount of decree against claim of assignee:

Held, that G could not succeed on plea of legal set-off but he was entitled to equitable set-off. Assignee's ignorance of the facts of the case did not give him an overriding equity. He ought to have made enquiries as to G's rights. AIR (Vol 25) 1938 Bom 253: 40 Bom LR 188: ILR (1938) Bom 263 : 175 Ind Cas 427 (DB).

——**Set-off — Decree for costs and decree for rent.**

Where A held a decree for costs against B and subsequently B obtained a decree for rent against A who transferred his decree to C who had no notice of the pending suit:

Held that C took the transfer subject to equity as there was debt in the form of rent and as a suit was pending to enforce payment. The fact that C had no notice was immaterial. Under Section 49, B was entitled to claim set-off. AIR (Vol 24) 1937 Rang 316: 10 R Rang 236: 172 Ind Cas 241 (DB).

——Assignee without notice — Equities.

For the purpose of Section 49, the equities have to be enforced even though the assignee might in fact have been an assignee without notice. Otherwise the very object of S. 49 would be in effect frustrated and its provisions rendered nugatory. AIR (Vol 20) 1933 Mad 215: 145 Ind Cas 767.

——O. 21, R. 18, (Old Code, Ss. 233, 246) — Equities — Cross decrees — Assignment, notice of.

Where there are cross decrees in suits between the same parties, the decree for the smaller amount becomes incapable of execution under Section 246, C. P. C., and the decree for the larger amount less the decree for the smaller amount is alone capable of execution. The decree for the smaller amount was subject to the equities under Section 246. Section 246 is applicable to a case where the cross decrees are passed by the very Court whose duty it is to execute them and neither has been transferred for execution to another Court. Where a decree is assigned, the assignment takes effect against the judgment-debtor only on notice to the latter and is accordingly subject to all equities arising prior to the date of such notice: Where, therefore, there was a decree against S. and the decree holder assigned it to the appellant, but before the assignment was perfected by notice, S. obtained a decree for a larger sum against appellant's assignor:

Held — (1) that the appellant took the assignment subject to the equity attaching to the decree under Section 246, C. P. C., and (2) that the appellant could not execute the decree assigned to him aganist. (1902) 26 M 428 (DB).

——S. 50.

See also Civil P. C., Ss. 52, 53, O. 21, R. 22 and O. 22, R. 3.

1. "Before decree has been fully satisfied".
1A. "Decree-holder".
2. Decree in personam.
3. Duty of legal representative to render accounts.
4. Execution against legal representative.
5. Execution against wrong legal representative.
6. Legal representative.
See also Civil P. C., S. 52 and O. 22, R. 3.
7. Legal representative not brought on record.
8. Liability of legal representative.
9. Limitation.
10. "Property of deceased".
11. Transfer of decree.
12. "Where judgment-debtor dies".
13. Scope.

1. "Before decree has been fully satisfied".

——Auction-purchaser applying for warrant of possession — Representatives of decree-holder need not be brought on record under S. 50 — Obstructor not claiming through judgment-debtor — His representatives also need not be brought.

A warrant of possession can be issued without bringing the legal representatives of the deceased decree-holder on the record under Section 50 when the decree has been fully satisfied. The proceedings under Rr. 95 and 97 of O. XXI, Civil P. C., are between the auction-purchaser and persons who are presumably claiming to be in possession of the property and if they are claiming not as the legal representatives of the judgment-debtor but on their own behalf, it is not necessary to bring any legal representatives on the record. AIR (Vol 28) 1941 Nag 322: 1941 NLJ 494: 198 Ind Cas 284: ILR (1942) Nag 633.

1-A. "Decree-holder".

——S. 50 — (S. 234, Old Code) — One of two joint decree-holders receiving decree amount and certifying satisfaction — Rights of the other.

If one of two joint decree-holders receives the decree amount and certifies satisfaction, the other decree-holder may either proceed against the judgment-debtor or the decree-holder who had received the amount for recovery of his portion of the decree amount. (1905) 29 M 183 (1) (DB).

——S.50 — (S. 234, Old Code) — Person entitled to apply.

Section 234 does not authorise any application to be made by the representative of the deceased judgment-debtor to bring them on the record, but only authorizes the judgment-creditors to bring them on application. (1904) 28 M 361 (DB).

2. Decree in personam.

——Ss. 50 and 52 — Decree for injunction does not run with land and cannot be enforced in absence of statutory provision against surviving member of joint family or against purchaser from judgment-debtor but can be enforced against legal representatives joined under S. 50 and so also against transferees from original judgment-debtor under Transfer of Property Act, S. 52.

The decree for injunction does not run with land and in the absence of any statutory provision such a decree cannot be enforced against the surviving members of a joint family or against a purchaser from a judgment-debtor. But where the sons of the judgment-debtor are brought on record as his legal representatives under Section 50, the decree can be executed against them and so also against the transferees from the original judgment-debtor during the pendency of execution proceedings against him, can be held to be similarly bound and are liable to be proceeded against in execution. AIR (Vol 18) 1931 Bom 280: 33 Bom LR 266 : 133 Ind Cas 244.

——S. 50 — O. XXI, R. 32 — Decree for injunction against Hindu father — Executability against sons.

Where a decree for an injunction has been obtained against a Hindu father, the son not being joined as a party, and the father dies during the pendency of the execution proceedings, the decree can be enforced under Section 50, against the son as his legal representative by proceeding under O. XXI, R. 32.

Where a decree was passed against a father directing him to make certain alterations in the ancestral house:

Held, that the decree could be executed against his son, even though the son was not a party to the original decree. AIR (Vol 18) 1931 Bom 482: 33 Bom LR 1118: 134 Ind Cas 968.

——S. 50 — (S. 234, Old Code) — Decree executable under S. 260 — Applicability of section.

Section 234 applies to decrees executable under S. 260. (1901) 4 Bom LR 14: 26 B 283 (DB).

——S. 50 — (S. 234, Old Code) — Execution against representative — Decree in personam against a partner — Death of partner — Execution against widow and undivided brother — Undivided brother no representative — "Representative:"

Where a decree in personam was obtained by the partner against another and not as representing any property of the joint family, and the judgment-debtor died pending execution, it was sought to be held against the whole of the joint family and the undivided brother

Held that the decree cannot be executed against the undivided property or effects and bringing to sale only the property which has come to him by survivorship whether as ordinary family property or as property acquired for the family by the partnership in trade

Execution can proceed only against the widow as she alone is the legal representative. If she has ceased the separate property of the deceased may be attached in execution even in the hands of the brother or a stranger for the satisfaction of that 1903) 27 M 108 (110)

1. Duty of legal representative to render accounts

— Execution against Legal Representatives of judgment-debtor — Power of Court to direct them to render accounts

The Court can at the instance of the decree-holder, direct the legal representatives of a deceased judgment-debtor to render accounts showing what amounts they have received of the estate of the deceased and how they have expended them and of what the assets of the deceased consist, and to pay the amount found due to the decree-holder. AIR (Vol 12) 1925 Bom 304 (306) 27 Bom LR 304

— Duty of legal representatives to account for assets

Where [illegible] legal representatives [illegible] of the assets belonging to the deceased it is for them to satisfy the Court as to the extent of the assets received by them and to account for the same. AIR (Vol 20) 1933 Rang 309 (311) 144 Ind Cas 1107 (1109)

4. Execution against legal representative

— Ss. 50, 51, O. XXII, R. 12 — Execution — Legal representative — Application for execution against deceased judgment-debtor pending — Fresh application against legal representatives, if necessary

Application for execution of the decree against the representatives of the deceased judgment-debtor can be made in the pending application for execution and it is not necessary to make a fresh application for the purpose. The terms of O. XXII, R. 12, also show that on the death of a judgment-debtor a pending application for execution does not abate. AIR (Vol 23) 1936 Bom 456 38 Bom LR 977 167 Ind Cas 303.

— S. 50, O. XXI, R. 22 — Procedure — Death of judgment-debtor during execution — S. 50 if obligatory — Execution against legal representative — Duty of decree-holder to proceed under S. 50 — O. XXI, R. 22 (9) — Effect of.

Although the language of S. 50 is permissive this does not mean that recourse to the section may not be obligatory. If a decree-holder does not desire to proceed with the execution after the judgment-debtor's death or if there are other parties on record against whom the decree can be executed, there will be no occasion to have recourse to S. 50. But if execution of the decree is necessary against the legal representative of the deceased judgment-debtor the decree-holder has no option but to proceed under S. 50. He must apply to the Court to execute the decree against the legal representative and notice must issue to the legal representative as required by O. XXI, R. 22.

Where there has been no application under S. 50 and consequently no issue of a notice under O. 21, R. 22, the formulation of the Court's [illegible] to execute a decree against the legal representative are proper, and a sale held [illegible] of the effect [illegible]

— Ex parte order

The order permitting execution against the legal representatives can be made ex parte. 5 Rang 775 (4 Bur L J 20) (1926 Ind Cas 921) (AIR 1926 Rang 41)

Minor sons and widow

Judgment-debtor dying leaving minor sons and widow. Procedure to be adopted stated. C P Code, O 32, R 3. When a judgment-debtor dies leaving minor sons and a widow what is required under Order 32 and Order 21 in regard to each minor is: (1) Service of notice on the minor asking him to show cause against the appointment of his mother as his guardian. (2) Service of notice on the mother asking her to show cause against her own appointment. (3) The passing of an order appointing her guardian after she has expressed her willingness and the Court has found her fit. (4) The granting of an opportunity to the mother as guardian to show cause why the decree should not be executed against the minors. 39 Ind Cas 787 (AIR Vol 4 1917) Mad 128

— Ss. 50 and 51 and O. 21, R. 53 (3) — Execution against legal representative — Objection to — Power of Court.

Where execution is sought against a legal representative of a deceased judgment-debtor and the legal representative offers objection to the execution the matter is left to the discretion of the Court. The court can under O. 21 R. 53 (3) make such orders as it thinks fit. The court will in a proper case exercise its equitable jurisdiction and consider the question between the several legal representatives. 13 All R 138 (1) 32 Ind Cas 908 (AIR Vol 4 1919 All 69 (DB))

— S. 50 and O. 21, R. 11 — Legal representative — Execution against.

Once the execution proceedings are commenced

ced they can be continued after the death of the judgment-debtor by substituting the name of legal representative in his place in the application for execution. No fresh application under S. 235 (old Code) is necessary. (1909) 34 Bom 142 : 11 Bom LR 1358 : 4 Ind Cas 839 (DB).

——Ss. 50 and 47 (Ss. 232, 244 of old Code) — "Legal representative" meaning of — Decree against Mitakshara father — Execution against ancestral property in the hands of the son: ..

Per Curiam (Harington and Geidt JJ., dissenting): — When on the death of a member of a joint Mitakshara family, against whom a decree for money has been passed, his son is brought on the record as his legal representative, the question of the liability of the ancestral property which the son acquires by survivorship for the debt covered by the decree may be determined in the execution proceedings, and a separate suit is not necessary. (1907) 34 C 642 : 11 CWN 593 : 5 CLJ 491 ((FB).

——S. 50, (S. 234 or old Code) — Hindu Law — Decree debt — Sons brought on record as representatives of deceased father pending suit — Decree, form of.

Where the sons of a Hindu father are brought on the record in a pending suit against the father as his legal representative the decree to be passed as against them should only be in their representative capacity, i. e., that the amount of the decree should be recovered from them only from the estate of the deceased father in their hands. (1905) 18 MLJ 36 (DB).

——S. 50 (1), O. 21, R. 22 (1) — Mortgage decree, execution of — Death of judgment-debtor — Sale without notice to legal representative — Validity.

A sale effected in execution of a mortgage-decree after the death of the judgment-debtor but after the service of all necessary processes including sale proclamation without any notice to his legal representatives is not valid and operative against the legal representatives. AIR (V 32) 1945 Pat 1 : 11 BR 201 : 23 Pat 528 : 217 Ind Cas 337 (FB).

——S. 50 (1), O. XXI, R. 16 — Application for execution against legal representative without prayer to add him as legal representative — Application, validity of.

The Civil Procedure Code does not contemplate any specific application to bring on record the legal representative of the judgment-debtor though in ordinary practice such a prayer is usually added in an execution petition. Therefore, an application for execution of a decree against the legal representative of the deceased judgment-debtor but without an express prayer for adding him as the legal representative, is a valid execution petition and serves to save limitation. AIR (V 20) 1933 Mad 568 : 38 LW 224 : 1933 MWN 1233 : 143 Ind Cas 844.

——Ss. 50 (2) and 47

Decree against legal representatives of deceased — Question of proper administration of estate at the instance of the decree-holder, can be dealt with in execution of decree though the remedy by way of separate suit is available. AIR (V 20) 1933 Rang 309 : 147 Ind Cas 1167 (DB).

5. Execution against wrong legal representative

——Execution sale — Binding nature of — Sale in execution of rent decree against co-sharer — Shares of his sons are not exempted from sale though they were not made parties.

In a sale in execution of a rent decree against a co-sharer, the shares of the sons cannot be deemed to have been exempted from sale even if they were not made parties to the execution proceedings and only the name of one of the sons was brought on the record. AIR (V 27) 1940 Oudh 55 : 1939 O WN 848 : 1939 O LR 660 : 1939 A WR 175 : 14 Luck 751 : 1939 R D 557 : 184 Ind Cas 818 (DB).

——Wrong person substituted as legal representative — Property of deceased judgment-debtor cannot be proceeded against.

A decree was passed by the High Court against R on whose death an application was made by the decree-holder before the High Court for substituting T only as his legal representative. This prayer was acceded to and when the decree was transmitted by the High Court to another Court for execution, T was described as one of the judgment-debtors. The Judge, however, held that T could in no event be regarded as the legal representative of R and his proper legal representative was his widow, who was alive. He accordingly refused to sell the property of R in the absence of his legal representative:

Held, that the High Court by substituting T as the legal representative of R could not be taken to have decided that the widow of R was not his legal representative. The executing Court rightly held that it would be a serious irregularity to proceed against the property of a deceased judgment-debtor in the absence of his proper legal representative and its order must, therefore, be upheld. AIR (V 25) 1938 Pat 372 : 19 PLT 193 : 4 BR 738 : 176 Ind Cas 566 (DB).

——Decree against assets — Execution against property in hands of party exonerated before trial — Such party not legal representative of the deceased widow who had life interest in the property:

Held, that the execution was wrong and could not be had. AIR (Vol 20) 1933 Mad. 508 : 144 Ind Cas 30.

——Decree — Execution of — Execution, if may be directed against a person not a party to the decree — Benami.

A person who is neither a party to the decree nor a representative of the judgment-debtors cannot be made liable for the decretal amount on the ground that the judgment-debtors were benamidars for him. (1910) 14 CWN 774 (DB).

——S. 50 (S. 234, old Code) — Representative of deceased person, order against — Res judicata how far against executor or real representative — Residuary legatee in possession no executor de son tort — Probate and Administration Act, Ss. 2, 14, 15, 19, 38, 82, 187.

An order in execution obtained after notice against the heir-at-law and the residuary legatee under the will of the deceased judgment-debtor is binding upon the true legal representative.

A residuary legatee entering into possession of the estate cannot be regarded as an executor de son tort so that his acts would not be binding upon the true legal representative. (1903) 30 C. 1044 (DB).

——Representative not added — Irregularity — Nullity of sale — Remedy of representative.

A sale in pursuance of a decree rightly obtained during the debtor's life time, but executed after his death against a wrong person as his representative, is not a nullity as made by the court without jurisdiction, and can only be got rid of either by an application under S. 311, CPC, or by a suit within the time prescribed by Art. 12 of the Limitation Act. (1900) 5 C.W.N. 10 : 25 B. 337 : 27 I.A. 216 (PC).

6. Legal representative

See also Civil P. C., S. 52 and O. 22, R. 3.

——Manager of a joint Hindu family dying — Other members may be regarded as his legal representatives because the deceased manager represented their interest. AIR (Vol 28) 1941 Pat.

596 : 20 Pat. 755 : 22 PLT 682 : 8 BR 280 : 197 Ind Cas 730 (DB).

——Decree against father in respect of pre-partition debt binding on property alloted to son — In such circumstances for the purpose of S. 50, the son is to be deemed to be the legal representative of his deceased father in respect of the share taken in the partition by the son. AIR (Vol 24) 1937 Mad. 610 : 1937 MWN 427 : 46 LW 112 : (1937) 2 MLJ 251 : ILR (1937) Mad. 880 : 171 Ind Cas 101 (FB).

——Legal representative.

Per Broomfield J. — The son who takes the joint family estate by survivorship should be regarded as a "person who in law represents the estate of a deceased person" within the meaning of the first part of the definition in S. 2 (11).

Per Patkar J. — It is difficult to draw a distinction that a son who inherits the estate of his father can be proceeded against in execution on the ground that he is a legal representative of his father but a son who is joint with his father cannot be so held liable in execution of a decree for injunction against the father. AIR (Vol 18) 1931 Bom. 484: 55 Bom. 709: 33 Bom. LR 1144: 134 Ind Cas 961.

——Legal representative, transfer by.

——A decree passed against a judgment-debtor can on his death be enforced not only against his legal representatives but also against the transferee from those representatives who take under an alienation pending the execution proceedings: 51 Bom 37 : 29 Bom. LR 60 : 100 Ind Cas 582 : AIR (V 14) 1927 Bom 93 (DB).

——Legal representatives — Father and son — Joint family.

A Mitakshara son succeeding by survivorship, can be brought on record as legal representative of his deceased father. (1910) 6 Ind Cas 582 (Cal) (DB).

——Legal representative — Nephew.

A nephew of a Hindu propositus is not the legal representative when the propositus dies leaving also a widow behind him. (1910) 32 All. 404 : 7 ALJ 512 : 6 Ind Cas 38 (DB).

——Meaning of expression "legal representative" discussed. (1907) 34 Cal. 642 : 11 CWN 593 : 5 CLJ 491 (FB).

——S. 50 (S. 234 Old Code) — Mortgage decree against father — Execution against son succeeding by survivorship — Mitakshara law.

A mortgagee is entitled to execute his mortgage decree against a successor of the judgment-debtor even when he holds the property by survivorship under the Mitakshara Law, without bringing a suit for a declaration that the property in his hands is liable to be sold in execution of the mortgage decree. It is open to the successor to take the very defences in execution proceedings which he might take in a fresh suit. (1905) 3 CLJ 131: 33 C. 676 (DB).

——S. 50 (S. 234 Old Code) — "Legal representative" meaning of — Decree against lifeholder when allowable — Holding a life estate with power to litigate on behalf of estate — Representation by agreement of parties and representation in law — Difference between.

Per Brett, J:—The term "legal representative has been used in S. 234 to meet the circumstances of a certain event, viz., the passing of the property, the subject of the litigation on the death of the deceased judgment-debtor, and to include such successor either to her estate or to the property in suit. Execution proceedings are proceedings in the suit and if a fresh suit can be brought against a person as a legal representative of a deceased person, there is no reason why the same person, should not be substituted as legal representative of the same deceased person in proceedings in execution of a decree obtained in a suit already brought against the deceased.

Per Woodroffe, J.:—In their strictest and ordinary sense the words "legal representatives" are understood to mean executors and administrators only; where there is an executor or administrator they alone are the legal representatives of a deceased judgment-debtor: but S. 234 is also commonly applied both in the case of heirs as well as in that of executors and administrators, and the term 'legal representative' has been defined to ordinarily mean all these classes of persons.

So where there is no executor or administrator but succession by heirship as in cases governed by the Bengal School of Hindu Law or in case of separate and self-acquired property under Mitakshara Law the decree must be executed against the heir as the legal representative within the meaning of S. 234. Although a decree is passed against a judgment-debtor not in his or her personal capacity, the decree may be executed against the person who though not an heir of the judgment-debtor, the last holder of the estate, is entitled to it after her death whether as reversioner or surviving co-parcener. The term "legal representative" is not limited therefore to administrators, executors, and heirs and includes any person who in law represents the estate of a deceased judgment-debtor.

Quaere:—Whether the heir of a person who has under an ekarnama been given a life estate in the properties of the judgment-debtor can be said to be a legal representative of the judgment-debtor on her death. J, a Hindu widow adopted B as her son, under an anumatipatra of her husband, which provided that she was to hold and manage the properties left by him during her lifetime. Disputes arose between J and B as regards her right to hold the properties after the adoption and were ultimately settled by B executing in J's favour an ekrarnama which provided inter alia that J was to possess and enjoy the estate without power of alienation during her life time, with liberty to carry on litigations in her own name.

Held — J. did not hold a Hindu widow's estate, but an estate created by the ekrarnama. That a decree recovered by the respondent against J., for possession, with mesne profits and costs of some lands which J had been holding as an accretion to the estate, could after J's death be executed against B's widow who succeeded to the estate on J's death as B's heiress, although B was no party to the suit, J having defended the suit in the interests of the estate and under the authority of the ekrarkarma which bound B and his heirs. Execution was prayed to recover only the costs awarded by the decree.

Held — that the lower Court had rightly substituted B's widow in the place of J and execution ought to proceed against her. (1904) 8 CWN 843 (DB).

7. Legal representative not brought on record.

——Decree against Mohammadan co-heirs for debt of deceased father — Death of one defendant pending execution — Legal representative not brought on record — Some property sold — Suit by legal representatives of deceased defendant to set aside sale:

Held, that the sale was not binding on the legal representative and that it could not be said that the surviving defendants represented the interests of the deceased's legal representatives.

Held, however, that the sale could not be avoided in its entirety and that it was binding on those who were parties to the execution proceedings.

AIR (Vol 31) 1944 Mad. 370: (1944) 1 MLJ 134: 1944 MWN 107 : 57 LW 110 (DB).

——S. 50, O. XXI, R. 22 — Rent decree — Judgment-debtor dying pending execution — No application under S. 50 — Heirs not brought on record — Sale held in execution, if void or voidable.

A sale held in execution of a rent decree without an application under S. 50 and without bringing the heirs of the deceased judgment-debtor on record is void and not merely voidable. AIR (Vol. 29) 1942 Cal 436: 46 CWN 631: 75 CLJ 368: ILR (1942) 2 Cal 262 : 202 Ind Cas 109 (DB).

——Where a judgment-debtor dies after the issue to him of a sale notice and his property is subsequently sold without bringing his legal representative on the record the sale is a nullity and the purchaser acquires no right, title and interest by sale. (1940) 1940 NLJ 148.

——S. 50, O. XXII — Omission to implead legal representatives of proper but not necessary parties — Effect.

In proceedings to set aside a sale, omission to implead legal representatives of certain transferees of the property on their death, is a mere irreguarity which cannot result in the sale being a nullity, as they were not necessary parties in the action and hence in the execution proceedings, though they were proper parties. The mere fact that they were parties in the suit does not mean that they were necessary parties to the execution proceedings.

It is impossible to hold that although an action could have been brought against the necessary parties leaving out the parties who are merely proper parties that execution could not proceed without their being added as parties. Their not being joined does not result in the splitting up of the security. AIR (Vol 20) 1933 Pat. 640 (2): 13 Pat. 10 : 15 PLT 211 : 146 Ind Cas 155 (DB).

——Effect of non-substitution of Legal Representative.

Execution sale held after judgment-debtor's death — Legal representative not brought on record — Sale is a nullity — AIR (Vol 11) 1924 Mad. 130, Diss. 22 MLW 828 : 92 Ind Cas 308 : AIR (Vol 13) 1926 Mad. 138 : 50 MLJ 662.

——Non-substitution, effect of.

——Where in execution of a decree, in which the puisne mortgagee consented for sale free of his mortgagee on the condition that the balance be paid to him after the discharge of the prior mortgage, subsequent to the order for sale but prior to the sale itself such puisne mortgagee died and his legal representative was not brought on the record and the sale was held and confirmed.

Held, as the procedure laid down by S. 50, C. P. Code had not been followed the sale was a nullity and did not require to be set aside under Art. 166 of the Limitation Act, 1908. 68 Ind Cas 667: 15 MLW 123: 1921 MWN 732: AIR (Vol 9) 1922 Mad 307: 41 MLJ 547 (DB).

——Legal representative — Execution — Procedure.

The legal representative could not be proceeded against in execution till he has been brought on record and the court which passed the decree only has the power to bring him in as the legal representative. 23 MLJ 287: (1912) MWN 888: 17 Ind. Cas. 293.

——Legal representative — Substitution of.

——The decree-holder entitled to apply for the execution of his decree is bound to implead a representative of a deceased judgment-debtor, for the purpose of such application, only when a default under the decree occurs and execution becomes necessary. Merely because execution has been unnecessary for 20 years, decree-holder cannot be held to be debarred from it. 14 MLW 632: AIR (Vol 8) 1921 Mad 693 (1) (DB).

——S. 50 and O. 22, R. 12 — Death of judgment-debtor — Execution of decree — Abatement — Heirs of judgment-debtor brought on record.

When a judgment-debtor dies during the pendency of execution proceedings the decree-holder can apply under S. 50, C. P. Code for execution of the decree against the heirs. But there is nothing which lays down that the Court cannot on the decree-holder's application bring the heirs of a judgment-debtor upon the record in execution proceedings nor does the law provide that on the death of the judgment-debtor, pending execution proceedings shall abate. 18 ALJ 735: 2 UP LR (U) 236: 57 Ind Cas 610: AIR (Vol 7) 1920 All 171 (DB).

8. Liability of legal representative.

——Maintenance decree — Death of judgment-debtor — Son's liability.

After the death of a Hindu judgment-debtor against whom a maintenance decree directing to make certain monthly payments to the decree-holder was passed, his son is liable to pay the maintenance to the extent of the ancestral property in his hands whether such maintenance was due at the time of the death of the deceased judgment-debtor or had become due since. AIR (Vol 30) 1943 Oudh 190 : 18 Luck 641 : 1942 OWN 748 : 203 Ind Cas 621.

——Decree for Maintenance.

——Where upon a true construction of the decree for maintenance no charge was created on the estate but only a personal decree was passed against the judgment-debtor.

Held, that after the death of the judgment-debtor the decree-holder would not be entitled to any maintenance by execution of the decree against the holders of property after the judgment-debtor. 49 CLJ 267: AIR (Vol 16) 1929 Cal 423: 120 Ind Cas 705 (DB).

——Property received by the legal representative from the hands of the rightful successors to the estate of the deceased before they could enter into possession of the assets of the deceased in recognition of his antecedent rights in the estate of the deceased does not make it the property of the deceased. One test to determine whether the property held by the legal representative is the property of the deceased is to see if that property could be claimed as the property of the deceased by those in whom the inheritance vested in respect of that property after the death of the propositus.

Obiter. — Property converted into one form different from the form which the estate of the deceased originally represented could not be called as "the property of the deceased". The converted property may not be the property of the deceased yet it may be liable for the satisfaction of his debts under some other principle of law than the principle enunciated in sub-section (2) of S. 50 of the Code of Civil Procedure. 27 OC 262: 11 OLJ 441: AIR (Vol 11) 1924 Oudh 364.

——Amendment of Decree.

Decree cannot be passed against legal representative personally — Application to amend decree at a late stage is entertainable in case of such a decree. 80 Ind Cas 180: AIR (Vol 10) 1923 Bom 414 (DB).

——Legal representative — Liability — Punjab Colonisation of Government Lands Act, S. 18 — Decree against tenant — Crops grown by heirs of tenant deceased.

A tenancy not being liable for attachment and sale in the hands of an heir of a tenant under S. 18 of the Punjab Act, the crops grown & reaped

by the heir of a tenant after his death are not the property of the deceased tenant and are not liable for attachment in the hands of the heir under S. 50 of C. P. C. 84 PWR 1916: 33 Ind Cas 741: AIR (Vol 3) 1916 Lah 313 (DB).

——Liability of legal representative — Extent of.

Under S. 50 (2), C. P. C. the liability is not confined to the property which has come to hands of the legal representative. To fasten liability on the legal representative, the right which has devolved must be properly capable of disposal for satisfying the debt. (1913) 9 NLR 137: 21 Ind Cas 272.

9. Limitation.

——Limitation.

The law does not require any application being made to bring on the record the legal representatives of a judgment-debtor. An execution application against the legal representatives of the deceased judgment-debtor is not barred merely because no application to bring them on record was made within three years of the judgment-debtor's death. AIR (Vol. 21) 1934 Lah 55: 154 Ind. Cas. 307.

——Limitation — Application returned for amendment but not re-presented — Whether sufficient to save limitation.

Where an application for execution is returned for amendment but is not re-presented, it will be sufficient to save limitation. AIR (Vol 20) 1933 Mad 568: 38 MLW 224: 143 Ind. Cas. 844.

——Right to proceed against properties of deceased — Limitation.

A person who has obtained a decree against father can proceed at once against the property in the hands of his son who is liable under the Hindu law for the payment of the debt of his deceased father and it is no longer necessary to apply Art. 120 of the Limitation Act because in such cases either Art. 182 or Art. 183 will directly apply. AIR (Vol 19) 1932 Pat 261: 13 PLT 719: 11 Pat 445: 139 Ind Cas 367 (DB).

——To bring judgment-debtor's Legal Representative on record.

Where a judgment-debtor dies, the decree-holder should get at least six months within which to make an application to bring his legal representative on the record on the analogy of Art. 177 of the Limitation Act. (1921) 62 Ind Cas 52 (Pat).

10. "Property of deceased."

——Ss. 50 and 53 — Scope — Decree against father for money in lieu of specific performance — Execution against ancestral property in hands of son — Permissibility.

S. 53, C. P. Code, is not limited to cases in which execution is being levied for a debt in respect of which a decree has been passed. The words "property in the hands of a son or other descendant which is liable under Hindu law for the payment of the debt of a deceased ancestor in respect of which a decree has been passed" in that section must be read as descriptive of the class of property which can be reached in execution, and not as limiting the nature of the debt for which execution can be levied.

Ancestral property, though impartible and governed by the rule of primogeniture, which had been attached during the lifetime of the father in satisfaction of a decree against him for compensation in lieu of specific performance remains liable after his death to execution in the hands of his eldest son who has succeeded by survivorship. The property in the hands of the son is of a character liable under Hindu law for the payment of a decretal debt of a deceased ancestor, and since the particular debt for which execution is being levied is not tainted with immorality, the property is liable in execution under S. 50, C. P. Code. 74 IA 247: ILR (1947) Nag 830: 52 CWN 109: AIR (Vol 35) 1948 PC 1: 29 PLT 12: 50 Bom LR 1: 61 LW 108: 1948 MWN 112: 1948 NLJ 136: 1948 ALJ 133: 50 PLR 95: (1948) 1 MLJ 154.

——Sections 50 and 53 — Scope.

Sections 50 and 53 cannot be said to refer only to property which came to the sons by reason of the death of their father. Once the father is dead, the only question is which property is in the hands of the son and whether that property is liable for the payment of the father's debt under the Hindu Law. The property of the son obtained by partition after a decree had been passed against the father can be sold in execution of that decree after the father's death. AIR (Vol 29) 1942 All 248: 1942 ALJ 276: ILR (1942) All 509: 1942 AWR 190: 202 Ind Cas 143 (DB).

——Attachment — Debt not yet come into possession — Security deposit of deceased judgment-debtor with his employers.

In the Code, there is no provision for attachment in execution against a legal representative of either a debt due to him or of movable property that has not yet come into his possession. Consequently the security deposit of a deceased judgment-debtor with his employer cannot be attached by a prohibitory order in execution against the legal representative of the judgment-debtor. AIR (Vol 24) 1937 Rang 274: 170 Ind Cas 766.

——Ss. 50, 53 — Decree against Hindu father — Right of decree-holder to proceed against properties in hands of son — Limitation.

Where the judgment-debtor dies and the decree-holder wants to proceed against his representatives, the Court which made the decree is by S. 50 the proper Court to order that the execution shall proceed against his representatives; but the getting of an order of substitution from the Court which passed the decree is only a matter of procedure and not of jurisdiction and if there is no compliance with such procedure, the defect may be waived and the party who has acquiesced in the Court exercising it in a wrong way cannot afterwards turn round and challenge the legality of the proceedings.

Section 50 does not expressly exclude those cases where the judgment-debtor dies before the passing of the decree. It only refers to the death of the judgment-debtor before the decree has been full satisfied and where, therefore, the decree is a good decree, notwithstanding the death of the judgment-debtor before the passing of the decree, the case comes well within the terms of the section, because that death takes place also before the decree has been fully satisfied.

Under the present Code, however, a person who has obtained a decree against the father can proceed at once against the property in the hands of his son who is liable under the Hindu law for the payment of the debt of his deceased father and it is no longer necessary to apply Art. 120 of the Limitation Act, because in such cases either Art. 182 or Art. 183 will directly apply. AIR (Vol 19) 1932 Pat 261: 13 PLT 719: 11 Pat 445: 139 Ind Cas 397 (DB).

——Ancestral property.

Legal representative of a Hindu liable to the extent of property of the deceased in his hands not duly disposed of — Order excepting ancestral property is wrong. 118 Ind Cas 396: 30 PLR 593: AIR (Vol 16) 1929 Lah 424 (DB).

——Possession of assets — Determination of, must be in execution.

A suit against the legal representative of a deceased debtor should not be dismissed on the mere ground that he is not in possession of any portion of the estate left by the deceased. That

is a matter to be determined in execution proceedings. (1929) 120 Ind Cas 333 (Nag).

——**Assets, what are.**

Balance of the sale proceeds of occupancy fields sold after father's death in execution of the mortgage decree against him are not assets of the father's estate in the hands of the son. To hold that succession to such an untransferable right of occupancy creates a personal liability to pay the debts of a deceased judgment-debtor, would be opposed to principle and could scarcely have been intended by the legislature.

To fasten liability on the heir-at-law or legal representative, the right which has devolved must be property which can be disposed of for the purpose of satisfying the debt due by the deceased. 89 Ind Cas 477: AIR (Vol 12) 1925 Nag 449.

——**Gratuity to heir.**

——Gratuity given to heir of an employee for services is not assets of the employee in the hands of the heir. 69 Ind Cas 893: 9 OLJ 401: 26 OC 53: AIR (Vol 10) 1923 Oudh 21.

——**Assets — Mesne profits.**

Mesne profits whether accruing in the shape of rent, or interest are for the purpose of discharging debts of the deceased, assets in the hands of the legal representative just as much as the real estate is. (1916) 2 MWN 92: 30 MLJ 391: 35 Ind Cas 224: AIR (Vol 4) 1917 Mad 536 (DB).

——**Ss. 50 and 53 — Assets — Property obtained by son on partition — Whether "assets".**

The property obtained by a son on partition with his father is not "assets" within Ss. 50 and 53, C. P. C. (1908). 38 Mad 1120 : 27 MLJ 112 : (1914) MWN 742: 24 Ind Cas 474: AIR (Vol 1) 1914 Mad 328 (DB).

——**Assets — Ancestral property.**

The ancestral property ceased to be a part of the assets of a deceased Jat as he did not exercise the right of alienation in his life-time and the heirs were bound to account for its due disposal. 79 PWR 1911: 182 PLR 1911: 11 Ind Cas 375 (DB).

——**Ss. 50, 47 (Ss. 234, 244 (c) old Code) — Question whether property attached is deceased judgment-debtor's.**

The question whether the property attached is the property of the deceased judgment-debtor in the hands of his representatives as such or belongs to them in their own right can be and ought to be decided only under S. 244 (c) and not by separate suit. (1902) 26 M 501 (DB).

11. Transfer of decree.

——**Legal representatives of judgment-debtor not brought on record — Sale of property in execution of decree — If affects their shares — C. P. Code, O. 21, Rr. 22 and 60 (as amended by Calcutta High Court) — Effect of.**

O. 21, R. 22, C. P. Code, as amended by the Calcutta High Court by the addition of sub-rule (3) does not do away with the necessity of making an application under S. 50, C. P. Code, to execute the decree against the legal representative of a deceased judgment-debtor. All that the amendment does is that where such an application has been made the Court will not lose jurisdiction simply because the notice under O. 21, R. 22 has not been issued against the legal representative. S. 50, C. P. Code, cannot be amended by any High Court, and it is imperative under this section if the decree-holder wishes to proceed against the properties of a deceased judgment-debtor to apply to the Court which passed the decree to execute the same against the legal representative of the deceased judgment-debtor. Similarly the amendment of O. 21, R. 90 by the Calcutta High Court does not affect the question of bringing on record of the execution case the legal representative of a deceased judgment-debtor under S. 50, C. P. Code. All that it does is to regulate further the consequences of not issuing a notice under O. 21, R. 22 on the legal representative of a deceased judgment-debtor where an application to bring him on record has already been made. Where, therefore, the legal representatives are not before the Court in accordance with the provisions of S. 50, C. P. Code, their shares in the property will not be affected by a sale in execution of the decree and the sale so far as they are concerned, is void and inoperative. AIR (Vol 36) 1949 Cal 299 (DB).

——**Decree transferred for execution — Application for substitution of legal representative, when lies.**

Where a decree is transferred to another Court for execution, an application for substitution of the legal representative of deceased judgment-debtor or for setting aside the substitution order lies in the Court passing the decree and not in the Court where the decree is sent for execution. AIR (Vol 32) 1945 Oudh 298: 20 Luck 449: 1945 AWR (CC) 137: 1945 OWN (CC) 210: 221 Ind Cas 681 (DB).

——**Ss. 50, 99 — Order of substitution — Interference with.**

When the Court to which the decree has been transferred for execution makes an order for substitution under S. 50, it is a matter of procedure and not of jurisdiction.

An appellate Court cannot, therefore, interfere with that order by reason of S. 99, where the merits of the case are not affected by the irregularity. AIR (Vol 28) 1941 Pat 139: 19 Pat 838: 7 BR 515: 22 PLT 439: 193 Ind Cas 245 (DB).

——The matter as to whether application to add a legal representative of a deceased judgment-debtor must be made to the Court which passed the decree or can be made to the Court executing the decree also, is one of procedure and not of jurisdiction. The jurisdiction of the executing Court over the subject-matter continues as before, but a certain procedure is prescribed for the exercise of such jurisdiction. If there was non-compliance with such procedure, the defect might be waived. No one has a vested right in a matter of procedure. AIR (Vol 25) 1938 Rang 385: 1938 Rang LR 355: 179 Ind Cas 374 (DB).

——**Court which has not passed decree, if can proceed with execution against legal representatives.**

On the death of the judgment-debtor during execution, the Court which has not passed the decree should not proceed with the execution against the representatives of the deceased judgment-debtor since under the provisions of S. 50, the application for such execution is to be made to the Court which passed the decree. AIR (Vol 24) 1937 Pat 239: 3 BR 421: 168 Ind Cas 346 (DB).

——**Transfer of decree — Application — Court to which it is to be made.**

Where a decree is transferred for execution to another Court after the death of the judgment-debtor an application to bring on record his legal representatives should be made to the Court which passed the decree and not to the transferee Court, as the Court to which the decree is transferred cannot execute the decree against those persons who were not parties to the decree before the decree was transferred. AIR (Vol 21) 1934 Bom 215: 36 Bom LR 443: 153 Ind Cas 181 (DB).

——An application under S. 50 (1) for substitution of legal representative of his deceased judgment-debtor may also be made to and orders passed by a Court to which the decree has been transferred for execution. AIR (Vol 18) 1931 All 320: 1931 ALJ 166: 133 Ind Cas 609 (DB).

——**Substitution of legal representative.**

——Judgment-debtor dying before full satisfaction

of decree — Application for substitution of legal representative made to transferee Court — Legal representative objecting to the procedure only at the last stage — He cannot be allowed to challenge legality of proceedings. 3 Luck 314: 55 IA 227: 5 OWN 502: 26 ALJ 681: 48 CLJ 23: 32 CWN 790 : 109 Ind Cas 417 : 28 MLW 25 : 30 Bom LR 1373 : 1928 MWN 863: AIR (Vol 15) 1928 PC 162: 55 MLJ 545.

——Substitution, application for.

C. P Code, Ss. 50 and 99 — Application for substituting legal representative's name can be made to the Court passing the decree — If it is not made to that Court, it is mere irregularity which is cured by S. 99. 90 Ind Cas 1050: 26 PLR 740: AIR (Vol 13) 1926 Lah 34 (DB).

——Substitution, by transferee Court.

Decree transferred — Execution commenced — J. D's death — Court of transfer bringing legal representative on record — Acquiescence by legal representative — Irregularity is curable. 87 Ind Cas 21: 12 OLJ 146: 2 OWN 73: 28 OC 330: AIR (Vol 12) 1925 Oudh 448 (DB).

——Assets, receipt and extent of.

——To make legal representative of administrator liable decree-holder must prove both amount of assets and receipt of assets.

Quaere.—Whether the proposition that if it were shown that a deceased person left a certain amount of assets and that the legal representative had received some portion of those assets it would be for him to explain why he did not receive the whole of the assets and if he says that he did not so receive them, it would be for him to establish what proportion of the assets proved to have been left by the deceased really got into his hands, is not too wide. 79 Ind Cas 894 : 19 MLW 119: 1924 MWN 207: AIR (Vol 11) 1924 Mad 466 (DB).

——S. 50 (S. 234, old Code) — "Court which passed the decree" — Jurisdiction of executing Court to make an order bringing the legal representative of the deceased decree-holder on record — Waiver of objection.

The proper Court to have the legal representatives of a deceased decree-holder brought on record is the Court which passed the decree, not the Court to which the decree has been transferred for execution, but the order of the latter Court, if it is otherwise competent to pass the order, will not be void, and the objection to jurisdiction being one that can be waived by the parties. (1906) 17 MLJ 300 (DB).

——Ss. 50, 47 (Ss. 234, 244, Old Code) — Court which passed the decree, power of — Executing court — Application to execute against legal representative.

Where, after a decree has been transferred, the judgment-debtor dies an application against his legal representatives must be made under S. 234, C. P. C., to the Court which passed the decree and not to the Court to which the decree is transferred for execution.

Per Arnold White, C. J. : S. 234, C. P. C., contemplates the making of an order in general terms, viz., "let the decree be executed against the personal representative". The canon of construction is that a statute ought to be so construed, that if it can be prevented, no clause, section or word shall be superfluous, void or insignificant.

S. 244, C. P. C., ought not to be so construed as to cut down the powers given to the Court which passed the decree under S. 234, C. P. C.

Per Davies, J.:—The first para of S. 234, C. P. C., is in direct conflict with S. 244, cl. (c) read with the last para of the same section. (1905) 15 MLJ 116: 28 M 466 (FB).

——S. 50 (1) — Jurisdiction — Execution against legal representatives of deceased judgment-debtor — Power to order — Order by transferee Court — If illegal or irregular only — Objection to order — Competency of.

Under S. 50, C. P. Code, the Court which passed the decree is the proper Court to order execution against the legal representatives of the deceased judgment-debtor and not the Court to which the decree is transferred for execution. If, however, the transferee Court orders execution against the legal representatives it is not an illegality which goes to the root of the jurisdiction of the Court, but only an irregularity in procedure which may be waived. But if the irregularity is not waived, and it affects the merits of the case, the objection has to be given effect to. 27 Pat 848: AIR (Vol 39) 1952 Pat 333 (DB).

12. "Where judgment-debtor dies."

——Ss. 50 and 53 — Sons not parties to suit on pro-note executed by father — Decree against father alone — Subsequently sons separating from father — In execution son's shares cannot be proceeded against.

The provisions of Ss. 50 and 53 enabling the decree-holder to proceed against the shares of the sons of the judgment-debtor after partition by making the sons parties in execution of decree obtained against their father alone are not applicable in a case where the sons were not parties at all to a suit on a promissory note executed by the father. AIR (Vol 33) 1946 Mad 408 : (1946) 1 MLJ 307 : 226 Ind Cas 228.

——"Dies".

The word "dies" in S. 50, has been used in its natural meaning. It does not include civil death. AIR (Vol 22) 1935 Cal 713: 159 Ind Cas 370 (DB).

——Execution — Execution against insolvent's property — Death of insolvent — Heirs claiming no interest in insolvent's property as heirs — Procedure.

Where in the course of the execution proceedings against his property the insolvent dies and his heirs do not claim any interest in the property as his heirs, the proper procedure would be to strike out the names of the heirs of the deceased from execution proceedings altogether. The decree-holder would be entitled, provided that the leave obtained by him, allows him to do so to proceed against the properties of the insolvent in the hands of the Official Assignee. AIR (Vol 31) 1944 Cal. 432 : 216 Ind Cas 76 (DB).

——Section 50 is wide enough to include the case where the judgment-debtor dies before decree, provided the decree is valid in spite of his death. AIR (Vol 24) 1937 Pat. 321 : 169 Ind Cas 872 : 18 PLT 341 : 16 Pat 316 : 3 BR 638 (DB).

——Decree against daughters for arrears of rent — Surrender of estate to reversioners — Liability — When attaches to reversion.

Where the decree for rent is passed against the daughters for arrears which accrued after the death of the last male owner and where the daughters are in enjoyment of the rent and profits of the tenure, the liability for rent ought to be regarded as their personal liability and ought not to be held as attaching to the reversion unless the tenure itself is brought to sale under the special provisions of the Bengal Tenancy Act. The reversioners, therefore, are not the legal representatives of the judgment-debtor in respect of the properties which the applicants want to sell in execution of the rent decree within the meaning of S. 50. AIR (Vol 22) 1935 Cal. 713 : 159 Ind Cas 370 (DB).

——Property of a person who is adjudicated an insolvent vests in the Official Receiver from the date

on which the person applies for insolvency. And after property vests in the Official Assignee, no proceedings can affect the property of the deceased insolvent in his hands unless he has been impleaded in the matter adjudicated upon. AIR (Vol 22) 1935 Mad 907 : 159 Ind Cas 244.

——'Dies'.

The word 'dies' in S. 50, is used in its natural sense and does not include civil death, e.g., by becoming a 'sanyasi'. AIR (Vol 18) 1931 All 306: 1931 ALJ 263: 53 All 529: 131 Ind Cas 598 (DB).

——Decree against dead person — Legal representatives.

A person who dies 'pendente lite' before a decree is passed against him is not a judgment-debtor and the decree cannot be enforced against his legal representatives under S. 50, C. P. C. 55 Ind Cas 449 : AIR (V 7) 1920 Nag 61.

——S. 50 and O. 22, R. 6 — Death of deft. before decree — Execution against legal representatives, if can be taken.

A decree cannot be executed against the legal representatives of a person against whom the decree purports to have been passed but who died before the hearing. (1913) 17 C LJ 634 : 20 Ind Cas 506 (DB).

13. Scope.

——Enquiry under S. 50 — Applicability of O. XXI, R. 19.

The mere fact that there has to be some inquiry under S. 50 as to the extent of the property of the deceased in the hands of his legal representative, or that the sum may be limited by the provisions of S. 50, does not remove a case out of the scope of O. XXI, R. 19. AIR (V 28) 1941 Sind 49 : ILR (1941) Kar 129 : 193 Ind Cas 783 (DB).

——According to R. 12, O. XXII, Rr. 3 and 4 of the Order are not applicable to proceedings in execution of the decree. The proper procedure in execution is regulated by O. XXI, R. 16 in the case of a deceased decree-holder and O. XXI, R. 22 and S. 50 in the case of a deceased judgment-debtor. AIR (V 18) 1931 Bom 425 : 33 Bom LR 858 : 134 Ind Cas 730 (DB).

——Dekkan Agriculturists' Relief Act — No bar.

Dekkan Agriculturists' Relief Act, Ss. 22 and 74 — Collector can be appointed to manage the property of the judgment-debtor in the hands of his legal representatives after his death. 63 Ind Cas 310 : 15 S LR 47 : AIR (V 8) 1921 Sind 29 (DB).

——S. 50 (S. 234, Old Code), para 2 — Object of.

The second clause of S. 234 was inserted only for the protection of the legal representative and not for detracting from the right of the decree-holder to proceed against property which is otherwise liable under the substantive law of the country to be sold in execution. (1907) 11 C WN 593 (DB).

——S. 51.

—See also Civil P. C., Ss. 54, 68 to 72, Or. 21, Rr. 30 to 40, 53, 64 and O. 40, R. 1.

1. Appeal.
2. Application by decree-holder.
3. Arrest and detention.
4. Attachment and sale.
5. Temporary alienation.
6. "Explanation".
   See N. 10, Proviso.
7. "In such other manner", etc.
8. Means of judgment-debtor.
   See N. 10, Proviso.
9. Mode of execution.
10. Proviso.
11. Receiver.
12. Inalienable property.
13. Collection of future maintenance.
14. Collection of rent and profits.
    See N. 11, Receiver.
15. Realisation of property outside jurisdiction.
16. Powers of receiver.
17. Scope.
18. Simultaneous execution.

1. Appeal.

——Order without jurisdiction.

Order of committal to jail passed without jurisdiction — Objection to its legality not taken — No appeal lies. 117 Ind Cas 245 : 7 Rang 110 : AIR (V 16) 1929 Rang 161.

——Civil P. C., O. 40, R. 1, is a general provision relating to appointment of Receivers and even if an order appointing a Receiver is made in execution proceedings, it may fall within the purview of O. 40, R. 1, so as to be appealable under O. 43, R. 1 (s). AIR (Vol 14) 1927 Lah 196: 100 Ind Cas 298.

2. Application by decree-holder.

——Application — Inference.

An application under S. 51, C. P. C., may be inferred from an act of the court. AIR (Vol 7) 1920 Lah 443: 52 Ind Cas 356.

——S. 51 and O. 21, R. 10 — Right to apply — Stranger.

It is only the holder of a decree that can apply for execution, and in the case of a compromise decree granting allowances to parties to a suit and also to a stranger the latter, being no party to the suit or decree cannot apply for execution, though he can sue separately for his claim. AIR (Vol 4) 1917 Oudh 182: 3 OLJ 570: 37 Ind Cas 133 (DB).

3. Arrest and detention.

——S. 51, Proviso, O. XXI, Rr. 40, 37 and 17 — Court still has discretion.

The word "may" in O. XXI, R. 40(3) implies a discretion. Order XXI, R. 37 and O. XXI, R. 40 together indicate that the Court has no discretion to order arrest where the judgment-debtor does not appear, but that it has a discretion where the judgment-debtor does appear. Therefore, even where the decree-holder is not debarred from executing his decree by arrest of the judgment-debtor because of the proviso to S. 51, it does not prevent the executing Court from exercising a discretion whether or not it will order arrest.

On the application of the mortgagee-decree-holder for arrest of the judgment-debtor for the costs of appeal in the mortgage suit payable by him personally the executing Court ordered that the decree-holder should first proceed against the hypotheca, then sell the attached properties (not included in the hypotheca) and that if all these properties were not sufficient, arrest might again be applied for:

Held, that the executing Court had a discretion whether or not it should order arrest and therefore it could not be said that the order passed by it was without jurisdiction. AIR (Vol 31) 1944 Mad 191: (1944) 1 MLJ 53: 1944 MWN 85: 57 LW 150 (2): 219 Ind Cas 31.

——A judgment-debtor who has by means of appeal delayed the execution of the decree against him, should not be allowed to take advantage of that. In the absence of evidence to show that he is in bad health or will suffer unduly by detention in the civil jail, the mere fact that he is sixty years of age does not entitle him to any consideration on that account. AIR (Vol 29) 1942 Sind 19: ILR (1941) Kar 479: 198 Ind Cas 630 (DB).

——Decree only against family properties in hands of judgment-debtor — Application for his arrest, if in accordance with law.

and found to be impracticable. AIR (Vol 16) 1929 Lah 195: 112 Ind Cas 790.

8. Means of judgment-debtor.

See N. 10 — Proviso.

9. Mode of execution.

——Section enumerates various ways in which the Court may order execution of a decree according as the nature of the relief may require, and save except the limitation imposed by S. 168-A (1) (a), Bengal Tenancy Act (VIII of 1885) it is for the decree-holder to choose in which mode he would execute the decree. AIR (Vol 31) 1944 Cal 240: 48 CWN 344: ILR (1944) 2 Cal 340: 217 Ind Cas 101 (DB).

——S. 51, O. XXI, Rr. 30, 64, Sch. III, Para 11 — Sale of judgment-debtor's property without attachment — Validity of.

A person obtained a compromise decree against a judgment-debtor for payment of a sum of money and the judgment-debtor consented to his property being attached. But there never was in fact any attachment. However the Court made an order for sale and sent the record to the Collector under S. 68, and the Collector sold the properties in dispute to the judgment-creditor in execution of his decree, while the same was privately sold by the judgment-debtor to the appellants who sued for declaration and injunction:

Held, that Rr. 30 and 64 of O. XXI, did not limit the powers given by S. 51 to sell without attachment, the absence of which did not vitiate the sale nor was the judgment-creditor guilty of any irregularity. AIR (Vol 26) 1939 Bom 277: 41 Bom LR 463: ILR (1939) Bom 420: 183 Ind Cas 457 (DB).

——Decree-holder's right to decide mode.

The decree-holder has the right to decide whether he should execute the decree for money by arrest of the judgment-debtor or by attachment and sale of property or both; and the discretion given to the Court by O. 21 R. 21, to refuse simultaneous execution against the person and the property does not extend to compelling the decree-holder to take either one of these methods. AIR (Vol 26) 1939 Pat 380: 5 BR 485: 18 Pat 366: 180 Ind Cas 767 (DB).

——Execution forms of — Appointment of Receiver by consent order — Property not subject to such order if can be proceeded against.

There is no reason why the decree-holder should not take out any or all the forms of execution which the Code entitles him to pursue against various items of the judgment-debtor's property. Treating the appointment of Receivers where they are appointed by consent order as a form of equitable execution, there is no reason why the decree-holders should not proceed against the properties which were not subject-matter of the order appointing Receivers. AIR (Vol 25) 1938 Pat 130: 4 BR 377: 19 PLT 359: 17 Pat 248: 174 Ind Cas 34 (DB).

——Executing Court, powers of.

All the various modes mentioned in S. 51 are not open to an executing Court in every case; it is to be guided by the procedure laid down in the schedule, and must resort to the method appropriate to each case. AIR (Vol 23) 1936 All 495 : 1936 ALJ 605 : 1936 AWR 565 : 58 All 949 : 163 Ind Cas 481 (FB).

——S. 51, O. XXI, R. 40 — Court, if can choose particular mode of execution — Decree-holder wanting to proceed against person cannot be ordered to proceed against property.

Section 51 lays down the mode in which a Court may execute a decree. It does not, however, give the Court discretion to choose one particular mode of execution as against another; there is nothing in any of the rules under O. XXI, except the discretion given by R. 40 of O. XXI, which empowers a Court to refuse execution of a decree in the manner desired by the decree-holder when execution is sought by one mode only. The Court has no jurisdiction to direct a decree-holder to proceed against the property of the judgment-debtor, when he desires to proceed against the person. AIR (Vol 23) 1936 Pesh 46 : 160 Ind Cas 812 (DB).

——Concurrent application for execution within time — Form of execution to be adopted.

When several applications for execution are pending against the same judgment-debtor, and all the applications have been made within the time required to give them a right to share in any realisations, it is obviously inequitable to adopt a form of execution which will favour one of the decree-holders at the expense of the rest. AIR (Vol 22) 1935 Lah 964 : 161 Ind Cas 237.

——Execution — Mode of, not to be prescribed in decree.

Where a court decrees a suit for rent it should pass a decree for rent simply, without any limitation on the right of the landlord to execute a decree in any legal method open to him. 45 Ind Cas 702 : AIR (Vol 5) 1918 Cal 186 (DB).

10. Proviso.

——S. 51, Proviso, Cl. (c) — Applicability — Order for payment of an amount in a misfeasance summons against a director — Execution — Director unable to raise money to discharge the debt — Arrest can be ordered as he was "bound in a fiduciary capacity to account."

A Director of a company occupies a fiduciary position with regard to the members of the company and he is liable to account to them. Where a Director is ordered to pay in misfeasance proceedings a sum of money, he can be arrested in execution proceedings though he was a pauper and was quite unable to raise the money to discharge the decree. ILR (1950) Mad 742 : AIR (Vol 37) 1950 Mad 208 : 62 LW 784 : 1949 MWN 689 : (1949) 2 MLJ 604 (DB).

——Arrest — Legality — Suit by sons of judgment-debtor for setting aside dismissal of their claim petition — Consent order that property should not be sold till disposal of suit — Grant of time to judgment-debtor for payment — Failure to pay — Order for arrest, if can be passed.

Where there was a consent order that the property should not be sold till the disposal of a suit by the sons of the judgment-debtor for setting aside the order dismissing their claim petitions and it was not shown that the judgment-debtor had other property, an order for arrest for failure to pay the decree-debt within the time granted for that purpose cannot be passed. In the circumstances, it cannot be said that the judgment-debtor was shown to have the means to pay the amount of the decree and refused or neglected to pay the same.

It is impossible to say that when time was taken for payment of the amount the judgment-debtor either expressly or impliedly admitted that he was liable to be arrested in case the amount was not paid. Accordingly the judgment-debtor is not estopped from raising the plea that he has not sufficient means to pay the amount of the decree in showing why he should not be arrested. 1949 MWN 294 : AIR (Vol 36) 1949 Mad 822 : 62 LW 220 : (1949) 1 MLJ 318 (DB).

——Order to arrest without giving reasons — Jurisdiction.

The Legislature has thought fit to order arrest and detention of civil debtors only where the conditions prescribed in S. 51, C. P. Code, are strictly satisfied. Reasons must be given every time a man is ordered to be arrested, and in every proceeding where he is ordered to be arrested, even if it is on the same day. Where a Court makes an order for arrest without giving reasons, it acts without jurisdiction. 1949 MWN 49 : AIR (Vol 36) 1949 Mad 470 : (1948) 2 MLJ 648.

——Mandatory nature of the provisions of — Compliance with — Necessity — Circumstances.

In execution of a small cause decree, the petitioner, who was the judgment-debtor, was given notice to show cause why he should not be committed to prison. He appeared and filed a counter but was absent on the date to which the application was posted for disposal. The decree-holder was ordered to pay arrest batta and when that was done an order for arrest was issued. In pursuance of this order the judgment-debtor appeared before the Court and was released on his furnishing security to file an insolvency petition, and the execution petition was dismissed.

On a contention in revision against the order of arrest that there was a non-compliance with the mandatory provisions of S. 51 of the C. P. Code,

Held, that a recital of the reasons for ordering arrest of the judgment-debtor as required by the mandatory provisions of S. 51 of the C. P. Code, was not necessary in the circumstances, as the order eventually passed by the Court was not one that the judgment-debtor should be detained in a civil prison and that the judgment-debtor had nothing to complain of. 1947 MWN 208 : AIR (Vol 35) 1948 Mad 9 (1) : (1947) 1 MLJ 246.

——S. 51, Proviso (b), Explanation — Decree for rent — Property exempt from sale under S. 168-A of the B. T. Act — If can be taken into consideration.

Under S. 51, proviso (b), in calculating the means of the judgment-debtor to pay the debt due under a decree for rent the Court should not leave out of account properties belonging to the judgment-debtor which are exempt from sale in execution of the decree under S. 168-A of the B. T. Act. The explanation attached to the proviso to S. 51, C. P. Code, requires that the Court should leave out of account only property which is exempt from attachment in execution of the decree, and not property which is exempt from attachment and sale. S. 168-A of the B. T. Act limits the prohibition contained in that section to the attachment and sale of any property other than the tenancy in arrears, and a mere attachment without sale does not come within the mischief of that section. ILR (1946) 1 Cal 145 : 50 CWN 181 (DB).

——S. 51, Proviso (b) and Explanation — Pension.

After the amount of the pension has been paid over to the pensioner, the amount ceases to be exempt from attachment under S. 11, Pensions Act, and therefore the amount of pension which is payable month by month to the pensioner cannot be left out of account in considering whether under S. 51 proviso (b) and the Explanation the pensioner judgment-debtor has the means to pay the amount of the decree or a substantial portion thereof. AIR (Vol 31) 1944 Mad 263 : 57 LW 17 : (1944) 1 MLJ 45 : 1944 MWN [illegible] 219 Ind Cas 340.

——Explanation — Property exempt from attachment — Income, if can be attach[illegible]

The income of property of the judgment-debtor which is exempt under the Explanation to S. 51, Civil P. C. can be attached in execution of a decree against him. AIR (Vol 30) 1943 Lah 166 : 45 PLR 173 : 209 Ind Cas 609.

——A Court should not order the arrest and detention of a debtor under S. 51, if it is satisfied by evidence that the debtor has not the means to satisfy the debt or a substantial portion thereof. Where it is obvious that the judgment-debtor cannot pay the debt or a substantial portion thereof, but he can pay a small amount towards the debt monthly if appropriate steps are taken, the drastic step of arresting the judgment-debtor by having recourse to S. 51, should not be taken. AIR (Vol 29) 1942 Pat 242 : 8 BR 222 (1) : 197 Ind Cas 470 (DB).

——Judgment-debtor having means to pay up decree but refusing to pay it.

Under the proviso to S. 51, in its present form, the Court can order execution by arrest and detention in prison of the judgment-debtor if he has the means to pay up the decree or a substantial part thereof and has refused or neglected to pay, provided that the execution can proceed at all. AIR (Vol 29) 1942 Pat 47 : 8 BR 21 : 196 Ind Cas 392.

Held, on facts that the judgment-debtor had sufficient means to pay the amount of the decree or substantial part thereof and had refused to do so, and that the provisions of the proviso to S. 51, Civil P. C., had been fully complied with. AIR (Vol 29) 1942 Sind 19 : ILR (1941) Kar 479 : 198 Ind Cas 630 (DB).

——Decree for payment of arrears of alimony under S. 37, Divorce Act (IV of 1869) — On arrest judgment-debtor unable to apply in insolvency under S. 55 (3) — Effect.

A decree for alimony under S. 37, Divorce Act, does not create a debt which can be proved in bankruptcy and an order of discharge in bankruptcy does not discharge the liability under a decree for alimony. But at the same time, a decree for the payment of arrears of alimony is a decree for the payment of money within the meaning of the proviso to S. 51. The fact that on arrest of the judgment-debtor in execution of the decree for payment of alimony, at any rate in respect of future alimony, he cannot apply in insolvency under S. 55 (3), does not render the decree for alimony any the less a decree for payment of money. AIR (Vol 28) 1941 Bom 17 : 42 Bom LR 945 : 192 Ind Cas 605.

——Explanation applies to Cl. (b) of proviso — It is not concerned with Cl. (a).

Explanation to proviso to S. 51, applies only to Cl. (b) of the proviso. By virtue of this explanation property which could not be attached or sold was not to be considered, only when deciding as to whether the judgment-debtor had any means to pay the money decreed. Obviously the explanation has nothing to do with Cl. (a) and, therefore, it cannot be said that a gift by the judgment-debtor, after the institution of the suit, of his land not liable to attachment and sale, does not make him forfeit the protection afforded by the amendment of S. 51 by Act XXI of 1936, even if the gift was made with dishonest intention. AIR (Vol 27) 1940 Pesh 33 : 189 Ind Cas 371.

——S. 51, (as amended by Act XXI of 1936) — Court whether can take into account judgment-debtor's agricultural lands and residential houses.

In the Explanation appended to the Proviso newly added to S. 51, Civil P. C., it is expressly stated that while calculating the means of the judgment-debtor for the purposes of Cl. (b), any

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property which by or under any law or custom having the force of law for the time being in force is exempt from attachment in execution of the decree shall be left out of account. The execution Court cannot, therefore, while determining the question of the capacity of the judgment-debtor to pay the amount of the decree, take into account his agricultural lands and his residential houses if he is an agriculturist. AIR (Vol 26) 1939 Lah 299 : 41 PLR 101 : 183 Ind Cas 133.

——S. 51, Proviso, sub-cl. (b) — Onus is on decree-holder.

The onus is on the decree-holder to establish that the judgment-debtor had sufficient means to pay the debt within the meaning of sub-cl. (b) of the proviso to S. 51 of the Civil P. C. AIR (Vol 26) 1939 Pat 22 : 5 BR 16 : 177 Ind Cas 797.

——S. 51, Proviso (a) (ii) (as amended by Act XXI of 1936) — Decree for price of car — Defendant hypothecating plaintiff's car to third person, bringing suit against him and abandoning it — Transaction fictitious — Conduct of defendant.

Where a defendant against whom a decree is passed for the price of the plaintiff's car, hypothecates the plaintiff's car along with other people's cars which were left with him either for sale or for custody, to a third party and then brings a suit against the third party and abandons it and it appears that the whole transaction of hypothecation was fictitious, the conduct of the defendant comes under S. 51. Proviso (a) (ii) as amended by S. 2 of the Amending Act (XXI of 1936). AIR (Vol 25) 1938 Cal 448 : 177 Ind Cas 1008 (DB).

——Contumacious conduct and not mere inability to pay is necessary.

Under the new Code, arrest is not possible unless there has been some contumacious conduct on the part of the judgment-debtor and mere inability to pay does not justify arrest. AIR (Vol 25) 1938 Lah 692 : 40 PLR 618 : 178 Ind Cas 848 (1).

——Punjab Relief of Indebtedness Act (VII of 1934), S. 34 — Civil Procedure Code Amendment Act (XXI of 1936) — Acts, if retrospective — Judgment-debtor, when immune from arrest — Onus of proof.

Judgment-debtor is immune from arrest under S. 34, Punjab Relief of Indebtedness Act, and O. XXI, R. 40, Civil P. C., read with S. 51, Civil P. C. as amended by Act XXI of 1936, which have retrospective effect, unless the provisions of these Acts are fulfilled. The onus under the new provisions of law lies upon the decree-holder to establish on the record that the judgment-debtor has the means to pay and if no such evidence is brought on the record and it is not apparent on the record otherwise that he has such means, no presumption adverse to the judgment-debtor can be drawn. AIR (Vol 25) 1938 Lah 515 : 40 PLR 857 : 179 Ind Cas 146.

——S. 51, Proviso, Cl. (b) — Judgment-debtor after decree selling his property and getting consideration but not paying decretal amount.

Where after the passing of the decree the judgment-debtor sold his property, received the consideration but did not pay the decretal amount or a substantial part thereof:

Held, that Cl. (b) of the proviso to S. 51, came into play and the judgment-debtor was liable to be detained in civil prison. AIR (Vol 25) 1938 Pesh 17 : 174 Ind Cas 629.

11. Receiver.

——No prior attachment.

The present Civil Procedure Code does not appear to contemplate an attachment as a necessary preliminary to the appointment of a Receiver in execution. After all there is no practical reason to attach property before appointing a Receiver. An appointment of a Receiver is in itself a form of attachment. Instead of signifying the Court's custody by merely affixing process to the property or serving it on the owner, an officer of the Court is sent to take charge of that property, realise the income and utilise it under the directions of the Court. An appointment of a Receiver in execution is not bad merely because there has been no prior attachment. AIR (Vol 29) 1942 Mad 396: (1942) 1 MLJ 217 (2): 55 LW 89 (2) : 1942 MWN 116 : 203 Ind Cas 529.

——S. 51, O. XL, R. 1 — Discretion of Court.

Execution by appointing a Receiver is among the rights of a decree-holder under S. 51 (d). But S. 51 itself provides that execution of a decree by appointing a Receiver (like the other modes there specified) may be allowed on the application of the decree-holder "subject to such conditions and limitations as may be prescribed" and "prescribed" means prescribed by the rules in the First Schedule. Order XL deals with the appointment of Receivers. Relief by appointing a Receiver is thus not a matter of course and can only be given where it appears to be just and convenient to do so. That is to say, a proper case must be made out, for the exercise of the Court's discretion to appoint a Receiver by way of execution, as by showing the existence of an impediment which prevents the decree-holder from obtaining satisfaction by an ordinary execution sale. AIR (Vol 29) 1942 Pat 455 : 23 PLT 191 : 8 BR 791 : 201 Ind Cas 350 (DB).

——Ordinary legal remedies involing considerable risk and doubtful result — Receiver may be appointed.

Where the decree-holder can only exercise the ordinary legal remedies at considerable risk and with doubtful results, there is ample justification for the appointment of a Receiver in execution. AIR (Vol 28) 1941 Cal 240 : 195 Ind Cas 69.

Appointment of a Receiver to take charge of the judgment-debtor's property is an exceptional remedy and when there is ample property of the judgment-debtor available for satisfaction of the decree, there is no good reason to appoint a Receiver. Besides, when the execution proceedings are to be transferred to the Collctor a Receiver cannot be appointed. AIR (V 27) 1940 Lah 345 : 191 Ind Cas 704.

——Member of Legislative Assembly — Receiver of his salary.

Per Derbyshire, C. J. — Members of Legislative Assemblies must satisfy their debts like other people but there are grave objections to the appointment of a Receiver of the salary of a member of the Legislative Assembly, although it can be done in a proper case if no other remedies are available to the decree-holder. AIR (V 26) 1939 Cal 428 : 69 CLJ 267: ILR (1939) 1 Cal 523: 43 CWN 512 : 183 Ind Cas 818 (DB).

——S. 51, O. XXI, Rr. 11, 30, O. XL, R. 1 — Compromise decree for payment of money.

The appointment of a Receiver is one of the recognised modes of executing a decree. This is an equitable execution, but nonetheless it is not always necessary that legal execution should be exhausted before equitable execution by this mode is resorted to. The provisions of O. XXI, R. 30, are not exclusive, and it is proper for a Court to order execution of a decree for payment of money passed on a compromise by means of the appointment of a Receiver. The wording of O. XL,

R. 1 (1) is of such a nature as to give a Court a very wide power.

A Receiver can, therefore, be appointed in execution of a compromise decree for the payment of money when the Court is satisfied that appointment of a Receiver is just and convenient from the point of view of both the decree-holder and the judgment-debtor. AIR (V 26) 1939 Oudh 116 : 1939 O WN 206 : 14 Luck 538 : 180 Ind Cas 29 (DB).

——Execution, forms of — Appointment of Receiver by consent order — Property not subject to such order if can be proceeded against.

There is no reason why the decree-holder should not take out any or all the forms of execution which the Code entitles him to pursue against various items of the judgment-debtor's property. Treating the appointment of Receivers where they are appointed by consent order as a form of equitable execution, there is no reason why the decree-holders should not proceed against the properties which were not subject-matter of the order appointing Receivers. AIR (V 25) 1938 Pat 130 : 4 BR 377 : 19 PLT 359 : 17 Pat 248 : 174 Ind Cas 34 (DB).

——Judgment-debtor's share in shop — Appointment of receiver.

Quaere — Since no Receiver can be appointed for the custody of property which the judgment-debtor himself cannot take possession of, it is doubtful if under S. 51, Civil P. C., a Receiver can be appointed in execution of a decree against a person having a share in a firm. In order to ascertain the approximate value of the share of the judgment-debtor, it may be open to the Judge to appoint a Commissioner to make an inventory of the assets of the firm and of its liabilities. AIR (V 24) 1937 Lah 313 : 174 Ind Cas 692.

Quaere — It is doubtful if under S. 51 a Receiver can be appointed in execution of a decree against a person having a share in a firm, since no Receiver can be appointed for the custody of property which the judgment-debtor himself cannot take possession of. AIR (V 24) 1937 Lah 313 : 174 Ind Cas 692.

——S. 51, O. XL, R. 1 — Restriction on power of Court — Receiver appointed to receive earnings of judgment-debtor's theatre after collection and keep accounts but not to receive gate money — Order, if ultra vires.

Section 51 prescribes the procedure in execution and lays down that the Court may, on the application of the decree-holder, order execution of the decree by appointing a Receiver. No further restrictions have been placed on the power of the Court in this section, nor has the nature of the property been defined of which a Receiver can be appointed. This section will, therefore, evidently be governed by the provisions of O. XL, R. 1.

Where, therefore, the judgment-debtor has a theatre and in execution of a decree against him a Receiver is appointed with the express reservation that the Receiver will not be entitled to manage the show but would merely keep an account of the income and expenditure and deposit the amount daily in the Civil Court account and he is not entitled to receive money at the doors but is merely entitled to receive the daily earnings after they have been collected, the order appointing the Receiver to receive the earnings is not ultra vires and the money so earned would come within the definition of property as used in O. XL, R. 1. As soon as the gate money is received and collected for the judgment-debtor, it becomes his property and it can be utilised for the benefit of his judgment-creditors either by attachment or through the appointment of a Receiver. AIR (V 23) 1936 Lah 239 : 162 Ind Cas 861.

——Same Court ordering sale and appointing Receiver of same properties in another suit — Receiver applying to Court making it clear he was Receiver — Sale without formal application for leave for execution to proceed — Sale, if vitiated — Receiver not joined as party in execution proceedings — Whether ground for setting aside sale.

Where the same Court orders a sale in execution and appoints a Receiver over the same properties which it has been ordered to be sold in execution and the Receiver himself puts in an application to the executing Court making it clear to the executing Court that he was a Receiver of the properties about to be sold in execution and knowing him to be the Receiver, the Court allows the sale to go on, it is quite unnecessary for any formal application to be made to the Court for leave for execution to proceed. Nor can the Receiver be heard to say under the circumstances that he should have been joined as a party to the execution proceedings. AIR (V 22) 1935 Mad 697 : 1935 M WN 738 : 42 LW 590 : 157 Ind Cas 379 (DB).

Section draws distinction between attachment and sale or sale without attachment and the appointment of Receiver. The Legislature by expressly prohibiting sale and not providing for any restriction on the appointment of a Receiver must be taken to have left that power of the Court intact, hence where the property has not in fact been sold in execution of any decree by Civil Court at all but only a Receiver has been appointed and as the appointment of Receiver is one of the modes of execution there will be no prohibition against the appointment of a Receiver. AIR (V 21) 1934 All 605 : 18 R D 224 : 1934 A LJ 770 : 3 A W R 695 : 150 Ind Cas 665 (DB).

——Appointment of Receiver, if operates as transfer of judgment-debtor's interest.

The Receiver is an officer of the Court and the appointment of a Receiver who takes over possession of the judgment-debtor's property, cannot be regarded as a transfer of the judgment-debtor's rights and interests to the Receiver. AIR (V 21) 1934 All 605 : 18 R D 224 : 1934 A LJ 770 : 3 A W R 695 : 150 Ind Cas 665 (DB).

——S. 51 (d), O. XL, R. 1 — Appointment of Receiver.

Court has no power to appoint Receiver in respect of property which is not the subject of any suit nor of any execution application — Decree-holders having ample security for value of land over which they had lien — No reason why decree should not be executed in ordinary manner — Appointment of Receiver, held, not proper — Fact that defendant approached the applicant to accept a smaller amount than the sum decreed or that they applied to the Manager, Sind Encumbered Estates for aid held no ground. AIR (V 20) 1933 Sind 231 : 150 Ind Cas 473.

——S. 51, O. XL, R. 1 — Principles — Decree 'just and convenient' — Simple creditor.

Under S. 51, a decree-holder is not entitled as of right and as a matter of course to apply for execution by the appointment of a Receiver; on the other hand, the remedy by the appointment of a Receiver is by way of equitable execution or indirect execution, the Receiver taking the place of the debtor in cases in which equitable and special considerations intervene. Section 51 must be read with O. XL, R. 1.

Much care should be taken to ascertain whether the order should be made in a case where the decree-holder having the ordinary remedy of

execution available to him applies for the appointment of a Receiver to pay himself out in respect of his decree, keeping the property fixed upon the judgment-debtor with all his liabilities intact in respect thereof and yet depriving him of its enjoyment and its profits.

A simple contract creditor who has no specified charge or no right to be paid out of a specified fund cannot, in general, ask for the appointment of a Receiver. AIR (V 19) 1932 Cal 189 : 35 C WN 1066 : 59 Cal 205 : 137 Ind Cas 98 (DB).

——Appointment of Receiver — Grounds.

Under S. 51, Civil P. C., the execution of a decree may be obtained by appointment of a Receiver. But the Court has a discretion in the matter and can refuse to grant such relief unless the party applying for such relief shows that it would be just and convenient in the particular case to grant such relief.

The mere fact that the appointment of a Receiver will save the ownership of the judgment-debtor in the villages hypothecated, while an order for sale may eventually deprive him of it is not a sufficient ground to support an order appointing a Receiver. AIR (V 18) 1931 Oudh 307 : 8 O WN 677 : 7 Luck 203 : 132 Ind Cas 349 (DB).

——Appointment of Receiver when made.

Before an appointment of a Receiver by way of execution can be obtained a case should be made out that ordinary execution cannot be effected with advantage in the case. Even when such a case is made and the sole purpose of the appointment is to have immovable property realized by sale, application by such appointment should prima facie be made as an application-in-execution to the Court within whose territorial jurisdiction the property is situate. AIR (V 17) 1930 Cal 502 : 57 C 964 : 34 C WN 238 : 51 C LJ 209 (DB).

——Appointment of Receiver.

Judgment-creditor's position is not improved by appointment of receiver in execution instead of attachment and sale. AIR (V 17) 1930 Mad 4.

Receiver appointed in execution proceedings — Other decree-holders need not apply for appointment of receiver of same property. AIR (V 17) 1930 Mad 4.

Or. 40, R. 1 is a general provision relating to appointment of Receivers and even if an order appointing a Receiver is made in execution proceedings, it may fall within the purview of O. 40, R. 1 so as to be appealable under O. 43, R. 1 (s). AIR (V 14) 1927 Lah 190 : 100 Ind Cas 298.

It would be stretching too far the discretion of the Court under O. XL, R. 1 in the matter of the appointment of receiver if the decree-holder is deprived of his right to sell the mortgaged property under the decree. S. 51 of the Code does not give any right to the judgment-debtor to apply for the appointment of a receiver but prescribes the mode in which the decree-holder may seek an execution of his decree, one of the modes being by the appointment of a receiver. AIR (V 9) 1922 Pat 369 : 4 PLT 58 : 67 Ind Cas 606 : 1922 PHCC 66 (DB).

——S. 51 (d) and O. 40, R. 1 — Receiver — Decree against legal representatives — Personal decree against one — Execution.

S. 51 entitles the Court to appoint a Receiver of rents of the estate of a deceased person for the purpose of liquidating debts against that estate, and there is nothing in the Code to limit the appointment of Receiver of rents to a case where the debt to be discharged was a debt against the heirs and not against the deceased holder of the estate. AIR (V 6) 1919 Oudh 326 : 22 OC 194 : 52 Ind Cas 305 (DB).

12. Inalienable property.

——Land not saleable — Receiver can be appointed — Application must be made in executing Court.

There is nothing in the Civil Procedure Code to prohibit the appointment of a Receiver in a case in which land of an agriculturist could not be brought to sale in execution of a decree. It is for the execution Judge to decide whether the appointment of a Receiver is "just and convenient". AIR (V 30) 1943 Pesh 52 : 209 Ind Cas 424 (DB).

——Land not liable to attachment or sale.

A Receiver can be appointed under S. 51, to liquidate a decree from the profits of the land by granting a lease, although the interest in the land of the judgment-debtor cannot be attached or sold by reason of S. 18, Punjab Colonization of Government Lands Act. AIR (V 29) 1942 Lah 126 : 44 P LR 74 : ILR (1943) Lah 179 : 201 Ind Cas 87 (DB).

——Ghatwali tenure — Judgment-debtor ghatwal of ghatwali governed by Bengal Regulation XXIX of 1814 — Surplus profits are available for satisfaction of decree — What would be surplus profits is to be determined by Court executing decree — Consideration in determining surplus profits — Allowance to be paid to judgment-debtor for his maintenance and other expenses — Tenure under attachment of Government for their dues — Receiver appointed — Commissioner fixing allowances to be paid to ghatwal — Government dues satisfied — Surplus profits under attachment by Civil Court — Allowances fixed by Commissioner are not binding on Civil Court.

Where the judgment-debtor is a 'ghatwal' in the Santal Parganas whose 'ghatwali' tenure is governed by Bengal Regulation XXIX of 1814 and is inalienable, the surplus profits of such 'ghatwali' tenure which may be left "after the payment of Government revenue, the wages of the 'chowkidars' employed by the 'ghatwal' and other like charges," are available for the satisfaction of decrees obtained against the 'ghatwal'.

The question of what would be the surplus profits available to the decree-holders of the 'ghatwal' must be determined by the Court executing the decree. Whatever is left to the 'ghatwal' out of the income of his tenure "after the payment of Government revenue, the wages of the 'chowkidars' employed by the 'ghatwal' and other like charges" is his personal property and as such liable to be seized and appropriated by the decree-holder The 'ghatwal's' maintenance allowance and other personal expenses do not come within the expression "other like charges". The Court, however, executing the decree must make provision for the maintenance and other necessary expenses of the 'ghatwal' judgment-debtor. His maintenance allowance cannot be regarded as salary to be fixed by the executive authorities. Where the surplus profits are under attachment by the Civil Court it is that Court which has to determine the amount of surplus profits available to the decree-holder and for that purpose to fix the allowance to be paid to the judgment-debtor for his maintenance and other expenses. The Receiver in possession of the judgment-debtor's estate is under the control and supervision of the executing Court and must, therefore, prepare the budget with the sanction of that Court.

Where the profits of the 'ghatwali' tenure were attached by the Government for the recovery of their dues and a Receiver was appointed for the satisfaction of those dues and after the satisfaction of the Government dues the surplus profits are under attachment by the Civil Court, the allowances to be paid to the 'ghatwal' fixed by the Com-

missioner of the Division at that time are not subsequently binding on the Civil Court, which can reduce the allowance in accordance to the circumstances. AIR (V 28) 1941 Pat 502 : 7 BR 734 : 194 Ind Cas 234.

——Jagir — Tenure granted to ancestors in 1842 — Estate forfeited by Government and in 1881 new grant made — New grant creating jagir for descendants of grantee — Stipulation that jagirdar had no power of transfer by sale or lease — Decree-holder seeking to bring tenure to sale in execution of money-decree — Crown Grants Act (XV of 1895).

Property is not liable to sale by the Court unless the judgment-debtor has a disposing power over it for his own benefit. The measure of liability to involuntary alienation is the power of voluntary transfer.

A judgment-debtor held a 'jagir' under Government. His ancestor enjoyed a tenure which was created in 1842 by the proprietor of certain estate, granted in consideration of services to be rendered as 'barkandas'. The estate was subsequently forfeited to Government and in 1881 there was a formal dispensation with the services which the 'jagirdar' had to render as 'barkandas', and a new grant was created of the tenure freed of those services, at certain annual rent. The new grant created a 'jagir' for the descendants of an earlier 'jagirdar' to enjoy, so long as any of his descendants should survive. There was a stipulation that the 'jagirdar' had no power to transfer by sale or by creation of 'mokarrari' tenures any part of the tenure, with a liability to resumption if unauthorised transfer should be made. A decree-holder sought to bring this tenure to sale in execution of his money decree:

Held, that the tenure was a Crown grant and was affected by the Crown Grants Act of 1895. The grantee by accepting a new grant had made an implied surrender of the former grant. The interest enjoyed by virtue of the grant of 1881 was a strictly limited interest in this way, that it was to be enjoyed by the heirs of the grantee and by nobody else; and what was granted was not a property which the heirs were to treat as their own in the sense that they might, if they pleased, transfer it to somebody else; it was a grant by the Crown of a limited interest which was not assignable either by operation of law or by voluntary alienation, and the judgment-debtor possessed no right in the corpus of the property which could be assigned or which could be brought to sale. The only manner in which the decree-holder could utilise for his own benefit the interest of the 'jagirdar' in property was by obtaining the appointment of a Receiver of the rents and profits until his decree was satisfied or during the life-time of the judgment-debtor whichever might be the shorter period. AIR (V 26) 1939 Pat 598 : 5 BR 850 : 18 Pat 370 : 183 Ind Cas 56 (DB).

——Agriculturists in N.-W. F. Province — Decree against — Execution of — Receiver, if can be appointed for limited period only — Whether against public policy.

The agriculturists in N.-W. F. Province have the right to alienate their lands within specified limits and to enjoy the profits of those lands. In execution of a decree against an agriculturist, an appointment of a Receiver for a limited period is not against public policy on the ground that it would enable money-lenders to circumvent the provisions of the Punjab Alienation of Land Act, for that Act itself allows agriculturists to alienate their lands temporarily for a period not exceeding 20 years. AIR (V 25) 1938 Pesh 30 : 176 Ind Cas 14 (DB).

——S. 51, if confers general powers.

Under S. 23, Agra Tenancy Act, any interest of an ex-proprietary or occupancy tenant which he possesses is not transferable or attachable or saleable under the Tenancy Act. Section 51, Civil P. C., does not confer a general power on an execution Court to appoint a Receiver in every case where it is just and equitable and the appointment of such a Receiver neither amounts to a transfer of the interest of the judgment-debtor to the Receiver nor even his dispossession. Having regard to the definition of the words "prescribed", it is subject to the rules in Sch. I, and S. 51 and O. XL, R. 1 go together. AIR (V 24) 1937 All 389 : 1937 A WR 197 : 1937 A LJ 267 : 1937 R D 210 : ILR (1937) All 542 : 169 Ind Cas 181 (DB).

——S. 51, O. XL, R. 1 — Colonization of Government Lands (Punjab) Act (V of 1912), S. 18 — Receiver, for collection of rent, if can be appointed for seven years.

Section 51 is to be read with R. 1 of O. XL, and an order appointing a Receiver is to be regarded as made under the latter Rule and can be passed only if the order appears to the Court to be just and convenient. While a decree-holder may not, as of right and as 'matter of course' apply for execution by the appointment of a Receiver, the law allows by way of equitable or indirect execution the appointment of a Receiver to take charge of property immune from attachment and sale under the provisions of the Code. Therefore, in execution of a money-decree, to recover rents of an occupancy holding, to which S. 18, Colonization of Government Lands Act, prohibiting attachment and sale, applies, a Receiver can be appointed under S. 51 (d), for a period of seven years, which is a period for which the property can be leased. Such an order would be just because attachment being impossible, the only other mode of execution would be by arrest and imprisonment of the judgment-debtor. AIR (V 24) 1937 Lah 738 : 39 PLR 649 : 175 Ind Cas 601.

——S. 51 (d), O. XL, R. 1 — Berar Inam Rules, R. 3 — Jahagir granted under, for maintenance — Receiver, if can be appointed to manage Jahagir — Suitable allowance to be fixed on amount coming into Receiver's hands.

Although a 'Jahagir' granted under R. 3, Berar Inam Rules, for maintenance, is not liable to attachment in execution of a decree, a Receiver can be appointed to manage the 'Jahagir' for the benefit of the decree-holders subject to a suitable allowance for the maintenance being made in favour of the judgment-debtor. It is not necessary that the executing Court should fix any suitable allowance when making the order of the appointment of the Receiver, inasmuch as unless it is ascertained what the profits of the estate would be in the hands of the Receiver it is not possible for the executing Court to fix any allowance. AIR (V 20) 1933 Nag 266 : 150 Ind Cas 633.

——Receiver cannot be appointed in respect of agricultural land of judgment-debtor in Santhal Parganas by way of equitable execution. Bengal Regulation (III of 1872), S. 27. AIR (V 16) 1929 Pat 700 : 118 Ind Cas 721 : 10 PLT 846 (FB).

——S. 51 (d) — Receiver — Execution of decree — Ghatwali Property — Receiver of rents.

A Receiver can be appointed to realise the rents and profits in execution of a decree against a Ghatwal, though the Ghatwali property cannot be attached and sold. (1912) 39 Cal 1010: 16 CWN 802: 14 Ind Cas 227 (DB).

13. Collection of future maintenance.

——Receiver in execution — Appointment — If amounts to or alternative to attachment and prohi-

bited by S. 60 (1) (n) — T. P. Act, S. 6 (dd) — Receiver for inalienable property — If prohibited — Power of Court in execution — Court-fees due to Government — Realisation in execution by receiver — Permissibility.

Though a mere right to future maintenance as such can neither be attached nor sold, when the maintenance has merged into a decree of Court, it does not follow that relief by way of appointment of a receiver in execution under S. 51, C. P. Code, cannot be granted, though attachment and sale may be prohibited by S. 60 (1) (n) and S. 6 (dd), T. P. Act. The power to grant relief by way of appointment of a receiver is not a mere substitute for attachment, but is an alternative, independent remedy. It cannot be laid down as a general rule of law that when a property is not alienable in law, a receiver in respect of such property cannot be appointed in execution. It is also well-settled that a mortgage or a charge (e.g., a charge under O. 33, R. 10, C. P. Code) can be realised in execution by the appointment of a receiver. AIR (Vol 17) 1930 Bom 350, diss. AIR (Vol 37) 1950 Orissa 220: 16 Cut LT 92 (DB).

——S. 51, O. XL, R. 1 — Decree against widow in possession of village in lieu of maintenance — Execution by appointment of Receiver.

A decree for Rs. 1023 was passed against a Hindu widow who was in possession of a village in lieu of maintenance. The decree-holder realised a portion of the decretal amount and for the realization of the balance of Rs. 700 applied for the appointment of a Receiver of the village :

Held, that the facts of the case did not justify the drastic step of dispossessing the widow from the property of which she was in possession in lieu of maintenance, by appointment of a Receiver. The widow should be allowed to pay the decretal amount by instalments and if she defaulted it would have to be seriously considered whether or not a Receiver of her property should be appointed. AIR (Vol 30) 1943 All 1: 1942 AWR 337 (2): 204 Ind Cas 210 (FB).

——S. 51, O. XLI, R. 1 — Right to future maintenance not attachable — Decree against maintenance-holder.

Section 51 clearly shows that a Receiver can be appointed even in cases in which attachment cannot be made. Hence where a decree has been passed against a holder of a right of future maintenance, a Receiver can be appointed to realise the maintenance allowance and pay it to the decree-holder till the decree is satisfied, even if the right to future maintenance is exempt from attachment. AIR (Vol 29) 1942 Oudh 410 (412): 1942 OWN 359: 1942 AWR 241: 18 Luck 147: 201 Ind Cas 100 (DB).

14. Collection of rent and profits.

See N. 11 — Receiver.

15. Realisation of property outside jurisdiction.

——The High Court has jurisdiction to appoint a receiver of immoveable property situated outside its ordinary original jurisdiction, because the appointment of a receiver is not execution but a substitute for execution. The appointment of a receiver has no doubt been described in English law as one by way of 'equitable execution' but it is really not execution but it is equitable relief which the Court gives because execution cannot be had at law. AIR (Vol 17) 1930 Cal 502: 57 Cal 964: 34 CWN 238: 51 CLJ 209 (DB).

——Receiver can be appointed to realise property outside jurisdiction. AIR (Vol 8) 1921 Mad 119: 61 Ind Cas 753 : 13 MLW 150 : 1921 MWN 106 (DB).

16. Powers of receiver.

——Lease auctioned by Receiver subject to sanction of Court — Court allowing lease money to be paid to decree-holder — Court must be taken to have sanctioned the lease. AIR (Vol 29) 1942 Lah 126: 44 PLR 74: ILR (1943) Lah 179: 201 Ind Cas 87 (DB).

——Appointment of Receiver to collect decree amount — Whether confers priority over attaching creditor.

The appointment of a Receiver for the collection of a decree amount at the instance of one of the decree-holder's creditors is not more effective than getting the decree attached or issuing an injunction against the defendant not to execute the decree. All such steps, to a certain extent, keep the property of the defendant under the control of the Court so as to ultimately make it available to the person who takes the step. But they do not amount to a charge.

A obtained a mortgage decree and realised a portion of the mortgaged money in execution. B, who was entitled to a share in the mortgage, obtained a preliminary decree for an account of the moneys realised by A in execution and for the appointment of Receiver for collecting and distributing in particular shares the balance due under the mortgage decree. C, a creditor of A, obtained a decree against A and attached A's share in the mortgage decree :

Held, (i) that on a proper construction of the decree, the Receiver was entitled to disburse the moneys collected by him only subject to B's right to an account of A's overdrawings;

(ii) that both B and C were in the position of unsecured creditors of A and neither was entitled to claim priority in respect of A's share in the mortgage decree. AIR (Vol 22) 1935 Mad 146: 153 Ind Cas 259 (2).

——**Money in hands of Receiver.**

It cannot be said that a receiver is the agent of a judgment-creditor in execution of whose decree he is appointed nor can it be said that the moneys realized by the receiver become ipso facto moneys belonging to the judgment-creditor, and, as moneys paid to the credit of the judgment-creditor's suit the moment the receiver comes into possession of the same. AIR (Vol 17) 1930 Mad 4.

——A receiver appointed by the Court is appointed on behalf and for the benefit of all persons interested, as parties to the suit or proceeding: Moneys in the hands of the receiver belong to the Court which appointed him and are in custodia legis, and he cannot spend them except under the orders of the Court. AIR (Vol 17) 1930 Mad 4.

17. Scope.

——It is incorrect to say that the decree having been passed, O. XXXVIII is no longer applicable, but that something in the nature of proceedings under S. 51, Civil P. C., is necessary. AIR (Vol 30) 1943 Mad 366: (1943) 1 MLJ 87: 56 LW 33: 1943 MWN 124: 210 Ind Cas 564.

——**Nature of decree-holder's right and how it arises stated — Such right, if created by the Code.**

Per Division Bench.—The right of the decree-holder is the result of the jural relation constituted by the decree itself. A new right in personam in favour of the decree-holder arises out of this jural relation and the legal advantages of the dominus (the decree-holder) involved in this right are available against the personality of the servus (the judgment-debtors). This personality extends over portions of the physical world over which the power of the person is extended. This is how the property belonging to the judgment-

debtor becomes available to the decree-holder for the realization of the judgment-debt. The provisions in the Civil Procedure Code do not create this right or its attendant advantages. These either only limit this right or the legal advantages by withdrawing some of the properties from their extent or only prescribe the mode of realization of this right or these advantages. The provision in S. 51 does not contain the law giving such a right. It simply gives the procedure in execution and enumerates in general terms the various ways in which the Court may order execution of a decree. AIR 1942 Cal 587: 46 CWN 999: 76 CLJ 500: 204 Ind Cas 168 (DB).

——S. 51, Civil P. C., is not in real conflict with S 168-A of Ben. Ten. Act. The conflict is avoided by S. 4, Civil P. C. AIR (Vol 29) 1942 Cal 470: 46 CWN 628: ILR (1942) 2 Cal 325: 202 Ind Cas 488 (DB).

——Section 51, Civil P. C., gives only the procedure in execution and powers of the Court to enforce execution of the decree in general. Section 168-A, Ben. Ten. Act only limits that power for special cases contemplated by it. Operations under special laws are, therefore, saved by S. 4, Civil P. C. and the provisions of the two Acts, are not repugnant to each other. AIR (Vol 29) 1942 Cal 429: 46 CWN 540: 75 CLJ 190: 201 Ind Cas 24 (DB).

——Attachment before judgment continuing after decree — Application for recovery of amount due by attachment, whether illegal.

Where before judgment the defendant's immoveable property is attached and the attachment continues after the decree, there is nothing illegal in an application to recover money found due by the decree by the sale of the moveable property of the judgment-debtor. That is a method of execution the right to which is given by the Civil Procedure Code and the right is not taken away because the decree gives the further right of recovering the money by sale of the attached immovable property. AIR (Vol 23) 1936 Bom 268: 38 Bom LR 492: 163 Ind Cas 937 (DB).

——Rules of procedure are handmaids to justice and should not be used for obstructing justice — Duty of executing Court to aid decree-holder in realising money due.

The holder of a rent decree put in an application by which he wanted the movables of the judgment-debtor to be attached in the first instance and if the money was not realised by the attachment of the movables, he wanted to sell the defaulting tenure. While this application was pending certain moneys to which the judgment-debtor was entitled were deposited in Court. On that the decree-holder made an application for attachment of those moneys. The Court said that inasmuch as the writ to attach the movables had been sent over to the Nazir, it could not allow the attachment of the moneys to be effected till that writ was recalled. On the said assurance and on the faith that the decree-holder would be given the attachment of the money, he made an application to the Court for recalling the said writ that had already been issued to the Nazir and it was accordingly recalled. But the Court then took up the attitude that inasmuch as there was no prayer in the application for execution for the attachment of the money in question, the prayer for attachment of the money should be refused and the amount was withdrawn by the judgment-debtor:

Held, that the order was not justified and the Court ought to have considered that rules of procedure are handmaids to justice, and ought not to be used for obstructing justice. It ought to have aided the decree-holder in realising the money due on his decrees and should not have enabled the judgment-debtor to take away the moneys from Court thereby defeating or delaying the execution. As there was no question of limitation, the Court should have allowed the decree-holder to add a prayer for attachment of the money. AIR (Vol 23) 1936 Cal 238 (239): 162 Ind Cas 707.

——Successful party is entitled to Court's assistance.

When a litigation has resulted in one side succeeding, that party is entitled to look to the Court to assist him in reaping the fruits of his victory and the party who has lost is not entitled, as a matter of course, to obtain the assistance of the Court in frustrating the victorious party. AIR (Vol 23) 1936 Pat 76: 2 BR 258 (2): 160 Ind Cas 923 (DB).

——Section 51 must be read with O. XL, R. 1. AIR (Vol. 19) 1932 Cal 189: 35 CWN 1066: 59 C 205: 137 Ind Cas 98 (DB).

18. Simultaneous execution.

——Decree-holder wishing to avail of two remedies under S. 51 — Court should grant both.

The mere fact that the land of the judgment-debtor has been attached cannot be taken into consideration if in law the other remedy of arrest is also open to the decree-holder. Ordinarily, if two remedies are available to a decree-holder and he wishes to avail himself of both, the Court should, as far as possible, try and give him both the remedies. AIR (Vol 30) 1943 Lah 166: 45 PLR 173: 209 Ind Cas 609.

——Simultaneous execution — Harassment — Relief.

Cases may conceivably occur in which simultaneous execution by two or more methods might be reasonable and feasible. But where there is already sufficient security for the realisation of the decretal amount and the procedure of the decree-holder savours rather of harassment than of a genuine desire to realise the decretal amount, the Court may in its discretion refuse the relief against the person of the judgment-debtor. AIR (Vol 23) 1936 Pat 28: 2 BR 239: 160 Ind Cas 685 (DB).

——S. 52.

See also Civil P. C., S. 50 and O. XXII, Rr. 4, 5 and 12.

1. Decree against executor.
2. Decree against legal representative — When and how passed.
3. Decree against some of legal representatives.
4. Decree against wrong legal representative.
5. Enquiry into assets.
5-A. Insolvency of heir.
6. "Legal representative".
   See also Civil P. C., S. 50 and O. 22, R. 3.
7. Liability of legal representative.
8. Liability of legal representative — Personal liability.
9. Manner of execution.
10. Property in hands of third party.
11. Property of deceased.
12. Scope and object.

1. Decree against executor.

——Decree against executors — Execution against one of them to the extent of testator's assets in his hands — Permissibility.

Where an executor is in possession of any portion of the estate of the testator either in his capacity as executor or claiming to hold it as a

legatee, a decree passed against him and his co-executors in their representative capacity can be executed against him to the extent of the assets in his hands as a "party" against whom a decree has been passed as the legal representative of a deceased person. AIR (Vol 36) 1949 Cal 690 (DB).

2. Decree against legal representative — When and how passed.

——Scope — Compliance — Strict compliance — Necessity — Frame and contents of decree — Suit against two persons as legal representatives of deceased debtor — Compromise by one — Decree based on — If executable against assets in hands of other.

A decree in order to be executed under Section 52, C. P. Code, against the estate of a deceased person, must contain two things: (1) it must be passed against the deceased's legal representative as such, and (2) it must state that the decretal amount is to be realized by execution out of the property of the deceased debtor. Compliance with the provisions of Section 52 is not a mere matter of form but one of substance. The decree must itself bear sufficient material to indicate that it was intended by the Court to be operative against the estate of a deceased debtor.

Where two persons are originally made defendants and impleaded as legal representatives of the deceased debtor, but the decree is based upon an agreement of compromise with one of the two originally impleaded defendants alone, it cannot be safely stated that it is passed against the consenting party as representing the deceased, enabling the creditor to execute it against the estate of the deceased in the hands of the other defendant. AIR (Vol 34) 1947 Pat 365: 25 Pat 550 (DB).

——Operation of.

The principle or method of which Section 52 is an expression has always been so operated as not to prejudice the rights inter se of beneficiaries or legatees over whom the creditor has priority. AIR (Vol 25) 1938 PC 169: 4 BR 606: 1939 MWN 545: 42 CWN 901: 1938 AWR 138: 32 SLR 772: 48 LW 16: 1938 OWN 581: 67 CLJ 350: (1938) 2 MLJ 210: 13 Luck 494: 1938 ALJ 843: 65 IA 219: 40 Bom LR 843: 174 Ind Cas 977.

——Scope.

An order under Section 52 (2) is an order in execution and in view of Section 35, Presidency Small Cause Courts Act, the Registrar of Small Cause Court has jurisdiction to make an order under Section 52. AIR (Vol 22) 1935 Mad 298: 1935 MWN 226: 41 LW 350: 159 Ind Cas 490 (1) (DB).

——Decree against assets of deceased person without specifying any person against whom execution may be taken out — Validity.

A decree must be against a person and not merely against something which is not a person; as for instance, against the estate of a deceased person, though it may operate upon such an estate by force of a direction to a person who has the estate in his hands to discharge the judgment-debt out of it.

Where a decree merely directed that a certain sum of money could be recovered from the assets of C (a deceased person) without adding in whose hands these assets were to be found and the decree-holder proceeded to attach certain properties in the hands of C's widow who was the 5th defendant in the case:

Held, that unless it was possible to construe the decree so as to read 'from the assets of the deceased C in the hands of the 5th defendant', the decree-holder could not proceed against the assets in the widow's hands. The decree was defective and inexecutable and the proper course would have been to apply to the Court which passed it to amend it. AIR (Vol 21) 1934 Mad 562: (1934) MWN 800: 151 Ind Cas 617.

——A plaintiff brought a suit on a pro-note against the father and sons of the deceased debtor who formed a joint Hindu family. The debt was not tainted with immorality.

Held, that a decree might be passed under the provisions of Section 52 and it would be for the execution department to decide whether the joint family property was liable. (1929) 116 Ind Cas 86: 26 ALJ 799.

——Plene Administravi.

The fact, that the plea of "plene administravi" can be taken in execution proceedings when events justifying such a plea may have occurred subsequent to the decree, is no reason why it cannot be taken in the suit as a reason for no decree being passed. AIR (Vol 14) 1927 All 459: 49 All 645 : 25 ALJ 359 : 101 Ind Cas 507 (DB).

——Legal Representative,, suit against.

A suit against the legal representative of a deceased debtor should not be dismissed on the mere ground that the defendants are not in possession of any portion of the estate left by the deceased: AIR (Vol 13) 1926 Nag 170: 89 Ind Cas 236.

——Decree — Form of suit for refund of proportionate consideration of the sale while previous suit by sons for possession of proportionate share of property sold was allowed.

A decree making the assets of the father and the joint properties of sons liable for the amount due by the father is perfectly legitimate even though the sale was held not binding on the sons in respect of their shares. AIR (Vol 4) 1917 Mad 418: (1916) 2 MWN 217: 31 MLJ 502: 20 MLT 320: 4 LW 366: 36 Ind Cas 387 (DB).

——O. 30, R. 1 — Decree — Form of — Defenddants sued in one capacity — Decree passed in another.

Certain persons being sued as representatives of deceased person, a decree cannot be passed against them as partners of a firm, since it would alter the nature of the suit. (1910) 34 Bom 244: 11 Bom LR 237: 2 Ind Cas 146 (DB).

3. Decree against some of legal representatives.

——Decree against executors — Execution against one of them to the extent of testator's assets in his hands — Permissibility.

Where an executor is in possession of any portion of the estate of the testator either in his capacity as executor or claiming to hold it as a legatee, a decree passed against him and his co-executors in his representative capacity can be executed against him to the extent of the assets in his hands as a "party" against whom a decree has been passed as the legal representative of a deceased person. AIR (Vol 36) 1949 Cal 690.

——Suit against two persons as legal representatives of deceased debtor — Compromise by one — Decree based on — Execution against assets in hands of other.

Where two persons are originally made defendants and impleaded as legal representatives of the deceased debtor, but the decree is based upon an agreement of compromise with one of the two originally impleaded defendants alone, it cannot be safely stated that it is passed against the consenting party as representing the deceased, enabling the creditor to execute it against the estate of the deceased in the hands of the other defendant. AIR (Vol 34) 1947 Pat 365: 25 Pat 550.

——Ss. 52, 53 — Members of joint Hindu family executing mortgage — One of executants dying — Suit — Remaining mortgagor with sons and grandsons of deceased mortgagor impleaded as defendants — Suit against grandsons dismissed with cost — Execution of decree against sons and also against grandsons and their interest in family property.

B and C members of a joint Hindu family governed by the Mitakshara, executed a mortgage-deed in favour of the appellant, R. B having died the appellant brought a suit in the Court of the Subordinate Judge to enforce the mortgage. In addition to C and other persons, he sued B's two sons, and five grandsons of B. The suit against the five grandsons of B was dismissed with costs. The appellant applied for execution of this decree not only against C and the two sons of B, but also against the five grandsons of B and their interest in the family property, notwithstanding that they had been dismissed from his suit with costs:

Held, that if the debt in question was not contracted for purposes regarded as immoral by the Hindu law, and if the grandsons of B were liable therefore to the extent of their interest in the joint family property, then the Subordinate Judge's decree was erroneous. The appellant should have appealed therefrom, claiming that, instead of dismissing the suit as against the grandsons, the Subordinate Judge should have given decree against them in like manner as against the other defendants namely, as representatives of B for a sum to be realised out of any property of B coming to their hands. Such a decree passed in accordance with S. 52 would have attracted the operation of S. 53, and the grandson's interest in the joint property would have been liable to attachment under the decree notwithstanding that such interests were not "property of the deceased" in the strict meaning of those words. The grandsons having been dismissed from the suit with costs could not be made liable under the decree. AIR (Vol 25) 1938 PC 7: 1937 OWN 1199: 42 CWN 200: 4 BR 169: 19 PLT 1: 47 LW 1: 1938 MWN 1: (1938) 1 MLJ 41: 40 Bom LR 277: 66 CLJ 422: 13 Luck 61: 1938 AWR 1: 32 SLR 221: 172 Ind Cas 5 (PC).

——Suit against some only of the legal representatives of deceased debtor — Maintainability — Decree, if binding on other legal representatives not impleaded.

There is no law that all the legal representatives of a deceased person must be impleaded. It is sufficient that the plaintiff sues those persons whom he considers to be the legal representatives after enquiry. If such persons are sued, the suit is a good one and the decree will be effective to the extent of the property of the deceased which has reached their hands; and a suit of this nature cannot be defeated by reason of the fact that two other sons have not been impleaded though the sons who are not impleaded will not be bound by the decree. AIR (Vol 21) 1934 Lah 657: 35 PLR 598: 155 Ind Cas 285.

——Decree obtained against karnavan — No executor appointed by will — Decree is valid against estate.

If a decree is obtained against the karnavan and no executor is appointed by will the decree is valid against estate. 1927 MWN 894: 108 Ind Cas 409: AIR (Vol 15) 1928 Mad 243.

——Legal representative when not liable.

A decree obtained against the estate of a deceased person by joining only some of the legal representatives only cannot be executed against such representatives who were not joined in the suit. 98 Ind Cas 613: AIR (V 14) 1927 Mad 197.

——Heirs not made parties.

Heirs of recorded tenant are not affected by sale in execution of a rent decree unless they were parties to the decree. 67 Ind Cas 149: AIR (Vol 10) 1923 Cal 166 (DB).

——Devolution of interest on two persons — Proceedings against one — Binding nature — Estoppel.

Where a Cowldar bequeathed 1/8 of his interest to A and 7/8 to B and on default in payment of rent due on B's share the zamindar took proceedings under Act VIII of 1865 against B, without knowledge of the rights of A and sold A's share also.

Held that the sale did not bind A, as he was not a party to the proceedings and that there was no estoppel in the case and that the omission to give notice of his interest to the landlord does not estop him as there is no obligation on him to give it. (1913) 13 MLT 95: 1913 MWN 93: 24 MLJ 288: 18 Ind Cas 632 (DB).

4. Decree against wrong legal representative.

——Wrong legal representative.

When, in a suit against the estate of a deceased, wrong legal representative is impleaded without any fraud or collusion and not the actual legal representative, the estate will be held bound. (1938) 40 PLR 25.

——Wrong legal representative.

Where the debtor himself has been sued or where a decree has been obtained against the debtor, and he dies before the decree has been passed or has been executed, the procedure to be followed by the Court in bringing the legal representative of the deceased on the record will be governed by the Code. But where a debtor dies before he could be sued, it becomes the duty of the creditor to sue the right person as the legal representative of the deceased. It is only after a suit has been instituted that the Civil Procedure Code comes into operation. Where a debtor himself is a party to a suit and dies either in the course of the suit or in the course of execution proceedings and the Court, by a judicial decision brings a person on the record, as the legal representative of the deceased debtor the decision, however wrong, will bind the estate of the deceased person and the rightful heir cannot subsequently come and dispute the correctness of the decision or the jurisdiction of the Court to sell the deceased debtor's estate. AIR (Vol 21) 1934 All 474: 18 RD 356: 150 Ind Cas 323 (DB).

——Legal Representative, when bound by decree against wrong person.

If the plaintiff without any fraud or collusion, sues a person who would be the ordinary legal representative, under the law, of the deceased person, in ignorance of other facts or circumstances by reason whereof some other person turns out to be the real or actual legal representative, then such a decree is binding in the same manner and to the same extent on the real heir and legal representative. AIR (V 15) 1928 Mad 248 : 1927 MWN 894 : 108 Ind Cas 409.

——Decree against wrong legal representative.

The estate of a deceased person in the hands of a true heir is not bound by a decree against a wrong person impleaded as heir. (1913) 15 Bom LR 41: 18 Ind Cas 381 (DB).

——S. 52 (1908), S. 282 (1882) — Legal representative — Execution against wrong person.

Execution of a decree against the holder of an impartible estate, was sought after his death against his widow. The successor to the estate was not made a party to the execution proceedings, and a lease of the estate was granted to satisfy the decree,

Held the lease did not bind the successor to the estate who was entitled to avoid it. (1912) 34 All 79: 8 ALJ 1251: 12 Ind Cas 915 (DB).

——S. 52 — S. 252 of Old Code — Decree against assets — Whether a party can be made defendant's representative in execution.

Plff. filed a suit against M's widow on a pronote by M and got a decree against the assets of M in her hands. But prior to the suit one V was declared entitled to M's estate. After the death of M's widow, plaintiff applied to make V second defendant in execution.

Held, that execution should proceed only against V who was made deft. in the suit or his or her representatives. When a person is sued as the legal representative of a deceased person for the recovery of a debt due by the deceased, and a decree is given for money to be paid out of the assets of the deceased in the hands of the legal representative, the decree is a decree against the legal representative also. (1909) 33 Mad 75: 19 MLJ 651: 6 MLT 199: 3 Ind Cas 737 (DB).

5. Enquiry into assets.

——S. 52, O. XXI, R. 63 — Questions under S. 52 must be decided by executing Court and not by separate suit.

A suit instituted under O XXI, R. 63, has nothing to do with S. 52. The questions under S. 52 must be decided by the Court executing the decree and not by a separate suit. AIR (Vol 24) 1937 Rang 531: 173 Ind Cas 873.

——Enquiry as to possession of assets — Proper stage.

In a suit against the legal representative of a deceased debtor it is not necessary before passing a decree against such legal representative, to enquire whether he has any assets of the deceased in his possession. This question must be determined in execution and not in the suit itself. AIR (Vol 18) 1931 Nag 173: 27 NLR 247: 134 Ind Cas 862.

——Nature of enquiry.

Questions arising in an enquiry under S. 52 (2) are questions arising between parties to suit relating to execution and must be decided by executing Court. 101 Ind Cas 431: 5 Rang 44: AIR (Vol 14) 1927 Rang 127 (DB).

——Assets — Enquiry into.

In a suit against the legal representative of a debtor the plaintiff can get a decree on proof that any assets belonging to the deceased debtor exist. He need not prove the extent of such assets. 56 Ind Cas 962: AIR (Vol 7) 1920 Nag 195.

——Scope of.

S. 52 does not provide for the reservation of property to satisfy debts. 18 MLT 147: 30 Ind Cas 256: AIR (Vol 3) 1916 Mad 645 (DB).

——Assets — Proof of.

A suit under S. 52 is maintainable though there is no proof that assets have come into the hands of the legal representatives. (1911) 33 All 414: 8 ALJ 199: 9 Ind Cas 935 (DB).

5A. Insolvency of heir.

——Creditor of ancestor, whether has a lien on assets of ancestor — Heir disposing of assets to those having notice — Creditor's right to follow — Heir adjudged insolvent — Insolvency of legal representative — Personal decree.

The creditors of the ancestor have a general lien upon the assets of the ancestor's estate for the payment of their debts and can follow such assets into the hands of the heirs, but it does not follow that the creditors can follow such assets into the hands of other persons. If the heir has disposed of his ancestor's property to other persons, who took the property without notice of the creditors' claims, then the creditors' right to follow the property is lost. That right cannot be revived to them by the fact that the heir has been adjudicated insolvent, and that his transfers of the property inherited by him have been set aside under the provisions of the bankruptcy law so that it becomes available for distribution among his creditors.

Bankruptcy is essentially a proceeding 'in personam and only the personal debts due by the insolvent can be proved therein. Until there is a personal decree under S. 52, a decree against a person as the legal representative of another does not make him liable to adjudication under the Provincial Insolvency Act. No doubt it is true that the legal representative of a deceased person is liable for the debts of the deceased to the extent to which property of the deceased has come into his hands, but before any such liability can be proved in the insolvency of such legal representative, it must first be crystallised into a personal liability in accordance with the proper procedure which is laid down in S. 52, Civil P. C. AIR (Vol 21) 1934 Rang 162: 12 Rang 602: 152 Ind Cas 557 (DB).

6. "Legal representative".

See also Civil P. C., S. 50 and O. 22, R. 3.

——Legal representative — Heir of deceased.

The term "legal representative" for the purposes of S. 52 includes the heir of the deceased. AIR (Vol 21) 1934 Rang 93: 148 Ind Cas 1092 (DB).

——Legal representative — Meaning of.

An executor de son tort is a legal representative for purposes of S. 52. 50 Ind Cas 951: AIR (Vol 5) 1918 Nag 73.

7. Liability of legal representative.

——Ss. 52 (2), 47 — Creditor obtaining money decree against heir-at-law of deceased debtor to extent of assets of deceased in his hands — Subsequent suit by creditor for administration of estate of deceased if maintainable.

The Court is not bound to make an order for the administration of the estate when the question between the parties can be properly determined without such an order even though the plaintiff be an infant or though the testator has directed the executor to take proceedings to have the estate administered by the Court.

A creditor filed a suit and obtained a money-decree against the heir-at-law to the extent of the assets of the deceased debtor in his hands and instead of proceeding to execute the decree, he filed a suit for the administration of the estate of the deceased :

Held, that the Court was not bound to order an administration in a case where there were no circumstances calling for such action. Since the plaintiff could get under S. 52 (2), all that he wanted by merely filing an application in execution of his decree, his suit for administration must fail.

Quaere.—It is doubtful whether in the above circumstances the suit for administration is maintainable. Section 47, Civil P. C., may bar such a suit. AIR (Vol 29) 1942 Mad 588: 55 LW 308: (1942) 1 MLJ 580: 1942 MWN 356: 205 Ind Cas 297.

——Costs — Action by executor or administrator as such failing — Liability for costs — Personal liability.

In ordinary cases, that is, unless the defendant has been guilty of some misconduct inducing the action, an executor or administrator who sues as such and fails is personally liable for the costs of the action. It is true that if he is sued upon a liability of his testator he has the protection of S. 52, but if he seeks to assert a claim, the fact that he possesses it by virtue of being sole executor and beneficiary of a deceased person puts

the defendant at no disadvantage from which he would have been free if the claim had been brought otherwise than in a representative capacity. AIR (Vol 28) 1941 Rang 37: 1940 Rang LR 603: 194 Ind Cas 177 (DB).

——Strict proof of any claim against estate.

A personal representative is fully justified in requiring strict proof of any claim against the estate not within his personal knowledge, and entitled — may be bound if others than he are interested in the estate — to avail himself of any technical defence, which he may be advised, is open to him. AIR (Vol 28) 1941 Rang 37: 1940 Rang LR 603: 194 Ind Cas 177 (DB).

——Property of deceased in hands of his widow as executrix and not in her personal capacity — Administrative suit.

Where the widow of the deceased has property of her husband in her hands as executrix and not in her personal capacity, the property may be attached in execution of a decree against the deceased. A decree-holder has rights which he may work out in execution proceedings, and the cumbrous method of filing an administration suit when he desires to attach property prima facie in the hands of the judgment-debtor as such may not appeal to him. He may not, therefore, file an administrative suit. AIR (Vol 27) 1940 Rang 78: 187 Ind Cas 370.

——Ss. 52, 53 — Proof that property was joint — Onus.

A person holding a decree against the assets of a deceased person can obtain satisfaction by attachment and sale of only such property as is shown to have formed part of the assets of the deceased. It is his duty to prove, at least prima facie, that any particular property which is attached at his instance is part of the assets of the deceased. The onus is on the decree-holder. When there has been a partition in the family and there is nothing to show that properties in dispute were dealt with at the partition, it is for the decree-holder to establish that the shares in the property attached formed part of the joint family property. AIR (Vol 21) 1934 All 249: 3 AWR 559: 148 Ind Cas 1113.

——Decree to extent of assets of deceased — Proof that representatives received assets — Burden.

Once it is admitted or proved that the person, whom it is sought to make liable as the legal representative of a deceased person, had come into possession of assets belonging to the estate of the deceased, it is for him to satisfy the Court as to the extent of the assets received by him and to account for them. In such cases the onus is, in the first instance, on the plaintiff decree-holder to prove that some assets had come into his hands of the alleged legal representative and when this is done, the onus is shifted on to the latter to show the extent of the assets received by him and also to satisfy the Court as to how they had been applied. AIR (Vol 21) 1934 Lah 106: 148 Ind Cas 980 (DB).

——S. 52 (2) — 'Legal representative', if includes heir of the deceased — Administration suit — Personal property of heir, if liable to attachment.

The term 'legal representative', for the purpose of S. 52, includes the heir of the deceased and the property which he obtains as a result of an administration, comes into his possession as legal representative. Under S. 52 (2), it is his duty to satisfy the Court that he has duly applied this property. In administering the estate of a deceased person, the debts due by the deceased must be paid out of the estate before it can be distributed among the heirs. Where, at the time the heir disposed of such property, the debt of the deceased had not come into existence and the decree against him not passed, it cannot be said that the heir has not duly applied the property. Under such circumstances, his personal property is not liable to attachment in execution of the decree. AIR (Vol 21) 1934 Rang 93: 148 Ind Cas 1092 (DB).

——Ss. 52, 53 — Decree against deceased Hindu — Liability of family property.

Under S. 53, a decree for money which has been obtained against a deceased Hindu represented by his sons or grandsons, is executable against the joint family property in the hands of his sons and grandsons. AIR (V 19) 1932 Bom 522 : 141 Ind Cas 509 (2) : 34 Bom LR 1005.

——When applicable.

Sub-section (2) applies only when no property of deceased is in possession of judgment-debtor and he fails to satisfy that he had duly applied property inherited. The contention that the words "such property" at the beginning of the sub-section mean 'property of which attachment is sought' is not compatible with the wording of the section. When there is a good deal of property left by a deceased person, there seems to be no good reason why the legal representatives should keep the whole of it intact on the off chance of some person getting a decree and executing it against the estate of the deceased. So long as there is sufficient property from which such a decree could be satisfied, the decree-holder cannot have any grievance in the matter. 121 Ind Cas 289: 31 PLR 29: AIR (Vol 17) 1930 Lah 354.

——Suit against legal representatives in possession of assets — Representatives may show preference in payment of debt due to himself.

Mukerji, J.—When an application for attachment is made, it is open to the legal representative to prove either that the property sought to be attached is not the property of the deceased or that he has sufficiently accounted for such property of the deceased as came into his possession. But in any case till a decree has been obtained by the creditor, he has no remedy. It is neither lawful nor expedient to throw out the suit against the legal representative altogether simply because one of the legal representatives alleges and seeks to prove that no assets are available.

Ashworth, J.—Legal representatives in the possession of assets (not being executors or administrators appointed by or subject to an administration order of a Court) may show preference in the payment of debts and may retain a debt due to themselves. 49 All 645: 25 ALJ 359: 101 Ind Cas 507: AIR (Vol 14) 1927 All 459 (DB).

——Where the executant of a hundi, the father of a Mitakshara family, is dead and his son is sued on the hundi, he is sued in the representative capacity. He is liable only to the extent of the assets of the coparcenary property held by him. Although the decree is a personal decree against him, yet the decree must be construed in the light of S. 52 of the C. P. C. (1921) 65 Ind Cas 224 (1): 2 PLT 396 (DB).

——Legal representative — Duty to account — Son liable to father's debts.

When a decree is passed against sons for the debts of the father, it is to be executed to the extent of the assets which have come to the hands of the sons. A personal decree cannot be passed against them unless they have sufficient assets. (1910) 8 MLT 105: 6 Ind Cas 397 (DB).

——S. 52 (S. 252 of Old Code) — No duty of heir to distribute assets rateably — Hindu Law — Mahomedan Law — Right of heir to administer property of deceased.

The heirs of a deceased Hindu or Mahomedan are entitled to take possession of the property, to administer the property and to pay debts with-

out being liable to account to the Court, otherwise than as heirs. The unsecured creditors of a deceased Hindu, have no charge or lien on the inheritance. If payments are not made by the heir rateably, it does not follow that he has failed to apply the assets duly. Every payment on account of a debt is perfectly lawful, irrespective of its effect upon the other creditors. (1904) 6 Bom LR 1135.

——**S. 52 (S. 252 of Old Code) — Duty of heir and legal representative in the application of assets — Rateable distribution — Distinction between heir under Hindu Law and Executor.**

The heir and legal representative of the deceased coming into possession of the deceased's assets is not bound to pay each and every creditor rateably. S. 252, C. P. C., only provides that the representative can be proceeded against personally to the extent to which he has failed to apply the assets duly. An heir paying debts but not paying the creditors rateably has not failed to apply assets duly within the meaning of S. 252, C. P. C. Every payment on account of a debt is a perfectly lawful payment irrespective of its effect upon other creditors and will be a due application of the assets within the meaning of S. 252.

There is no analogy between the position of an executor governed by the special provisions of the Indian Succession Act and that of the legal representative under the Hindu Law in respect of the distribution of assets. Where payments have been made by the representative to the full value of the property that has come into his hands, creditors cannot proceed against such on the mere ground that the representative is still in possession of property originally belonging to the deceased.

Where certain jewels were pledged by the deceased and the representative redeemed them with his own money, he is entitled as against the creditors to a lien with respect to the amount paid by him for redemption. The representative is not a mere volunteer in so redeeming with his own funds. Where a debt is due by the deceased to the representative the latter is entitled to pay himself out of the assets as he cannot sue himself. (1902) 13 MLJ 258: 26 M 792 (DB).

8. Liability of legal representative — Personal liability.

——**S. 52 (2) — S. 52 (2), when operates.**

Section 52 (2) applies only when it is proved that the property inherited by the legal representative from the deceased judgment-debtor is longer in his possession. Until then, there can be no execution against him personally. AIR (Vol 24) 1937 Pesh 80: 169 Ind Cas 445.

——**Application for execution against defendant personally — Grounds — Mere lapse of time, effect.**

Where a decree was passed against a person as the legal representative of another and an application to execute the decree personally against the latter as he had disposed of the assets, was dismissed on the ground that in view of the time which had elapsed between the execution of the bond on which the suit was instituted the death of the original executant thereof, and the date of the decree and also of the fact that the sales of the property of the deceased which came into the hands of the defendant took place before the plaintiff's decree was passed in his favour the defendants could nowise be held to be accountable for the sale proceeds :

Held, that this was clearly an erroneous ground for absolving the respondent from his undoubted liability to account for the assets of the deceased which admittedly came into his hands and which were disposed of by him. AIR (Vol 17) 1930 Lah 332: 129 Ind Cas 885.

——Where heirs do not show that income of property is applied to payment of debts of deceased they are personally liable. AIR (Vol 17) 1930 Lah 204.

——**Legal representative — Extent of liability.**

Where a plaintiff after having exhausted the mortgaged property under a mortgage decree he had obtained against the legal representative of a deceased mortgagor, sought to execute a personal decree he had subsequently obtained against him, the legal representative was held to be personally liable to the extent of the property he had failed to duly account for. AIR (Vol 4) 1917 Mad 536: 30 MLJ 391: (1916) 2 MWN 92: 35 Ind Cas 224 (DB).

——**Assets — Profits — Attachment — Sequestration of property by attachment — Personal liability of heirs.**

Till sequestration of the estate by attachment or otherwise a creditor is not entitled to seize the rents and profits of the property of the deceased or make the heirs personally liable to the extent of those profits. Such profits cannot be treated as the estate of the deceased. AIR (V 1) 1914 Oudh 233: 17 OC 207: 25 Ind Cas 384.

9. Manner of execution.

——**One heir in possession.**

Property held by one heir as legal representative — Creditor can proceed against whole property and need not wait for partition among heirs — Purchaser in execution is not responsible for neglect on the part of heir in possession, in allowing a larger portion to be sold than necessary unless any fraud or collusion is alleged. AIR (Vol 12) 1925 Oudh 515: 89 Ind Cas 534: 2 OWN 407: 12 OLJ 512 (DB).

10. Property in hands of third party.

——**Right to follow assets in legatee's hands.**

The right of a creditor to follow the assets in the hands of a legatee is a right which has to be exercised by a suit and cannot be exercised merely by levying execution against the assets in the hands of the legatee. Hence a decree for costs obtained against the administratix in that capacity, cannot be executed against the legatee of the deceased to whom the estate has been made over, by the administratix. The decree-holder must institute a suit against the legatee. AIR (Vol 28) 1941 Cal 27: 45 CWN 78: 192 Ind Cas 335.

——**Property in hands of alienee from legal representative.**

Section 52 does not preclude a decree-holder from following the property of a deceased judgment-debtor in the hands of an alienee from the former's legal representative when the alienation is void. AIR (Vol 26) 1939 Lah 373: 41 PLR 362.

——**Usufructuary mortgage by legal representative — Part of consideration to discharge debt of deceased — Mortgagee knowing that debts of deceased had not been fully discharged and that consideration for mortgage not applied towards discharge of such debts — Creditor of deceased obtaining decree — Property mortgaged held could not be attached in execution.**

Defendant obtained the property of the deceased G by way of surrender from his daughter; but he gave an undertaking that he would pay off certain debts. He mortgaged usufructuarily a substantial item of property in favour of the plaintiff and the consideration for it was partly to discharge a debt of G and partly to discharge

a private debt of defendant. A creditor of G obtained a decree against the daughter of G and against defendant. In execution of that money-decree, he attached certain property said to belong to G including the property which had been usufructuarily mortgaged to the plaintiff. The mortgagee knew that the debt of G had not been completely paid off and that the consideration or part of it was not utilized for the discharge of such debt:

Held, that these facts alone did not entitle the creditor to attach the property. It was necessary for the creditor to prove that his debt was a debt of the deceased G and that defendant had not already paid off debts of an amount equivalent to the value of the property inherited. It was also necessary to raise this issue clearly in the suit, in order that the parties might let in evidence on that point:

Held, also that the right of the creditor to proceed against the property which was in the plaintiff's possession was an equitable right; and before permitting the creditor to proceed against that property, the Court would have to be satisfied that equitable reasons for applying the remedy existed. Clearly, it would not be competent for an executing Court to attach the property of a stranger on purely equitable consideration. Section 52 (1) did not give a creditor a right to proceed against property which was no longer in the hands of the judgment-debtor. To proceed against a transferee, he must, therefore, establish his equitable right to do so in a separate suit.

Held, further that the land in question had not been sold to the plaintiff, but only usufructuarily mortgaged. A right in that property still enured therefore in defendant and that right could be attached by the creditor. The property could not, therefore, be attached subject to the mortgagee's right. AIR (Vol 25) 1938 Mad 684 : 47 LB 782: 1938 MWN 518: (1938) 1 MLJ 867: 182 Ind Cas 333.

——**Property in hands of third party.**

Right of a creditor to follow the assets in the hands of a legatee is a right which has to be exercised by a suit only. It cannot be possibly exercised merely by levying execution against the assets in the hands of the legatee under a judgment against the legal representative. AIR (Vol 17) 1930 Cal 762: 34 CWN 761: 52 CLJ 16: 58 C 170: 129 Ind Cas 419 (DB).

——Where the defendant along with another person took possession of the assets of the deceased and disposed of a portion thereof without any right and where the property disposed of was sufficient to have discharged the debts, a personal decree can be passed against the defendant. 77 Ind Cas 306: AIR (Vol. 9) 1922 Oudh 200.

——**11. Property of deceased.**

——**Liability to attachment — Produce of estate of deceased judgment-debtor.**

Where the estate of a deceased judgment-debtor in the hands of his heir is liable for the debt. it cannot be said that crops raised by the heir on a portion of the estate will not be liable to be attached in execution of the decree. AIR (Vol. 37) 1950 Mad 154:62 LW 779: 1949 MWN 705: (1949) 2 MLJ 593.

——**Ss. 52 and 53 — Decree against sons in a suit on a promissory note executed by father — Joint family assets in the hands of the sons — If can be proceeded against in execution.**

A decree against the sons of a Hindu father in respect of a sum due on a promissory note executed by the father, passed against the assets of the father in the hands of his sons was sought to be executed under Ss. 52 and 53 of the C. P. Code, and it was contended by the sons that the father did not have any separate properties of his own and that the decree cannot be executed against the joint family properties.

Held, that a decree could be passed not only against the separate assets of the father in the hands of his sons but also against the share of the father in the joint family properties obtained by the sons by right of survivorship and the decree-holder was entitled to proceed against such properties. AIR (Vol. 34) 1947 Mad 357: 1947 MWN 275: (1947) 1 MLJ 239.

——**Scope — Income and profits accruing after devolution, if can be attached.**

When a party is proceeded against as the representative of a deceased judgment-debtor, and it is proved that the property which belonged to the deceased judgment-debtor has come into his hands, it lies upon him to account for such property, and to include in his account mesne profits, whether accruing in the shape of rents or of interest. Profits arising after the death of the last holder form part of the property of the deceased. The rents and profits of the property of a deceased person accruing after the property has devolved on his heirs can, therefore, be taken by a creditor of the deceased. AIR (Vol 25) 1938 Oudh 45: 1937 OWN 1243: 13 Luck 689: 172 Ind Cas 306 (DB) **[Overrules AIR (Vol 1) 1914 Oudh 233: 25 Ind Cas 384 : 17 OC 207 (DB)].**

——Joint Hindu family — **Decree against son as** legal representative of father — Father dying before grandfather — Joint family property in hands of son was liable for debts of father. AIR (Vol. 21) 1934 Lah 101: 148 Ind Cas 930.

——**S. 52(2) — Rent accruing due after death of judgment-debtor, whether 'assets' of deceased.**

Rent of property which belonged to a deceased person which has accrued due after his death forms part of the assets of the deceased within the meaning of S. 52 (2). AIR (Vol 19) 1932 Lah 383: 33 PLR 462: 137 Ind Cas 25.

——**Execution against assets of deceased — Rents and profits — Liability for satisfaction of decree.**

The rents and profits accruing from the immovable property of a deceased person must be regarded as the assets of the deceased. Rents and profits are legal incidents of immovable property and must bear the same character as the property itself. (1932) 137 Ind Cas 632 : 9 OWN 315.

——**'Assets' — Decree obtained by widow for maintenance, whether assets.**

In 1926 a decree was passed under O. XXXIV, R. 6 against the assets of the mortgagor in the hands of his widow and the next reversioner to whom she had surrendered the estate. In 1928, in pursuance of an agreement between the widow and the next reversioner, she obtained a decree for maintenance allowance against him with a charge on the property in his possession. The mortgagee sought to attach not only the corpus of the property in the hands of the reversioner but also the decree for maintenance obtained by the widow:

Held, that the decree was not a part of the assets of the deceased and could not be attached by the mortgagee. AIR (Vol 18) 1931 All 368: 129 Ind Cas 374 (DB).

——**Ss. 52, 53 — Decree against sons recoverable from assets of deceased — Joint family property in sons' hands, liability of.**

Where three brothers who were members of a joint Hindu family executed a mortgage, and on their death a suit was instituted against their sons as their legal representatives and a money-decree

was passed against them for the amount recoverable only from the assets of the deceased, if any, in their hands:

Held, that the case fell within the purview of S. 53, and the decree-holder was entitled to execute the decree by attachment of the joint family property in the hands of the sons of the deceased executants. (1931) 133 Ind Cas 910 (All).

——Assets, what are.

Rents and profits are legal incidents of immovable property and must bear the same character as the property itself i.e., rents and profits accruing from immovable property of the deceased debtor are his assets: AIR (Vol. 15) 1928 Oudh 40 : 2 Luck 408 : 4 OWN 98 : 99 Ind Cas 897 (DB).

——Son as representative.

Where a sale by a Hindu was set aside as being without family necessity and the vendee being deprived of possession sued to recover the purchase money from the vendor and where his son had been brought on the record as the legal representative of his father who died during the pendency of the suit.

Held, that the proper decree to pass would be a decree against the son as the legal representative of his father and capable of execution against him so far as he held property which was liable to attachment under the Hindu Law for his father's debts. AIR (Vol 13) 1926 Oudh 301 : 92 Ind Cas 787 (DB).

——Property includes income.

Under S. 52 the income of landed property, which has passed from one Zamindar to the next, the property being an impartible Raj is liable to execution for the debts of the deceased Zamindar. Income accrued since the late Zamindar's death which has come into the hands of the new Zamindar can be attached. It is unnecessary to sell it if it is actual money. The Code has made ample provision for execution upon the money belonging to a deceased person in the hands of another. AIR (Vol 11) 1924 Mad 530: 80 Ind Cas 163: 47 Mad 411: 34 MLT 17: 1924 MWN 346: 46 MLJ 261 (FB).

——Assets — Meaning — Execution of decree.

A decree is capable of execution against the 'assets' of judgment-debtor. 'Assets' include those acquired after the decree. AIR (Vol 3) 1916 All 284 : 14 ALJ 899 : 36 Ind Cas 901 (DB).

——Ss. 52 and 60 — Assets — Court of Wards Act (IX B. C. of 879) S. 48 — Execution of decree against Ward of Court — Attachment of cash balance of estate under Court of Wards in execution of money decree, if legal.

A decree against a ward of Court may under the general law be executed like any other decree and in execution of a simple money decree against the ward, the cash balance of an estate under the Court of Wards, that is the amount to the credit of the estate in the personal ledger of the Collector, may be attached. AIR (Vol 1) 1914 Cal 496 : 19 CLJ 406 : 18 CWN 1055 : 22 Ind Cas 694 (DB).

——Ss. 52 and 53 — Decree against assets of father — Execution — Death of son — Property in the hands of son's legal representative.

Where a decree was against the assets of the father in the hands of his son: Held that the property did not cease to be "the property of the deceased father" merely because the son died and it passed into the hands of his heir or legal representative. AIR (Vol 1) 1914 Mad 668 : (1914) MWN 354 : 24 Ind Cas 280 (DB).

——Assets — Rents and profits.

Till sequestration of the estate by attachment or otherwise a creditor is not entitled to seize the rents and profits of the property of the deceased or make the heirs personally liable to the extent of these profits. Such profits cannot be treated as the estate of the deceased. AIR (Vol 1) 1914 Oudh 233: 17 OC 207: 25 Ind Cas 384.

12. Scope and object.

——Applicability — Conditions.

To make S. 52 applicable, it is sufficient to satisfy three conditions. The legal representative must have received some property of the deceased; he must no longer be in possession of it; the Court must be satisfied that he has failed to duly apply that property to discharge the debt of the deceased. When these requirements are fulfilled the decree may be executed against the legal representative as if it had been passed against him personally. S. 52 does not impose any other fetter on the decree-holder. AIR (Vol 37) 1950 Mad 407: 1950 MWN 101: 63 LW 153: (1950) 1 MLJ 192 (DB).

——S. 52(2) — Scope of — Company going into voluntary liquidation — Assets and liabilities taken over by another company — Decree passed against latter for liabilities of former — Mode of execution.

Section 52 (2) simply enacts a rule of procedure in accordance with natural justice, and even in the absence of that section (and of any provision of law to the contrary), Courts would have been justified in applying the principle embodied in it as a rule of justice, equity and good conscience. No system of law can be conceived which would allow the representatives of a deceased debtor to take his assets and nevertheless resist the execution of decrees to be satisfied out of those assets without duly accounting for them and thus leave the decree-holders to remain content with infructuous decrees. If a creditor has obtained a decree for the payment of money out of the property of the deceased, and proves in the execution proceedings that the debtor died leaving properties which came into the hands of his representatives, then it is for these representatives to account for those properties, and if they fail to do so, they become personally liable to the extent of the assets not accounted for. The personal liability of the representatives in such a case is implicit in the very decree passed against them for payment of money out of the property of the deceased.

Where in a case a certain company has gone into voluntary liquidation and another company has taken over its assets and liabilities and a decree is passed against the latter company for the liability of the former company (as a representative of the former) and the liability is expressed in the form adopted in decrees against legal representatives of deceased persons, the mode of execution of such a decree is not different in principle from a decree passed against the legal representatives of a person who has died a natural death. The latter company having all the assets and liabilities of the former company are to all intents and purposes representatives-in-interest of the former company and the principle of S. 52(2), extends to such a case even though under the Companies Act the transferee company cannot be said to be the legal representative of the transferor company. AIR (Vol 26) 1939 Pat 580: 181 Ind Cas 721: 5 BR 664: 20 PLT 685 (DB).

——Principle of.

The principle or method of which S. 52 is an expression has always been so operated as not to prejudice the rights inter se of beneficiaries or legatees over whom the creditor has priority. AIR (Vol 25) 1938 PC 169: 4 BR 606: 1939 MWN 545: 42 CWN 901: 1938 AWR 138: 32 SLR 772: 48 LW 16: 1938 OWN 581: 67 CLJ 350: (1938) 2 MLJ 210: 13 Luck 494: 1938 ALJ 843: 652 A 219: 40 Bom LR 843: 174 Ind Cas 977.

——S. 53.

See also Civil P. C. Ss. 50, 52 and O. 22 Rr. 3, 4, 5.

1. "Deceased ancestor"
2. "Decree"
3. "Legal representative"
   See Ss. 50, 52 and O. 22 R. 3.
4. Property in hands of son or other descendant.
5. Property of deceased.
   See also N. 7.
6. Scope, applicability and object.
7. Property liable under Hindu Law.
   See also N. 5.

1. "Deceased ancestor"

——Applicability — Debts of Hindu father — Liability of sons during father's lifetime.

In a case where partition has taken place but the father is dead at the time of execution, shares allotted to sons at such partition can be proceeded against in execution under this section. Under Hindu law, the separate property in possession of the sons is liable for the pre-partition debts of their father and such property clearly falls within ambit of S. 53. AIR (Vol 36) 1949 EP 9 (DB).

——S. 50 — Son not party to suit — Pre-decree partition.

Where a decree is obtained against the father as trespasser, the same can be executed against the property in the hands of the son even though he was not a party to the suit and had partitioned from his father prior to the decree. AIR (Vol 30) 1943 Mad 415 : 56 LW 176 : (1943) 1 MLJ 268 : 1943 MWN 180: 210 Ind Cas 616.

——If applies where ancestor against whom decree is obtained is alive.

Section 53 does not apply where the ancestor against whom the decree had been passed is still alive and there is no question of enforcement of the decree against his legal representatives, or against ancestral property in the hands of such legal representatives. AIR (Vol 23) 1936 Oudh 139: 1935 OWN 1113 : 11 Luck 523 : 158 Ind Cas 490 (DB).

——Joint Hindu family — Debts — Suit and decree against father alone, after partition between father and sons — Father dying:

Held, (Per Muhammad Noor and Agarwala, JJ., Wort, J. contra), though the sons are liable for their father's pre-partition debts, the decree against the father alone could not be executed against the separate shares of the sons. Sections 50, 52 and 53, Civil P. C., had no application.

(Per Wort, J.) — Son's share is liable under S. 53 and no separate action against the sons is necessary. AIR (Vol 22) 1935 Pat 275: 16 PLT 393: 1 BR 691: 14 Pat 732: 157 Ind Cas 53 (FB).

2. "Decree"

——Mortgage — Suit on mortgage impleading also sons of executants — Personal decree given against executants — Suit dismissed against sons — Execution against whole family property.

Two brothers of a joint Hindu family executed a mortgage. The mortgagee brought a suit on mortgage for the sale of the property and impleaded also the sons of the mortgagors and prayed for a decree against the sons also. The Court passed only a personal decree against the executants only and no mortgage decree was passed and the suit was dismissed as against the sons. The decree-holder sought to execute the decree against the whole family property:

Held, that the decree-holder could not be allowed to proceed in execution against the shares of the sons in the properties and the fact that no plea of illegality or immorality of the debt was raised by the sons in their written statement could not take away the effect of the decision dismissing the claim against them. AIR (Vol 29) 1942 Oudh 9: 1941 OWN 1126: 1941 RD 923: 1941 AWR 1028: 17 Luck 319: 196 Ind Cas 680 (DB).

——Suit for specific performance — Decree for alternative remedy of compensation.

Where a decree has been passed in a suit for specific performance for the alternative equitable remedy of compensation in lieu of specific performance, the decree may be regarded as creating a debt of record without its being a decree on a debt and consequently S. 53 has no application. AIR (Vol 27) 1940 Nag 278: 1940 NLJ 275: ILR 1940 Nag 632: 193 Ind Cas 598 (DB).

——Decree against deceased father — Suit by son for declaration that decree is not binding on him and the joint family property — Result of the decree would be to save the plaintiff from payment of the decretal amount for which the joint family property in his hands is liable to attachment under S. 53 and the consequential relief is implicit in the relief asked for and court-fee payable on such relief is 'ad valorem'. AIR (Vol 21) 1934 Oudh 212 : 11 OWN 488 : 8 Luck 668 : 150 Ind Cas 722.

——"Decree."

Where a suit is brought against the sons and grandsons of a deceased Hindu for the recovery of a debt due by the deceased but the suit is dismissed against the grandsons and is decreed only against the sons, the decree will not bind the grandsons and the interest of the latter in the joint family cannot be proceeded against in execution of such decree. AIR (Vol 25) 1938 PC 7: 1937 OWN 1199: 4 BR 169: 42 CWN 200: 19 PLT 1: 47 LW 1: 1938 MWN 1: (1938) 1 MLJ 41: 40 Bom LR 277: 1938 AWR 1: 32 SLR 221: 66 CLJ 422: 13 Luck 61: 172 Ind Cas 5.

——Judgment-debtor dying during pendency of appeal before Privy Council — Heirs not brought on record — Decree passed by Privy Council is not a nullity and can be executed against the property of deceased coming into the hands of his sons. AIR (Vol 24) 1937 Pat 321: 16 Pat 316: 3 BR 638: 18 PLT 341: 169 Ind Cas 872 (DB).

——S. 53, O. XXXIV — Decree against father under O. XXXIV — Sons, if bound by it — Execution — Binding decree — Executing Court, if can vary it.

A decree passed under O. XXXIV determines unconditionally that certain property is chargeable and shall be sold. The words "which is liable under the Hindu law for the payment of the debt of a deceased ancestor", in S. 53 are not intended to allow the representative of the judgment-debtor in a mortgage-decree to resist proceedings in the executing Court on the plea that the decree itself ought not to have been passed as it stands but with a qualification in favour of the judgment-debtor's representatives, if these turned out to have succeeded by survivorship and could show that the deceased ought not to have contracted the debt on which the decree was based. Such a plea is not one relating to the execution of the decree, the executability and validity of which is obvious, but to the propriety of the decree itself, which can only be determined by a separate suit. AIR (Vol 21) 1934 Lah 438: 15 Lah 772: 37 PLR 36: 153 Ind Cas 772 (DB).

——Scope.

Decree for money against a Hindu represented by his sons or grandsons, is executable against the joint family property in the hands of his sons and

grandsons. AIR (Vol 19) 1932 Bom 522: 34 Bom LR 1005: 141 Ind Cas 509(2).

——Three brothers, members of joint Hindu family executing mortgage — On their death suit against their sons as legal representatives — Money-decree for amounts recoverable only from assets of deceased in their hands:

Held, that case fell within the purview of S. 53 and that the decree-holder was entitled to execute decree by attachment of the joint family property in the hands of the sons of the deceased executants. (1931) 133 Ind Cas 910 (All) (DB).

——Separated brother.

Where the plaintiff, in a suit against the son of a deceased Hindu on a pro-note executed by the deceased, joined as a defendant a separated brother of the deceased praying for a decree also against him on the ground that he had sold certain crops sown by the deceased:

Held, that a decree against the separated brother cannot be passed in that suit. AIR (Vol 14) 1927 All 683 : 103 Ind Cas 388.

——Decree in respect of joint family property.

S. 53 is not confined to money decrees and a decree passed in respect of joint family properties can be executed against the sons after the father's death. AIR (Vol 11) 1924 Mad 571: 83 Ind Cas 985: 19 MLW 484: 34 MLT 209: 46 MLJ 471 (DB).

——3. "Legal representative".

See Ss. 50, 52 and O. 22 R. 3.

——Son as Representative.

A decree-holder who has a decree against a Hindu father can proceed in execution after his death against the joint ancestral property in the hands of the son and can treat the son as the legal representative of his judgment-debtor provided the property is liable under the Hindu Law for the debt. AIR (Vol 12) 1925 All 471: 23 ALJ 467: 6 LRA Civ 321: 88 Ind Cas 200 (DB).

——Liability of brother.

Where after mortgage decree had been passed on a mortgage by two members of a Hindu joint family one of the mortgagors died without issue and in the proceedings for final decree one of his brothers was made party,

Held, he could resist this as it is only in case of son or other descendant that a person taking property by survivorship can be joined as legal representative under S. 53. 78 Ind Cas 637: 5 LRA Civ 279: AIR (V 11) 1924 All 873.

4. Property in hands of son or other descendant.

——Ss. 53 and 52 — Joint Hindu family — Debts — Father — Decree against sons and grandsons — Liability of grandsons born subsequent to decree.

Although a Hindu son or grandson is not a legal representative of his father or his grandfather in the strict meaning of that expression, it is by virtue of the provisions of Ss. 52 and 53 that the property in his hands is regarded to be the property of the deceased which comes to his hands as his legal representative and becomes liable to be proceeded against for payment of the debt of the deceased ancestor. The position does not differ if the sons are impleaded in the suit and the decree is passed against them. But where the Court dismisses the suit against the sons and the grandsons and the decree, not being appealed against, becomes final, the interest of the persons against whom the suit was dismissed ceases to be liable for the payment of the debt. This position is not available to the sons or the grandsons who are born subsequent to the decree, who were not made parties to the decree and could not be so made and whose interest consequently was not exempted from the decree. Their liability by virtue of the provisions of S. 53 must be taken to be an established fact. They have got no decree of dismissal in their favour and it is not open to them to claim the privilege of exemption which was available to the sons or the grandsons against whom the decree of dismissal had been passed and had become final. The liability of the subsequent born sons or grandsons continues to remain unaffected under the Hindu law, and, by virtue of the provisions of S. 53, their undivided interest must be held liable for the satisfaction of the debt of the ancestor.

Where a mortgage executed by the deceased father of a joint Hindu family is not found to be for legal necessity and a simple money-decree is passed against the estate of the deceased in the hands of the sons and as against the grandsons the mortgage suit is dismissed (erroneously, the debt not having been shown to be for illegal or immoral purpose) the decree can be executed under S. 53 against the interest of the subsequent born grandson. It is not open to the subsequent born grandsons to contend on the strength of S. 11, Expl. VI, Civil P. C., that the decree of dismissal against the interest of the grandsons in existence at the date of the decree operated as 'res judicata' against their interest as well. AIR (Vol 31) 1944 Oudh 131 : 218 Ind Cas 105 : 19 Luck 481 : 1944 OWN 27 : 1944 AWR 23 (DB).

——S. 53 is not meant to deprive the descendant of his right to contest the existence of the debt where he was in danger of losing the whole of his ancestral property. There is no provision in the section that the entire property belonging to a joint family of which the father was Karta, would be necessarily liable for payment of debts incurred by him. AIR (Vol 26) 1939 Mad 867: ILR (1940) Mad 123: 1939 MWN 918: 50 LW 472: 187 Ind Cas 816 (DB).

——Scope and applicability.

Suit against sons and grandsons for debts due by deceased ancestor — Decree against son only —Decree cannot be executed against grandson's interest in the joint family property. AIR (Vol 25) 1938 PC 7: 1937 OWN 1199: 42 CWN 200: 19 PLT 1: 1938 AWR 1: 32 SLR 221: 47 LW 1: 1938 MWN 1: (1938) 1 MLJ 41: 40 Bom LR 277: 66 CLJ 422: 13 Luck 61: 4 BR 169: 172 Ind Cas 5 (PC).

——Decree against son of M — Execution against estate of M — Occupancy rights created in land in time of M's ancestors in favour of third parties — M purchasing occupancy rights long after his father's death with his own money.

In the time of M's ancestors, occupancy rights had been created in a certain land in favour of third parties, and the estate so carved out had passed away from their lands. All that devolved on M on his father's death was the proprietary rights in the land. At that time the occupancy rights were held by third parties, and it was long after his father's death that M had purchased these valuable rights from the tenants for a considerable sum of money belonging to himself:

Held, that this was clearly his own self-acquisition and the estate so acquired could not possibly be immune from attachment in execution of a decree against his estate.

Held, also that the act, which brought about this state of affairs, was the purchase by M with his own money, and that the interest so purchased could not be regarded as having devolved on him by inheritance from his father. AIR (Vol 24) 1937 Lah 596: 168 Ind Cas 385.

——Legal representative.

Administration suit against undivided son of Hindu debtor:

Held, that S. 53 extends the meaning of 'legal representatives" as defined in S. 2 (11) by expressly making the son or descendant of a Hindu, his legal

representative in respect of the joint family property in his hands which is liable under Hindu law for satisfaction of debt of the deceased ancestor. AIR (Vol 24) 1937 Mad 785: 46 LW 321: 1937 MWN 757 : 173 Ind Cas 671.
[Reversed in AIR (Vol 26) 1939 Mad 552: 184 Ind Cas 183].

——**Liability of son.**

Section 53, Civil P. C., imposes the liability to pay the decree on the son or other descendant of the judgment-debtor, and not on any collateral of the judgment-debtor, such as the brother of the deceased. The decree-holder can proceed only against the assets of the deceased in the hands of his sons. AIR (Vol 24) 1937 Oudh 327 : 1937 OWN 516: 13 Luck 241: 168 Ind Cas 268

——**Decree-holder can enforce father's obligation under surety bond against son by attachment and sale of latter's undivided share in joint family property.**

Section 53 enacts a rule of procedure only and is not intended to affect in any way the extent of a son's liability for his father's debts under the Hindu law. The expression "property in the hands of a son" in that section does not necessarily signify tangible property exclusively possessed by the son without any cosharers or coparceners; it means and includes the undivided share of the son in the joint family property held by himself and the other coparceners who may be in existence. It is, therefore, open to the decree-holder to enforce the obligation incurred by the father under the surety bond against his son by attachment and sale of the latter's undivided share in the joint family property. AIR (Vol 22) 1935 Oudh 510: 1935 OWN 1005: 11 Luck 449: 157 Ind Cas 945 (DB)

——**Ss. 53, 2 (11) — Decree against legal representative — Proof of property of deceased in their hands — Allegation that the other has intermeddled — Burden.**

A person is entitled to sue the legal representatives of his deceased debtor and to obtain a decree against them without proving that any assets have come into their hands, or even that the deceased debtor left any assets.

Where it is alleged on behalf of the plaintiff that they are the legal representatives of the debtor within the meaning of cl. (11) of S. 2, in that they have intermeddled with the estate of the deceased, in order to bring them within the terms of this clause the onus is upon the plaintiff to establish that they had intermeddled with the estate of the deceased, i.e., with the property belonging to the deceased at the time of his death. It would not suffice to show that they are or have been in possession of property which the deceased debtor owned at some time prior to his death. AIR (Vol 21) 1934 Rang 196: 153 Ind Cas 56

——**Decree against Hindu father — Execution against assets in hands of his sons.**

If a creditor obtains a decree against a Hindu father and the father dies before the decree is executed, the decree can be executed under S. 53 by attachment and sale of the entire joint property in the hands of his sons and the ancestral property in the hands of the sons is to be deemed to be the property of the deceased which had come to the hands of the sons as the legal representatives of the father. (1930) 32 Bom LR 919

——**Nephew not a descendant.**

"Descendants" do not include a nephew. AIR (Vol 10) 1923 All 539: 21 ALJ 353: 45 All 455: 4 LRA Civ 220: 73 Ind Cas 958 (DB)

5. Property of deceased

See also N. 7.

——**Property, if should be of deceased ancestor.**

Section 53 does not require that the property should be that of the deceased or should have come into the hands of the son as the legal representative. AIR (Vol 30) 1943 Mad 415: 56 LW 176: (1943) 1 MLJ 268: 1943 MWN 180: 210 Ind Cas 616

——**Ancestral property.**

S. 53 applies to ancestral or joint family property coming to the hands of descendant on partition. AIR (Vol 26) 1939 Sind 258: ILR (1939) Kar 300: 184 Ind Cas 582 (DB)

——**Compensation for forest dues.**

Where a decree is passed simply against the son but is really against the assets of the father deceased, the compensation in respect of forest dues from Government becoming due after the death of the father and received by the son is liable to attachment in execution of the decree. AIR (Vol 17) 1930 Nag 134: 121 Ind Cas 664

——**Rent of land.**

Although lands inherited by agriculturist son could not be attached, under the Deccan Agriculturists' Relief Act the rents thereof are liable to attachment for satisfaction of the decree to extent of property inherited. AIR (Vol 16) 1929 Bom 233: 119 Ind Cas 179: 53 Bom 463: 31 Bom LR 442 (DB).

——**Standing crops — Collector can deliver standing crops.**

The Collector has power to deliver possession of the standing crops. The Collector when partitioning the estate in accordance with S. 53, C. P. C., has power to give the shares to the respective allottees and he can also place them in possession of the crops attached to the land. AIR (Vol 14) 1927 Nag 300 : 103 Ind Cas 231.

——**Legal representative, determination of.**

In order to see whether a certain person is the legal representative of the deceased with regard to the property sought to be attached, the crucial date is the date of the death of the deceased and not the date of the attachment of that property. It is not with respect to every property that a Hindu son can be said to be the legal representative of his deceased joint father. A Hindu son may be a legal representative with respect to a certain property and he may not be a legal representative with respect to another property. AIR (Vol 13) 1926 All 220: 48 All 245: 24 ALJ 273 : 91 Ind Cas 785 (DB).

——**Impartible estate — Assets.**

Impartible estate of a deceased holder is assets in the hands of legal representatives under C. P. C., S. 234 (1882). (1909) 32 Mad 429 : 19 MLJ 401: 2 Ind Cas 18 (DB).

6. Scope, applicability and object.

——**Scope — If affects, or modifies Hindu Law.**

S. 53, being a rule of procedure and not of substantive law, cannot modify, qualify or even attempt to interpret Hindu Law rules governing the rights of a son or his obligation to pay his father's debts under that law. It, however, prescribes the mode of procedure which a decree-holder has to adopt in order to realise his debt. AIR (Vol 36) 1949 EP 9 (DB).

——**Scope — Liability of Hindu son.**

Section 53 is not intended to diminish the ordinary liability of a Hindu son under Hindu law as existing before the enactment of that section. AIR (Vol 31) 1944 Nag 360: 1942 NLJ 424: ILR (1945) Nag 409.

——**S. 53, if negatives claim of son to be legal representative under S. 2 (11) — Fiction in S. 53.**

The fiction introduced in S. 53 which arises in execution is not in treating the son as the legal representative, but in treating the property which

has passed to the son as a surviving coparcener as being property of the deceased come to the hands of the son. Section 53 does not in any way negative the claim of the son to be a legal representave within S. 2 (11). AIR (Vol 28) 1941 Bom 23: 42 Bom LR 1066: ILR (1941) Bom 177: 1941 AWR 4 Sup: 192 Ind Cas 198 (FB).

——Suit for specific performance — Decree for alternative remedy of compensation.

Where a decree has been passed in a suit for specific performance for the alternative equitable remedy of compensation in lieu of specific performance, the decree may be regarded as creating a debt of record without its being a decree on a debt and consequently S. 53 has no application. AIR (Vol 27) 1940 Nag 278 : 1940 NLJ 275 : ILR (1941) Nag 632 : 193 Ind Cas 598 (DB).

——Scope of.

Section 53 assumes the existence of a debt and declares in effect that the property which was liable under Hindu law for payment of a debt incurred by the ancestor would, despite his death, continue to remain liable in the hands of his descendants as his legal representative. It was not meant to deprive the descendant of his right to contest the existence of the debt where he was in danger of losing the whole of his ancestral property. There is no provision in the section that the entire property belonging to a joint family of which the father was 'karta', would be necessarily liable for payment of debts incurred by him. AIR (Vol 26) 1939 Mad 867 : ILR (1940) Mad 123 : 1939 MWN 918 : 50 LW 472 : 187 Ind Cas 816 (DB).

——Decree against father — Sale in execution — Questions to be considered before deciding that entire interest of sons has passed in sale.

The existence of a decree against a Hindu father which he was bound to satisfy is prima facie sufficient to hold that this was a debt binding on the sons in the absence of proof of illegality or immorality in the transaction leading up to it and the estate in the hands of the sons is open to be taken in execution proceedings upon a decree for payment. AIR (Vol 20) 1933 Pat 552 : 145 Ind Cas 570.

——Under the present law there is no necessity of any order for attachment of the property in execution of a mortgage decree. Consequently after father's death, the proceedings in execution may be continued against the sons. 62 Ind Cas 905 : 3 PLT 43 : 6 PLJ 451 : AIR (Vol 10) 1923 Pat 143 (DB).

7. Property liable under Hindu Law

See also N. 5.

——Property liable under — If limited to property devolving on sons after father's death — Property devolving by partition before decree — If liable.

Property mentioned in S. 53, is not limited to the property which has devolved upon the sons after the death of their father. It includes the property which came to the sons on partition even before the decree was passed. AIR (Vol 36) 1949 EP 9 (DB).

——Promissory note executed by father — Death of father — Suit against sons — Decree against father's share in joint family estate — Whether can be passed.

Where the sons of the maker of a promissory note are sued on the note after the death of their father the Court can pass a decree against them so as to render them liable not only to the extent of the father's separate property but also to the extent of his share in the joint family property in their hands. ILR (1947) Mad 463 : AIR (Vol 34) 1947 Mad 162 : 59 LW 649 : 1946 MWN 705 : (1946) 2 MLJ 361 (DB).

——Decree against father as trespasser — Son partitioning prior to decree — Still decree can be executed against property in hands of son.

A joint family cannot commit a tort. Only persons can commit a trespass and they alone are liable for the tort committed by them. If the sons are joint trespassers with their father, they are liable as joint tortfeasors and can be made liable only by impleading them.

Where, however, a decree is obtained against the father as trespasser, the same can be executed against the property in the hands of the son even though he was not a party to the suit and had partitioned from his father prior to the decree. Section 53 does not require that the property should be that of the deceased or should have come into the hands of the son as the legal representative. AIR (Vol 30) 1943 Mad 415 : 56 LW 176 : (1943) 1 MLJ 268 : 1943 MWN 180 : 210 Ind Cas 616.

——Watan.

Watan property is not to be regarded as property inherited by the son so as to expose it to liablility to execution under S. 53, Civil P. C. AIR (Vol 28) 1941 Bom 144 : 43 Bom LR 232 : 194 Ind Cas 431.

——Rent-decree against father — Death of father — Sons not brought on record — Sale held — Shares of sons, held not exempted.

The shares of the sons cannot be deemed to have been exempted from sale in an execution of a decree for rent obtained against their deceased father even if they were not made parties to the execution proceedings and only the name of one of the sons was brought on the record. AIR (Vol 27) 1940 Oudh 55 : 1939 RD 557 : 14 Luck 751 : 1939 OWN 848 : 1939 AWR 175 : 184 Ind Cas 818 (DB).

——S. 53 is not meant to deprive the descendant of his right to contest the existence of the debt where he was in danger of losing the whole of his ancestral property. There is no provision in the section that the entire property belonging to a joint family of which the father was karta, should be necessarily liable for payment of debts incurred by him. AIR (Vol 26) 1939 Mad 867 : ILR (1940) Mad 123 : 1939 MWN 918 : 50 LW 472 : 187 Ind Cas 816 (DB).

——Decree against father alone — Property of joint family attached in execution and put up to sale — Father dying before sale.

Where in execution of a decree passed against the father alone, the property of the joint family is attached and put up for sale and the father dies before the actual sale, the decree-holder is entitled to proceed against what would have been the father's share in the joint family property at the time af his death. AIR (Vol 26) 1939 Pat 568 : 5 BR 729 : 18 Pat 499 : 20 PLT 718 : 182 Ind Cas 184 (DB).

——Ss. 53, 2 (11) — Hindu son becoming owner by survivorship — Whether bound to provide out of estate descending to him, maintenance payable by late proprietor.

As a Hindu son, he is legally bound to provide out of the estate which descends to him, maintenance for those persons whom the late proprietor was legally or morally bound to maintain. It cannot be contended that the particular property charged for maintenance can alone be proceeded against. According to Hindu law, the property inherited by the heir is liable for the

maintenance of the persons entitled to maintenance. If a person is placed upon a specified property, it is only for the sake of convenience, and it does not amount to surrender of the right given by law on the entire property. AIR (Vol 26) 1939 Pesh 45 : 184 Ind Cas 456 (DB).

——Ancestral property.

Section 53 applies to ancestral or joint family property coming to the hands of descendant on partition. AIR (Vol 26) 1939 Sind 258 : ILR (1939) Kar 300 : 184 Ind Cas 582 (DB).

——Decree against father in respect of pre-partition debt binding on property allotted to son.

Section 53 covers a case where there is a decree against the father in respect of a pre-partition debt binding on the share of property allotted to the son in the partition. In such circumstances, for the purpose of S. 50, the son is to be deemed to be the legal representative of his deceased father in respect of the share taken in the partition by the son. AIR (Vol 24) 1937 Mad 610 : 46 LW 112 : 1937 MWN 427 : (1937) 2 MLJ 251 : ILR (1937) Mad 880 : 171 Ind Cas 101 (FB).

——Scope — Father as manager of Hindu joint family incurring liability in personal capacity — Liability enforceable against property in hands of son.

Per Cornish, J.— Apart from S. 53, Civil P. C., a Hindu son cannot be made liable in execution as his father's legal representative in respect of property which was not property in which the father had any right or title at the time of his death. The language of the section is sufficiently wide to include a liability incurred by the father which is enforceable against property in the hands of his son, whether the liability was incurred by the father in his capacity of manager or personally. In both cases it is the Hindu law which attaches to the property this liability. AIR (Vol 24) 1937 Mad 610 : 1937 MWN 427 : 46 LW 112 : (1937) 2 MLJ 251 : ILR (1937) Mad 880 : 171 Ind Cas 101 (FB).

——Liability of heirs — Income accruing after death of judgment-debtor.

Where the heirs are bound to satisfy a decree passed against the estate of the deceased even out of ancestral property in their hands, then, after the death of the deceased, income from the land left by him which has devolved upon his heirs remains part of his estate and the produce and income are liable to attachment and sale in satisfaction of the decree against the deceased. AIR (Vol 23) 1936 Lah 236 : 165 Ind Cas 802 (DB).

——Applicability in case of custom.

Section 53 was specially enacted to meet a case as regards sons and other descendants of a deceased ancestor under Hindu law but there is no similar provision in any enactment for persons who follow custom. The question, therefore, has always to be determined afresh when custom is the rule of decision. AIR (Vol 22) 1935 Lah 855 : 17 Lah 139 : 38 PLR 521 : 159 Ind Cas 1024.

——Scope — Share of father's brother coming to son — No decree against father's brother — Decree against father.

Section 53 is only meant to cover the case of a son or other descendant who, under the section, is to be deemed the legal representative of his ancestor with respect to property which was liable under Hindu law for the payment of the debt of the deceased ancestor, in respect of which a decree had been passed. But it does not apply where a share of a brother of the father comes to the son and no decree has been passed against the father. Consequently, such share cannot be attached in execution of decree against the father. Share of a paternal uncle to which a person succeeds by survivorship is not property which under the Hindu Law is liable to satisfy a debt of the father of such person. AIR (Vol 22) 1935 Lah 650 : 159 Ind Cas 233 (DB).

——Ordinary liability of a son under Hindu law, if diminished by S. 53.

Section 53 does not diminish or decrease the ordinary liability of a Hindu son which existed prior to the enactment of the section under the Hindu law. AIR (Vol 21) 1934 All 590 : 3 AWR 765 : 1934 ALJ 483 : 57 All 176 : 150 Ind Cas 411 (FB).

——Watan.

Money decree against watandar and minor sons — Death of watandar — Execution against watan property in hands of minor sons — No certificate under S. 10, Bombay Hereditary Offices Act, by guardian of minors from Collector:

Held, that interest of minors in watan property was liable to attachment and sale in execution of the decree obtained against them. AIR (Vol 21) 1934 Bom 119 : 36 Bom LR 181 : 58 Bom 273 : 151 Ind Cas 207 (DB).

——Watan — Money-decree against watandar — Death of watandar — Decree cannot be executed against watan property in the hands of his son. AIR (Vol 21) 1934 Bom 116 : 58 Bom 218 : 36 Bom LR 169 : 151 Ind Cas 151 (DB).

——Decree against Hindu lambardar for sums collected and remaining uncollected due to neglect — Death of lambardar before attachment.

The legal representative of a deceased lambardar is, so far as the assets of the deceased in his hands are concerned, liable to the same extent as the lambardar that is not only for the money actually collected by the lambardar, but also for money left uncollected owing to his negligence or misconduct.

Where, therefore, a decree for such amount has been passed against a Hindu lambardar who dies before attachment, in view of the provisions of S. 53, Civil P. C., the decree can be executed as against the son to the extent of the joint family estate in his hands. AIR (Vol 20) 1933 All 110 : 1932 ALJ 873 : 16 RD 580 : 143 Ind Cas 617 (DB).

——Mortgage executed by father — Suit against sons and grandsons — Decree against property of father in hands of sons only — Joint family property.

Where a mortgagee sued the sons and grandsons on a mortgage executed by the father and the suit was decreed only against the estate of the father in the hands of the sons, but dismissed as against the grandsons, and the decree-holder sought to attach the joint family property:

Held, that as the grandsons were not liable under the decree, their interest in the joint family property could not be attached in execution of the decree and that S. 53, Civil P.C., would not help the decree-holder as there was no decree against the grandsons. AIR (Vol 20) 1933 Oudh 309 : 10 OWN 629 : 8 Luck 700 : 144 Ind Cas 397 (DB).

——Scope.

Sections 47 and 53 are not limited in their scope to an enquiry in respect of property which came into the possession of the legal representatives by survivorship on the death of the judgment-debtor but extend to property which came into his possession by partition before the death of the judgment-debtor.AIR (V 18) 1931 Sind 84 : 25 S LR 374 : 134 Ind Cas 386 (DB).

——Money decree against Hindu father.

Money decree obtained against father and properties attached — In execution whole of interest

may be proceeded against irrespective of ambiguity in description — Son is bound by such execution unless he shows that debt was immoral. There may be some special circumstances in some cases to show that the execution proceedings were limited to a particular share of interest. Where no such limitation expressly appears, all that the sons can claim is to show that the debt was illegal or immoral or that the debt never existed, and the moment they fail to prove any of the specific circumstances, their claim must fail. 120 Ind Cas 375 : 1929 MWN 776 : AIR (Vol 17) 1930 Mad 257 (DB).

——The whole of the ancestral property and not merely father's share can be sold under a decree passed in terms of S. 53. 81 Ind Cas 15: 11 OLJ 202: 27 O.C. 111: AIR (Vol 11) 1924 Oudh 393 (DB).

——Where after a decree on a debt due by a Hindu father the latter died, held that the decree can be executed against the ancestral property in the hands of the son. The ancetsral property in the hands of the son is liable under Hindu Law for the payment of this debt unless and until the son could prove that there was in fact no debt at all or that the debt was tainted with immorality. 71 Ind Cas 417: 20 ALJ 969: 4 LRA Civ. 31: AIR (Vol 10) 1923 All. 124 (DB).

——Ancestral property — Liability of son — Costs.

Sons who take the property of their father obtained by him in a partition among them are liable for the decree of costs against him and property in their hands is liable to attachment. (1913) 19 Ind Cas 252 (All) (DB).

——Ancestral property — Liability of sons.

The whole of the ancestral property and not merely that portion of it in the hands of a Mitakshara son, which upon partition would have represented the interest of the father, if a partition had taken place during his life time, is liable for the satisfaction of the judgment debt in execution of a decree passed against the deceased Mitakshara father, where the loan was not contracted by the father for immoral purposes. S. 53, C. P. C. 1908 provides that a question as to what property would be liable in execution, is to be determined in execution proceedings and not by a separate suit. (1912) 16 CLJ 85: 16 Ind Cas 970 (DB).

——Ancestral property — Jats — Punjab.

Ancestral property of a deceased Jat judgment debtor is not an asset in the hands of his heirs for purposes of S. 234 C.P.C. of 1882, unless it is specifically charged in his life time by the original debtor for his debts. (1911) 80 PWR 1911: 11 Ind Cas 376.

——Personal decree — Liability of ancestral property.

A personal decree under O. 34 R. 6 Civil P.C. Act against a legal representative to be realised out of the property belonging to the deceased personally cannot be executed against property which passed by survivorship. (1911) 9 Ind Cas 631 (All) (DB).

——Personal decree — Ancestral property.

Property which is not self-acquired property of the sons but has come to them from their father by survivorship is liable to satisfy decree under O. 34, R. 6 against the assets of the father. (1910) 11 CLJ 362: 5 Ind Cas 146 (DB).

——S. 54.

See also Civil P.C. Ss. 67 to 72 and O. 20 R. 18.

1. **Applicability and scope.**
2. **Decree for partition.**
3. **"Estate."**
4. **Jurisdiction of Civil Court over Collector.**
5. **Mode of partition.**
6. **"Shall be made by Collector".**

1. Applicability and scope.

——A revenue-paying estate can be partitioned by a Civil Court where no separate attachment of the revenue is asked for. AIR (Vol 32) 1945 Cal 28: 48 CWN 223: 218 Ind Cas 67 (DB).

——Revenue-paying estate — Decree for partition by Civil Court — Subsequent partition by Collector does not supersede decree.

If the Civil P.C. and the Estate Partition Act be read together, there is no warrant whatsoever for superseding the decree of the Civil Court by a partition subsequently obtained from the Collector. Consequently, where a Civil Court has passed a decree for partition of a revenue-paying estate, a partition subsequently obtained from the Collector does not supersede the decree. AIR (Vol 21) 1934 Pat. 365: 13 Pat. 637: 150 Ind Cas 608 (DB).

——S. 54 does not apply to a suit for partition of a revenue-paying estate, when no separate allotment of revenue is asked for. AIR (Vol 21) 1934 Pat 365: 13 Pat 637: 150 Ind Cas 608 (DB).

——Scope of.

S. 54 does not apply to a suit for partitoin of a revenue-paying estate where no separate allotment of revenue is asked for. AIR (Vol 20) 1933 Pesh 101: 146 Ind Cas 201 (DB).

——S. 54 merely deals with a case where there is a decree for partition of an undivided estate or for separate possession of a share of such an estate. AIR (Vol 18) 1931 Cal 104: 34 CWN 895: 130 Ind Cas 287 (DB).

——Quaere — Whether under S. 54 it is necessary that the plaintiff should ask for a division of the Government revenue in order that the case may come within the section. 34 CWN 895: AIR (Vol 18) 1931 Cal 104 (DB).

——Decree for partition of estate assessed to revenue — Absence of prayer or provision for division of revenue.

If a decree is for the partition of an undivided estate assessed to the payment of revenue to Government S. 54 applies and the partition is to be carried out by the Collector and in order to bring the section into operation it is not necessary that the plaintiff should have asked for or that the decree should have provided for partition of the revenue. AIR (Vol 18) 1931 Cal 93 : 34 CWN 892 : 58 Cal. 122: 130 Ind Cas 129 (DB).

——Putnidar.

——Obiter — A putnidar cannot as such ask for a separate division of the revenue. 34 CWN 892: AIR (Vol 18) 1931 Cal 93 (DB).

——Partition of a revenue-paying estate — If allowable.

According to the Calcutta view followed in this case by the Patna High Court, S. 54 C.P.C. does not prevent a Civil Court from decreeing partition of a revenue-paying estate where separate allotment of the revenue is not asked for. A different view has been taken by the other High Courts. 1 Pat. LW 335: 2 Pat LJ 221: 1917 Pat H.C.C. 131: 39 Ind Cas 173: AIR (Vol 4) 1917 Pat 637 (DB).

——Applicability — Execution of decree in Administration suit.

S. 54 only applies where the decree is for partition of land by metes and bounds, that is where land held jointly and assessed to Govt. revenue as a whole is to be divided up into two or more plots between the sharers to be held by them separately. In an administration suit, execution of a decree cannot be carried out by entrusting the Collector under S. 54 to partition the estate. It can be correctly carried out by appointing a receiver. AIR (V 4) 1917 LB 126 : 8 LBR 338 : 10 Bur LT 206 : 36 Ind Cas 385 (DB).

2. Decree for partition.

—For applying S. 54 it is not necessary that the decree should direct partition not only of land but also of land revenue assessed on it. AIR (Vol 20) 1933 Mad 259: 36 LW 974: 64 MLJ 63: 1933 MWN 146: 56 Mad 443: 141 Ind Cas 181 (DB)

It is not necessary for the applicability of S. 54, that the plaintiff should have asked for or the decree should have provided for partition of revenue AIR (Vol 18) 1931 Cal 93: 34 CWN 892: 58 Cal 122: 130 Ind Cas 129 (DB).

——Partition of Revenue paying estate — Finality of decree.

The decree of a Court is final and a final decree in a partition suit cannot be re-opened unless by way of review. The effect of the final decree of Civil Court for partition is to put an end to co-tenancy and to vest in each person or group, a sole estate in a specific property or allotment. (1918) Pat HCC 134: 5 Pat LW 9: 4 Pat LJ 29: 45 Ind Cas 895 : AIR (Vol 5) 1918 Pat 63 (DB).

——S. 54 (S. 265 of Old Code) — U. P. Land Revenue Act (III of 1901), S. 107 — Partition — Execution of a Civil Court decree for partition of revenue-paying property.

A decree of a Civil Court for partition is subject to the provisions of S. 107 of the United Provinces Land Revenue Act and cannot be fully executed until the decree-holder's name is recorded in the revenue papers. (1906) 1906 AWN 53 : 3 ALJ 336 : 28 A 375 (DB).

3. "Estate"

——Decree directing partition of portion of undivided estate — Decree directing partition of land but not of revenue.

Section 54 applies only to a case where the decree comprehends the partition of the whole of the estate paying revenue to the Government. It does not apply to a decree which directs partition only of a portion of an estate.

For applying S. 54, it is not necessary that the decree should direct partition not only of land but also of the land revenue assessed on it. AIR (Vol 20) 1933 Mad 259: 36 LW 914: 64 MLJ 63: 1933 MWN 146: 56 Mad 443: 141 Ind Cas 181 (DB).

——Suit for partition of mouza by tenure-holder interested only in a share in mouza — Jurisdiction of Civil Court.

Section 54 merely deals with a case where there is a decree for the partition of an undivided estate or for separate possession of a share of such an estate. A suit for partition of a particular 'mouza' by a person who is a tenure-holder only in respect of a share in the land of that particular 'mouza' does not fall within the purview of that section and can be entertained by the Civil Court. AIR (Vol 18) 1931 Cal 104: 34 CWN 895: 130 Ind Cas 287 (DB).

The words "for the separate possession of a share of such an estate" contemplate the case of a man whose right is to the possession of an aliquot portion or share of the whole undivided estate considered as one. 34 Cal WN 892: AIR (Vol 18) 1931 Cal 93 (DB).

Section 54 is meant to be applied only in the case of estates assessed to revenue in one lump sum for the whole estate and not to estates like the ordinary paddy holdings in Burma which are assessed at acre rates. 5 Rang 106: 4 Bur [illegible]: 95 Ind Cas 39: AIR (Vol 13) 1926 Rang 80 (DB).

4. Jurisdiction of Civil Court over Collector.

——S. 54 and O. 20, R. 18 and O. 26, Rr. 13 and 14 — Decree for partition sent to Collector to effect partition — Power of Court to disturb partition effected by Collector.

On reading S. 54 in the light of O. 20, R. 18 and O. 26, Rr. 13 and 14, it is quite clear that the Legislature did not intend the Court, which has passed a decree for partition and sent it to the Collector under S. 54 for the purpose of effecting the partition, to have power to hear objections to the partition made by the Collector or his subordinate or to modify the partition. AIR (Vol 32) 1945 Mad 336: (1945) 2 MLJ 62: 1945 MWN 406: 58 LW 350: 221 Ind Cas 270: ILR (1940) Mad 10 (FB).

[Overrules 19 Mad 435].

——Partition by Collector — Interference by Court.

A Civil Court referring a case to the Collector under S. 54 has no power to interfere with the Collector's proceedings therein. 42 Bom 689: 20 Bom LR 411: 46 Ind Cas 10: AIR (Vol 5) 1918 Bom 206 (DB).

——Execution before Collector — Application to Civil Court.

An application to a Civil Court to expedite and authorize the Collector to revive and continue old execution proceedings referred to him for execution by that court and still pending before him, is not an application for execution and the limitation bar does not apply to it. A Civil Court is competent to entertain such application as it has a right of control over the Collector's proceedings in execution. 8 SLR 335 : 29 Ind Cas 58 : AIR (Vol 1) 1914 Sind 97 (DB).

——S. 54 (S. 265 of Old Code) — Decree — Execution — Collector — Partition — Collector contravening the orders — Court's jurisdiction.

Where a Collector in partitioning an estate, under a decree sent to him under S. 265, C. P. C., (Old Code), contravenes the decretal command of the Court or otherwise acts 'ultra vires', his action is subject to the control and correction of the Court which passed the decree and sent it to him for execution. (1903) 5 Bom LR 949: 28 B 238 (DB).

5. Mode of partition.

——Ss. 54 and 50 — Decree for partition transferred to Collector — Death of one of defendants — Collector has no jurisdiction to bring his legal representative on record — Proper procedure is to ask the decree-holder to apply to Civil Court to execute the decree against the legal representatives of the deceased defendant by substituting them on record. (1950) 1950 Nag LJ 426.

——Jurisdiction — Partition decree — Shares not defined by Civil Court — Batwara officer — Jurisdiction of to define — Order of Batwara officer confirmed by commissioner and embodied in final decree — Interference by Board of Revenue.

Where the preliminary decree for partition made in a Civil Court does not contain any definition of the shares of the parties, it is open to the Batwara officer effecting partition under S. 54, Civil Procedure Code, to correctly define the shares. Where such a definition of the shares by the Batwara officer is confirmed by the commissioner, and the same is incorporated in the final decree of the Civil Court, it cannot be revised by the Board of Revenue. (1946) 12 BR 132.

——Transfer of decree for partition.

A decree of a Civil Court on an application to partition the lands of an estate is not a decree under the section and cannot be sent to the Collector for execution under S. 12(2) of the Bengal Estates Partition Act (5 of 1876) which restricts the operation of this section. (1916) 1 Pat LW 51: 38 Ind Cas 593.

6. "Shall be made by Collector".

——Ss. 54 and 50 — Decree for partition transferred to Collector — Death of one of defendants — Jurisdiction of Collector to bring his legal representative on record — Proper procedure.

A Collector to whom a Civil Court has transferred a decree for partition under S. 54. C. P. Code,

cannot order substitution of heirs on record on the death of one of the defendants to the suit. The Collector is in charge of the case, so far as the making of the partition is concerned, that is, the mode of partition, distribution of assets, etc., but he cannot substitute the existing parties and change the decree of the Civil Court. In view of the provisions of S. 50 (1), C. P. Code, the Collector would be encroaching upon the jurisdiction of the Court which passed the decree, if he were to bring the legal representatives of the deceased defendant on record by his own order. The proper procedure would be to ask the decree-holder to apply to the Civil Court to execute the decree against the legal representatives of the deceased defendant by substituting them on record. ('50) 1950 NLJ 426.

——S. 54 and O. 20 R. 18 — Decree of Civil Court for partition of estate assessed to the payment of revenue — Further proceedings before the Collector — Nature of.

S. 54, C. P. Code, is an exception to the ordinary rule of procedure that the Court passing a decree is entitled to execute it. The law prohibits the execution of a decree for partition of an estate assessed to the payment of revenue by the Civil Court. The further proceedings in regard to partition taken by the Collector are not execution proceedings under the decree of the Civil Court. AIR (V 36) 1949 Oudh 37 : 1947 OWN, 595 : 23 Luck 77 (DB).

——Powers of Civil Court — Partition suit — Preliminary decree — Direction to Collector to effect partition in particular mode — Jurisdiction to issue.

S. 54, read with O. 21, R. 18, C. P. Code, authorises the Civil Court only to declare the rights of the parties and places the execution of the decree in the hands of the Collector who is vested with full authority to determine the mode of effecting partition. Once the preliminary decree is passed, the Civil Court becomes 'functus officio' and it has no power thereafter to give any direction to the Collector in what way the partition is to be made. 1946 NLJ 362: 224 Ind Cas 352: AIR (Vol 33) 1946 Nag 353.

——Partition — Collector — Position and powers of — Court cannot so fetter Collector's discretion as to overrule powers conferred upon him under S. 54 and O. XX, R. 18.

In effecting partition under S. 54 and O. XX, R. 18, the Collector is a ministerial officer of the Court and he must not disregard the terms of the decree; he must not divide the property in contravention of the terms of the decree and if he does so, the Court is entitled to refer the case back to the Collector to partition the property in accordance with the terms of the decree. The Collector is to execute the decree and not to alter it. But on the other hand, the decree itself must be in accordance with the provisions of S. 54 and O. XX, R. 18. Neither S. 54 nor O. XX, contemplates that the Court shall dictate to the Collector the manner in which an estate shall be partitioned or divided. The Collector must divide the estate in accordance with the rights declared in the decree, but in the manner he thinks best, bearing in mind the need and the convenience of the land as a revenue paying entity. The Collector is bound by the declaration of the rights of the parties, so far as the shares are concerned; further, if any particular party has a preferential right to any particular piece of property and that right is declared, the Collector must have regard to any such declaration when dividing the estate; but all this is subject to the partition of the estate by the Collector as the Chief Revenue Officer responsible for the collection of the land revenue from land paying revenue to Government and which must not, therefore, be divided into fragments which cannot form convenient or appropriate properties for the payment of land revenue. The Court itself is, however, bound by the terms of the Civil P. C., and has not the power so to fetter the discretion of the Collector as to overrule the powers that are conferred upon him under S. 54 and O. XX, R. 18. [The Collector held did not in any way contravene or ignore the terms of the decree.] AIR (Vol 30) 1943 Sind 7 (8, 9): ILR (1942) Kar 162: 204 Ind Cas 324 (DB).

——Order under S. 151.

Where a remedy was provided under S. 54 and O. XX, R. 18, the Court has no jurisdiction to pass an order under S. 151, allowing a proclamation to be issued in villages in which the plaintiff had been granted a certain share in a suit for partition. AIR (Vol 28) 1941 Oudh 383 (385): 16 Luck 765: 1941 OWN 718: 1941 AWR 183: 194 Ind Cas 175.

——Meaning of words "for the separate possession of a share of such an estate".

If a decree is for the partition of an undivided estate assessed to the payment of revenue to Government then the partition is to be carried out by the Collector under S. 54. It cannot be said that it is open to plaintiff to insist that it is carried out by a Commissioner under the Civil Court merely because he has not asked for partition of the revenue. 130 Ind Cas 129: 58 Cal 122: 34 CWN 892: AIR (Vol 18) 1931 Cal 93 (DB).

——S. 54 and O. 20, R. 18 — Jurisdiction of Civil Court — U. P. Land Revenue Act, S. 233 — Consent of parties has no effect.

A Civil Court is not competent to make a division of revenue paying land, even with the consent of the parties. 2 OLJ 321 : 30 Ind Cas 209 : AIR (Vol 2) 1915 Oudh 28.

——S. 54 and O. 21 — Execution of decree — Administration suit, method.

In an administration suit the execution of a decree cannot be carried out by entrusting the collector under S. 54, to partition the estate, but can be correctly carried out by appointing a receiver to get in the debts, collect the movable property and sell it or collect the proceeds of it, also to sell the immoveable property, if necessary to do so to meet the legal charges and legal expenses payable out of the estate, the proceeds to be distributed amongst the heirs according to their shares. S. 54 only applies where the decree is for partition of land by metes and bounds, that is where land held jointly and assessed to Government Revenue as a whole, is to be divided up into two or more plots between the sharers to be held by them separately. 8 LBR 338: 10 Bur LT 206: 36 Ind Cas 385: AIR (Vol 4) 1917 LB 126 (DB).

——Final order — Meaning of.

A final order allotting specified property to each co-sharer should be passed only after the Court has determined the share of each and further proceedings on such a final order will merely lie for delivery of possession. The order passed is analogous to one passed by the Collector under S. 265 of the C. P. C. of 1882. (1912) 35 Mad 26: (1911) 2 MWN 316: 12 Ind Cas 775.

——S. 55.

See also Civil P. C. S. 145 and O. 21, Rr. 37, 38 and 40.

1. **Appeal.**
2. **Arrest of judgment-debtor.**
3. **Bond of judgment-debtor.**
4. **Bond if should be in writing.**
5. **Court's duty to inform judgment-debtor that he may apply in insolvency.**

6. Damages for trespass.
7. Liability of Surety.
See also N. 8.
8. Realisation of Security.
See also N. 7.
9. Realisation of Security — Concurrent proceedings against judgment-debtor and surety.

1. Appeal.

——Appeal.

An order issuing a warrant for the arrest of a judgment-debtor in execution of a decree is appealable as a decree. AIR (Vol 24) 1937 Lah 706: 39 PLR 690: 169 Ind Cas 613.

——When a condition of the bond is broken and the option of proceeding against the surety or the judgment-debtor has been exercised by the Court, the matter cannot be subsequently re-opened. AIR (Vol 24) 1937 Pat 476: 18 PLT 357: 3 BR 791: 170 Ind Cas 955.

——S. 55(4) — Order under — Appeal.

Where after giving notice under S. 145 to the surety of a judgment-debtor under a money-decree the Court directs the security to be realized under S. 55(4) the order is appealable under S. 47. AIR (Vol 19) 1932 Bom 77: 33 Bom LR 1593: 135 Ind Cas 812.

——S. 55(4) — Order — Appeal.

An order made under S. 55(4) rejecting an application for forfeiture of security bond is appealable and therefore no revision lies. 1916 UBR II 103: 10 Bur LT 15: 34 Ind Cas 247: AIR (Vol 4) 1917 UB 16.

2. Arrest of judgment-debtor.

——Arrest — Legality.

When a warrant of arrest is executed at a place other than the one addressed to, the arrest is legal provided the place is not outside the jurisdiction of the Court. (1940) 42 PLR 374.

——Arrest — Arrest is effected by touch.

In making an arrest the person authorized to make it shall actually touch the body of the person to be arrested, unless there be a submission to the custody by word or action. 123 Ind Cas 127: 7 Rang 593 : AIR (V 17) 1930 Rang 131 (DB).

——Effect of bar of arrest.

Bar of arrest under C. P. Code, S. 55(4) does not suspend complete execution and it is open to decree-holders to execute their decree in any other way e.g., by attachment and sale of any moveable or immoveable property of the judgment-debtor. 82 Ind Cas 1: 5 LRA Civ 408: AIR (Vol 11) 1924 All 707.

——Warrant how executed.

Bailiff is not bound to show warrant in first instance — Penal Code, S. 225-B. It is sufficient that he should apprise the person to be arrested of the contents of the warrant and show it if desired 25 CWN 815: 66 Ind Cas 1003: AIR (Vol 8) 1921 Cal 79 (DB).

3. Bond by judgment-debtor.

When a security bond is executed under S. 55(3) and (4), it must be construed in the light of the order directing the security to be given. When on an application by the judgment-debtor under S. 55, that he might be discharged from arrest complying with the terms of S. 55(3) and (4), the Court orders that "the necessary bond" should be executed, the bond must be such as is required under S. 55(4). AIR (Vol 23) 1936 Rang 168; 14 Rang 190: 162 Ind Cas 251.

——Bond under S. 55(4) — Stamp duty.

Personal security bond under S. 55(4) on arrest of judgment-debtor — Bond falls under Art. 6 of Sch. 2, Court-fees Act, and not within Art. 57 or Art. 15 of Sch. 1 of Stamp Act, and stamp of eight annas is sufficient. AIR (Vol 20) 1933 Lah 89: 34 PLR 132: 14 L 284: 141 Ind Cas 301 (SB).

——Application under S. 55(4) — Particulars.

An application referred to in S. 55(4) for being declared an insolvent need not necessarily be an application containing all the particulars required by S. 13 of the Provincial Insolvency Act. AIR (V 18) 1931 Bom 444: 33 Bom LR 820: 134 Ind Cas 718.

——Security bond.

——Security bond given under S. 55 must be interpreted and enforced according to conditions expressly mentioned in the bond. AIR (V 17) 1930 Lah 575.

——Security when non-acceptable.

A Court is fully justified in refusing to accept the security of a person over whose property or person it has no jurisdiction. 112 Ind Cas 689: AIR (Vol 16) 1929 Lah 161.

4. Bond, if should be in writing.

——Scope — Whether provides that surety will be effective only if bond is formally executed.

Under S. 55, all that is necessary is that security "to the satisfaction of the Court" should be furnished. It is not provided that the surety will become effective only if a bond is formally executed. In such cases the liability of the surety is determined by the undertaking that is given to the Court by means of the agreement or statement made by him and accepted by the Court, and non-compliance with the undertaking renders the surety liable under S. 145. AIR (Vol 24) 1937 Lah 772: 40 PLR 38: 174 Ind Cas 965.

5. Court's duty to inform judgment-debtor that he may apply in insolvency.

——Warrant — Legality.

A warrant of arrest is not illegal simply because the judgment-debtor has not been informed that he can apply to be adjudged an insolvent. (1940) 42 PLR 374.

——No record of reasons.

Absence of note in record that provisions of S. 55(3) have been complied with does not necessarily, indicate that they have not been complied with — Failure to comply with provisions does not invalidate arrest. 31 PLR 188: AIR (Vol 17) 1930 Lah 736.

——Provisions mandatory.

Provisions of S. 55 are mandatory. 54 Cal 782: 106 Ind Cas 66: AIR (Vol 15) 1928 Cal 62. (DB).

——Adjudication by insolvency Court — Effect of.

Proceeding commenced before adjudication order is not inoperative and must be carried to the end except in so far as it may involve an application for a remedy against the property of the insolvent. On production of order of adjudication, security to appear should be taken. The object of this requirement is to compel the insolvent when he has obtained an adjudicating order to be also reasonably diligent in proceeding with his insolvency in a 'bona fide' manner. 89 Ind Cas 381: 3 Rang 187: AIR (Vol 12) 1925 Rang 305.

——S. 55 (3) — Insolvency application — Provincial Insolvency Act (III of 1907) — Right to adjudication.

S. 55(3) does not entitle the debtor to be adjudged an insolvent on an application except in conformity with the provisions of the Insolvency Law. (1913) 14 MLT 305: 25 MLJ 545: 21 Ind Cas 293 (DB).

——Ss. 55(3) and 143 — Dismissal of insolvency application.

When the application of a judgment-debtor to be declared an insolvent has been dismissed, and he is re-arrested in execution of a decree, he cannot claim the benefit of S. 55(3) and (1) so long as the bar of the previous dismissal is not removed. (1911) 9 Ind Cas 121 (Sind).

——S. 55(3) — Duty of court — Procedure — Punjab Government Notification No. 3860 of 3rd Oct. 1877.

It is the duty of the Court to inform the judgment-debtor whenever he is brought before the Court under arrest in execution of a money-decree, to apply for insolvency. This must be done before any inquiry is made. (1909) 15 PWR 1909: 16 PR 1909: 50 PLR 1909: 1 Ind Cas 402.

6. Damages for trespass.

——Defendant entering plaintiff's baithak with bailiff and Naib Sheriff under bona fide belief that judgment-debtor was there.

In execution of decree against the plaintiff's brother, the defendant entered the 'baithak' of the plaintiff with bailiff and 'Naib' Sheriff believing that the brother was there, with the object of effecting his arrest. The brother was not there and the defendant apologised to the plaintiff. The plaintiff afterwards filed a suit for damages:

Held, that the defendant acted lawfully, that no trespass was committed and that the plaintiff was not entitled to any damages. AIR (Vol 20) 1933 Lah 723: 146 Ind Cas 543.

7. Liability of surety.

See also N. 8.

(a) General.

(b) Application to be declared as insolvent.

(c) Appearance when called upon.

(d) Illness or death of judgment-debtor.

(e) Extension of time.

(a) General.

——S. 55 (4) — Surety under, if can claim to be released from obligation at his pleasure — Principle of Contract Act (IX of 1872), S. 130.

There is no analogy between a security bond executed by a surety under S. 55 (4), Civil P.C., and a continuing guarantee as defined in S. 129, Contract Act. In the former case, there is no series of transactions giving rise to distinct liabilities which the guarantee is intended to cover but there is only a single transaction under which the surety undertakes responsibility for certain things to be done in future though on different occasions. The markedly different terms of S. 55 (4) and the absence of any provision for the discharge of the surety at any stage before he has fully carried out his undertaking point clearly to the conclusion that a person who becomes a surety under this section cannot claim to be released from his obligation at his pleasure and the principle of S. 130, Contract Act, does not apply. Therefore, where it is provided by the terms of the security bond which is in conformity with S. 55 (4) of the Code, that the security deposited by the petitioner should be realized if the judgment-debtor did not apply to be declared an insolvent within a month from that date or did not appear when called upon to do so in the proceedings on such application or in execution of the decree, it would be contrary to this stipulation to release the petitioner from his undertaking and set free his security deposit. AIR (Vol 29) 1942 Mad. 101: 1941 MWN 793: (1941) 2 MLJ 650: 200 Ind Cas 774.

——S. 55 (4) — Surety bond — Surety bond if enforceable where there is breach of only one of two conditions of bond under S. 55 (4).

A surety bond executed under S. 55 (4) can be enforced against the surety even if there is no failure of both the conditions set out in the section, namely in applying for adjudication as an insolvent and in appearance but only of one of them. AIR (Vol 29) 1942 Sind 134 : ILR (1942) Kar 79: 201 Ind Cas 750 (DB).

——Proper form and formalities and prescribed time are necessary essentials.

Any and every petition which is presented by a judgment-debtor in Court though it is not in the prescribed form or accompanied by necessary deposit or otherwise proper and is not represented after due compliance has not the effect of discharging the surety from his liability under the bond. The section should be interpreted as meaning 'applying in the proper form and after due complying with the formalities prescribed by law or the rules framed thereunder within the prescribed period or within such extension thereof as may have been granted by the Court'. 111 Ind Cas 258: AIR (Vol 15) 1928 Sind 192.

——Liability of surety arises when he fails either to produce the judgment-debtor or when the latter fails to apply for adjudication. 26 MLW 49: 101 Ind Cas 525: AIR (Vol 14) 1927 Mad. 1081: 52 MLJ 523 (DB).

——Obiter: Under the present Code the surety's bond would be enforceable even after the dismissal of the execution case, in which it was given. 1921 PHCC 19: AIR (Vol 8) 1921 Pat 72 and AIR (Vol 13) 1926 Mad 286: 86 Ind Cas 286 (DB).

See also 81 Ind Cas 702: 5 PLT 336: 1924 PHCC 63: AIR (Vol 11) 1924 Pat 487 (DB).

——Ss. 55 (4) and 145 — Liability of surety.

A surety, undertaking to pay decretal amount on failure of judgment-debtor to file insolvency petition and to produce the judgment-debtor if the filed petition was rejected, was held liable on default of judgment-debtor. A question of the production of judgment-debtor did not arise and the dismissal of the execution case made no difference. 5 Pat LJ 417: 57 Ind Cas 303: AIR (Vol 8) 1921 Pat 72 (DB).

——S. 55 (4) — Liability limited by bond.

A surety bond under S. 55 (4) should strictly conform to the provisions of the section and even when the liability is limited in its terms, the extent of surety's liability is that created by S. 145. AIR (Vol 4) 1917 Mad 237: (1916) 2 MWN 273: 34 Ind Cas 407 (DB).

——S. 55 (4) — Liability of surety — Filing of insolvency petition.

The mere filing an insolvency petition by the judgment-debtor or the dismissal of an execution petition does not put an end to the liability of the surety. (1916) 2 MWN 273: 34 Ind Cas 407: AIR (Vol 4) 1917 Mad 237 (DB).

——S. 55, Cl. (4) — Surety's liability — Extent of

The liability of a surety on a bond executed by him to produce a judgment-debtor, under S. 55, Cl. 4 continues till the appearance of the judgment-debtor and not merely till he applies for insolvency. 15 MLT 224: 22 Ind Cas 953: AIR (Vol 1) 1914 Mad 270.

——S. 55 (S. 366 of Old Code) — Surety — Order that execution might issue against surety — Subsequent order refusing execution against him — Validity of.

Where at the instance of a decree-holder execution has been issued against a surety, any subsequent order between a transferee of the decree and the surety refusing execution as against the surety is invalid. (1902) 26 M. 258.

(b) Application to be declared as insolvent.

——S. 55 (4) — Surety for conduct of insolvency proceedings — Failure to apply for discharge — Liability.

Where the bond under S. 55 (4) merely requires the judgment-debtor to present the petition for insolvency and regularly and properly conduct the proceedings thereon, there is no liability on the part of the surety when there happens to be a failure on the insolvent's part to apply for his discharge. Section 55 (4) requires the due prosecu-

tion of the petition for adjudication and his appearance when required. The expression "properly conduct the proceeding" does not include application for discharge. AIR (Vol 30) 1943 Mad 363: 56 LW 112: 1943-1 MLJ 162: 1943 MWN 172: ILR (1943) Mad 691: 210 Ind Cas 256 (DB).

——S. 55 (4) — Arrest of judgment-debtor — Surety for filing insolvency petition and prosecuting it — Adjudication of debtor annulled for failure to apply for discharge in time.

Where a judgment-debtor was arrested in execution of a decree and the appellants entered into a bond undertaking to produce the debtor before the Court whenever directed, to cause him to file an insolvency petition within one month from that date and to get him to prosecute it to its very end and also to produce him in the meantime, and though the debtor filed an insolvency petition and was duly adjudicated an insolvent, he failed to apply for his discharge within the prescribed time and his insolvency was annulled:

Held that as soon as the judgment-debtor was adjudicated an insolvent, the liability of the surety under the surety bond became extinguished and the decree-holder was not entitled to proceed against the surety because of the subsequent annulment of the adjudication for failure to apply within time for discharge. AIR (V 23) 1936 Mad 963 (963, 964) : 44 LW 647 : 1936 MWN 1031 : 71 MLJ 646 : 165 Ind Cas 864.

——Undertaking to be surety until adjudication and discharge of judgment-debtor — Dismissal of application for discharge.

K, defendant in a suit, was arrested in execution of the decree. C executed a surety bond depositing the decree amount in Court as security for the due presentation of an insolvency petition by K within a month of date. C also undertook to produce K either before the Court or before the Official Receiver until he presented the petition and was adjudicated and discharged. He also agreed to make the amount deposited liable for the decree debt if K failed to present the insolvency petition within a month or failed to produce K when so ordered by the Court in the execution proceeding. K applied to be adjudicated an insolvent. He was directed to apply for discharge. The Court dismissed the application relying on the report of the Official Receiver that the outstandings shown were unrealizable and that a large credit of over Rs. 500 was given to a woman without any security. After this C, the surety, filed an application praying that he may be discharged from his liability under the surety bond:

Held, that the words of the surety bond were clear that the liability enured, not only till an application for discharge was filed, but till there was actual discharge; that the wording of the bond was within the scope of S. 55, Cl. (4), Civil P.C., and that as no order of discharge had been passed, the surety's application was premature and he was not at that stage entitled to the relief claimed by him. AIR (Vol 20) 1933 Mad 360 (361, 362): 145 Ind Cas 531.

——S. 55 (4) — Arrest of judgment-debtor — Application for insolvency — Surety providing for continuing insolvency proceedings.

Where a judgment-debtor, on being arrested in execution, had filed an application in the Insolvency Court to be adjudicated an insolvent and the surety executed a bond to the effect that the judgment-debtor would continue the insolvency proceedings and that if he failed to do so, he (the surety) would pay the amount of the decree:

Held, that the intention was that the bond should be as near the terms of the bond contemplated in S. 55 (4), Civil P.C., as possible and the liability to continue the execution proceedings extended no further than the actual adjudication. AIR (Vol 20) 1933 Nag. 40: 29 NLR 28: 144 Ind Cas 615.

——Arrest of judgment-debtor — Surety for application in insolvency — Dismissal of execution proceedings for default of decree-holder.

Where on the arrest of a judgment-debtor another person undertook that if the judgment-debtor did not apply for being declared an insolvent within a month or did not appear in Court he would be liable for the decretal amount and on the next day fixed for the hearing of the execution proceedings, the decree-holder did not appear and the application for execution was dismissed in default and the judgment-debtor was released:

Held, that the liability of the surety did not come to an end when the application for execution was struck off and the decree-holder would be entitled to proceed against the surety if no application for insolvency was filed within the prescribed time. AIR (V 19) 1932 Lah 492 : 33 PLR 676 : 138 Ind Cas 198.

——S. 55 (4) — Arrest of judgment-debtor — Application for being declared insolvent — Dismissal of — Surety.

The application referred to in S. 55 (4), for being declared an insolvent need not necessarily be an application containing all the particulars required by S. 13 of the Provincial Insolvency Act.

Where a surety for the judgment-debtor executed a surety bond engaging that the judgment-debtor would apply to be declared insolvent within fifteen days and the judgment-debtor made a bona fide application within that period, but the application was rejected on the ground that it did not contain all the particulars required by S. 13, Provincial Insolvency Act:

Held, that the liability of the surety was extinguished as a bona fide application was made within 15 days and the debtor was ready to appear when called upon.

Although under S. 55 (4), the decree-holder has alternative and not concurrent remedies against the debtor and the surety, still the mere re-arrest of the judgment-debtor does not have the effect of discharging the surety. AIR (Vol 18) 1931 Bom 444: 33 Bom. LR 820: 134 Ind Cas 718.

——Surety becomes liable where judgment-debtor fails to apply for insolvency within time fixed. 116 Ind Cas 554: AIR (Vol 15) 1928 Lah. 974.

——The condition was that if the judgment-debtor failed to apply in the Insolvency Court for his discharge, the surety would render himself liable for a certain sum.

Held, that no question, whether the surety has failed to produce the judgment-debtor, being called upon to do so, would arise. The surety's liability did not terminate on the striking off or dismissal of the execution case in which the bond was given. 1921 PHCC 19: AIR (Vol 8) 1921 Pat 72 (DB).

——S. 55 (4) — Bond by Surety — Insolvency petition by judgment-debtor — Liability of Surety.

A surety is liable for the default of his principal to apply for insolvency when he has agreed to produce him. The bond having been assigned to the decree holder the surety is bound to him, the bond or its assignment not being against public policy or void for want of consideration. (1910) 12 CLJ 419: 7 Ind Cas 917 (DB).

——S. 55 (S. 336 of Old Code) — Application by judgment-debtor within time — Release of Surety.

A surety is released from suretyship on the judgment-debtor applying within time for insolvency. The subsequent withdrawal of the application will not subject to any liability the surety once released.

(1902) 26 Mad 366.

[See editorial note under (1901) 24 Mad 560—Ed.]

(c) Appearance when called upon.

——S. 55 (4) — Execution of surety bond for producing judgment-debtor on particular day — Judgment-debtor suffering from fever on such day — No provision in bond for such contingency.

Where a surety bond undertaking to produce a judgment-debtor before the Court on a particular day is executed by a person, the mere fact that the judgment-debtor is suffering from fever on such particular day does not absolve him from his liability when the illness is not so serious as to render the appearance of the judgment-debtor physically impossible and when the bond does not provide for a contingency of this kind, the obligation of the surety can successfully be avoided only by reasons akin to vis major. AIR (Vol 25) 1938 Mad 530: 47 LW 408: 1938 MWN 321: 178 Ind Cas 511.

——S. 55 (3), (4) — Security bond — Construction — Failure of debtor or counsel to be present on date fixed — Effect.

When a security bond is executed under S. 55 (3) and (4), Civil P. C., it must be construed in the light of the order directing the security to be given. Where on an application by the judgment-debtor under S. 55, that he might be discharged from arrest complying with the terms of S. 55 (3) and (4), the Court orders that 'the necessary bond' should be executed, the bond must be such as is required under S. 55 (4) of the Code.

The operative terms of a bond executed by two persons as sureties of the judgment-debtor were: "the condition of the above written obligation is such that if the said judgment-debtor applies for insolvency within thirty days from this date and if he appears in the High Court of Judicature at Rangoon on the day which may be fixed for his public examination or for his attendance for any other purpose and thenceforth on the day or days to which the hearing of the said insolvency application shall be adjourned until the disposal of the said application or the cancellation of the security and if he shall duly prosecute his insolvency petition, then this obligation shall be void and of no effect. Else to remain in full force and virtue":

Held, that the effect of the bond was to make it an obligation thereunder that the sureties should be liable if the insolvent did not appear on any day fixed for his attendance and on which for the purposes of the insolvency, his attendance was required and the words so construed were within the ambit of S. 55 (4) and were merely an amplification of the words "that he will appear, when called upon in any proceeding upon the application." The failure of the debtor either by himself or by counsel to appear in Court on the day fixed amounted to his failure to appear when called upon on a day fixed for his attendance, within the meaning of the condition in the bond. AIR (Vol 23) 1936 Rang. 168: 14 Rang. 190: 162 Ind Cas 251.

——Surety producing judgment-debtor and requesting to cancel security bond given by him — Court should not refuse to absolve him from further liability. 30 PLR 595 : AIR (V 16) 1929 Lah 262 : 118 Ind Cas 438.

——Surety undertaking to produce judgment-debtor on date fixed must produce even though decree-holder remains absent. 116 Ind Cas 554: AIR (Vol 15) 1928 Lah 974.

——S. 55 (4) — Default in appearance — Suit on bond — Limitation.

Where a surety failed to produce the judgment-debtor and became liable on the bond:

Held, that the suit on the bond, being within three years from the date of the default was not barred by limitation. (1910) 12 CLJ 419: 7 Ind Cas 917 (DB).

——S. 55 (4) and O. 21, R. 40 — Liability of surety.

Where a surety was to be liable for the absence of the judgment-debtor on a certain date, his liability ends if the judgment-debtor presents on that date but remains absent on a further date fixed by the Court. (1910) 61 PWR 1910: 51 PLR 1910: 6 Ind Cas 983.

——S. 55 (S. 336 of Old Code) — Surety — Bond that surety will produce the judgment-debtor when ordered to do so — Surety's right to notice.

A surety executing a bond under S. 336, C.P.C., undertaking to produce the judgment-debtor when called upon is entitled to be served personally with notice to do so. The bond does not mean that the surety undertakes to produce him when the debtor was called upon to appear. (1902) 26 M. 366.

——S. 55 (S. 336 of Old Code) — Surety undertaking that judgment-debtor will apply to be declared insolvent — Judgment-debtor applies and afterwards fails to appear — Release of surety.

Where a surety undertook that the judgment-debtor should apply to be declared an insolvent, and the latter did so but did not afterwards appear when called on to do so, and the petition was dismissed:

Held that the decree could not be executed against the surety. (1901) 24 M 560 (DB).

(But see now provisions of S. 55 to which words "to appear" are added, with the result that the judgment-debtor not only should apply but also appear when called upon.—Ed.)

(d) Illness or death of judgment-debtor.

——Non-production owing to illness.

The illness of a judgment-debtor rendering his attendance physically impossible without risk to health or life is a valid excuse for the sureties for his non-production, if they were otherwise liable so to do, so as to absolve them from liability under the bond. 117 Ind Cas 910: AIR (Vol 16) 1929 Lah 479.

——S. 55 (3) and (4) — Death of judgment-debtor — Surety's liability.

A surety gave an undertaking that the judgment-debtor would apply in insolvency within a specified time and would appear when required to do so; the liability of surety cannot be enforced if the judgment-debtor dies before the time. 41 Cal 50 : 17 CWN 1241 : 19 Ind Cas 981 : AIR (Vol 1) 1914 Cal 162 (DB).

——Death of judgment-debtor.

An application to set aside order of arrest abates on the death of the person against whom the order is made. 15 MLT 224: 22 Ind Cas 953: AIR (Vol 1) 1914 Mad 270.

——S. 55 (S. 336 of Old Code) — Security for filing application by judgment-debtor to be declared insolvent — Death of insolvent after filing petition — No forfeiture.

The petition gave security for one Aziz, who had been arrested in execution of a decree. He deposited a sum of money in Court on condition that if an application which was to be made by Aziz within a time specified to be declared insolvent was rejected on any ground whatever, the amount deposited would be paid to the decree-holder. The judgment-debtor duly presented his application for a declaration of insolvency but before any order could be passed on it, he died.

Held, that the decree-holder was not entitled to the money deposited by the surety. (1907) 29 A. 466: 1907 AWN 120: 4 ALJ 437.

——S. 55 (Ss. 336, 349 of Old Code) — Judgment-debtor released on finding surety for his produc-

tion at a certain time — Death of judgment-debtor before that time.

A judgment-debtor was released from custody on condition of finding a surety for his production within a certain time. He died before the date.

Held, that the Court had no jurisdiction to enforce the obligation as a decree against the surety. Also the obligation of the surety was discharged by judgment-debtor's death. (1901) 24 M 637 (DB).

(e) Extension of time.

——Extension of time.

Court cannot extend period of one month prescribed by S. 55 (4), even under S. 148. 1926 MWN 390: 95 Ind Cas 444: AIR (Vol 13) 1926 Mad 689: 50 MLJ 477.

——The Court has no power to extend the period for the judgment-debtor's filing a petition to be declared an insolvent, beyond the prescribed month. 86 Ind Cas 304: AIR (Vol 13) 1926 Mad 286.

8. Realisation of security.

See also N. 7.

——S. 55 (4) — Security bond — No attempt by decree-holder to execute decree for three and half years — Security given by judgment-debtor should not be forfeited.

In execution of a decree, the judgment-debtor was arrested but was released on his furnishing security that he would apply within one month to be declared an insolvent. He failed to apply within one month but the decree-holder made no attempt to execute the decree for over three and half years:

Held, that the obvious inference was that the decree-holder realized that the judgment-debtor had substantially, if not technically, complied with the order of the Court, and that the purpose for which the security was given was substantially fulfilled. It would be wholly inequitable at such late stage to order that the security should be forfeited. AIR (Vol 28) 1941 Cal 122 : 194 Ind Cas 103.

——S. 55 (4) — Decree-holder, when can proceed against surety.

Unless there has been failure in both the respects namely in applying for adjudication and in appearance, the decree-holder is not entitled to proceed against the surety. Where the judgment-debtor has complied with one of these conditions by applying for adjudication as an insolvent, the decree-holder is not entitled to ask the Court to realize the security. AIR (Vol 27) 1940 All 304 : 1940 ALJ 344 : ILR (1940) All 338 : 1940 AWR 266 : 188 Ind Cas 869 (DB).

——S. 55 (4) — Conditions not fulfilled — Proceedings against surety — Option lies with Court executing decree and not with decree holder — Court discharging surety — Whether can find him liable on remand of case from appeal.

The petitioners executed a security bond under S. 55, which provided that they would become liable for the decretal money upon the happening of two events: (1) if the judgment-debtor failed to apply to the District Judge within the period of one month for being adjudicated insolvent; and (2) if they (the sureties) failed to produce the judgment debtor before the Court when ordered to do so. The judgment-debtor did not apply to the Insolvency Court within the period prescribed, but the sureties did produce him before the Court on being called upon to do so by the Subordinate Judge before whom the execution proceeding was pending. The Subordinate Judge accordingly discharged the sureties but the decree-holder preferred an appeal against the order to the District Judge without impleading the sureties as respondents and the District Judge in their absence set aside the order. The Subordinate Judge took up the matter again and on this occasion he held, that the sureties were liable to pay the decretal amount:

Held, that in case the conditions laid down in S. 55 were not fulfilled the option lay with the Court executing the decree and not with the decree-holder to proceed against the surety under S. 55 or to proceed against the judgment-debtor. The option had been exercised by the Subordinate Judge in favour of the surety on a previous occasion and the matter could not be reopened before him and therefore his subsequent order was without jurisdiction. AIR (Vol 24) 1937 Pat 476 : 18 PLT 357 : 3 BR 791 : 170 Ind Cas 955.

——Failure of judgment-debtor to apply for insolvency — Consignment of execution proceedings to record room.

Where a security is given under S. 55, and the bond itself is clear that the liability of surety arises in the failure of the judgment-debtor to apply for insolvency, the liability of the surety arises on such failure itself and not on further failure of the judgment-debtor to appear when called upon.

The liability having already arisen on the breach of the contract, it could be enforced in execution proceedings and the execution proceedings which can be taken against the surety are not affected by what happens to the execution proceedings previously taken out against the judgment-debtor, unless the decree-holder chooses under S. 55 (4) the alternative method of having judgment-debtor committed to the civil prison in which case alone the surety is automatically discharged. AIR (Vol 22) 1935 Lah 918 : 160 Ind Cas 570.

——S. 55 (4) — Arrest of judgment debtor — Surety for application to file insolvency — Omission to file application — Construction of bond.

A surety bond provided as follows: "If the defendant (judgment-debtor) fails to file an insolvency petition within one month, I shall produce the defendant before this Court and the Insolvency Court, on any day that might to fixed by the Court. If as aforesaid there is default anywise, I shall be liable to pay the entire decree amount out of my properties." The judgment-debtor having failed to apply for being made an insolvent, the decree holder sought execution against the surety:

Held, that under the terms of the bond, the surety was entitled to be given an opportunity to produce the judgment-debtor and could be made liable for the decree amount only if he failed to produce him. AIR (Vol 22) 1935 Mad 543 : 156 Ind Cas 113.

——S. 55 (4) — Breach of bond.

——Failure to prosecute insolvency petition even after the remand amounts to breach of the bond. (1935) 1935 MWN 823.

——S. 55 (4) — Execution — Surety for appearance and for satisfaction on judgment-debtor's failure to pay — Dismissal of execution for default — Pendency of application to restore — Surety, if can be summoned.

Where, in the course of execution proceedings, a surety gives security for the appearance of the judgment-debtor and for satisfaction of the decree against him in the event of his failure to produce him when required, the security bond does not enure after the dismissal of the application in default. In the absence of any stipulation

to the contrary, the surety would naturally consider himself absolved from his liability on the dismissal of the application in the proceedings relating to which his bond was taken. The Court will not be justified in summoning the surety when an application for restoration of the execution petition is filed, much less in ordering him to pay up the decretal amount. The mere fact that the surety failed to raise the point as regards the validity of the bond at the time cannot estop him from raising it later. AIR (Vol 21) 1934 Lah 92 : 148 Ind Cas 570.

——**Failure to apply in insolvency.**

On Judgment-debtor's failing to apply within one month option as to whether security should be realized or judgment-debtor committed to prison lies not with decree-holder but executing Court. 119 Ind Cas 500 : AIR (Vol 16) 1929 All 377.

——When the Court acts under S. 55 (4) of the C. P. Code, the surety bond is in favour of the Court though the ultimate beneficiary may be the decree-holder, and where the decree-holder grants time to the judgment-debtor a surety under S. 55 (4) is not discharged under Contract Act, S. 135. 100 Ind Cas 762 : AIR (Vol 14) 1927 Lah 336.

——Under S. 55 (4) surety does not merely undertake that the judgment-debtor will appear when called upon to do so, but also that the judgment-debtor will apply to be declared an insolvent within the prescribed period. If the judgment-debtor does not apply to be declared an insolvent within the prescribed one month, the surety can be proceeded against.

Obiter. The surety is liable even after the dismissal of the execution proceedings against the judgment-debtor. 86 Ind Cas 304 : AIR (Vol 13) 1926 Mad 286.

——Surety bringing judgment-debtor in Court during stay which was ordered in his favour is not absolved from his liability. 86 Ind Cas 105 :23 ALJ 59: 6 LRA Civ 171: AIR (V 12) 1925 All 344 (DB).

——Failure of judgment-debtor to apply within time makes surety liable though judgment-debtor may die after the time allowed. S. 55, Cl. 4 does not mean that the Court may proceed both against the surety as well as the debtor. 48 Bom 500 : 26 Bom LR 415 : 86 Ind Cas 257 : AIR (Vol 11) 1924 Bom 428 (DB).

——Court as well as decree-holder can enforce security bond even in execution although original execution application is dismissed. 81 Ind Cas 702 : 5 PLT 336 : 1924 PHCC 63 : AIR (Vol 11) 1924 Pat 487 (DB).

——**Discretion of Court.**

If the security has been realised under an order of the Court under section 55 (4) or in the first instance consists of a cash deposit, the judgment-creditor may ask the Court to execute the decree under section 145 against the money lying in Court. But the Court may, in exercise of its discretion, refuse to make an order in favour of the judgment-creditor. 64 Ind Cas 648 : 46 Bom 702: 23 Bom LR 1263: AIR (Vol 9) 1922 Bom 340.

——**S. 55 (3) and (4) and O. 21, Rr. 1 and 2 — Surety for appearance of judgment-debtor — Default — Realisation — Satisfaction of decree pro tanto.**

Where a judgment-debtor is arrested in execution of a money decree and a person stands surety for him under S. 55. Cl. (4) but omits to produce the judgment-debtor before the Court as undertaken by him, the amount realised from the surety must be credited towards the decree. The decree-holder cannot claim to have this amount over and above the amount of the decree. 25 CWN 36 : AIR (Vol 8) 1921 Cal 559 (DB).

——**Ss. 55 (4) and 145 — Cash Security — Forfeiture — Decree-holder to obtain benefit and not Government.**

Where cash security is deposited by a surety for benefit of a decree-holder to enable the judgment-debtor to apply in insolvency, the cash security must be paid to the decree-holder if the insolvency application fails and the Court cannot forfeit the amount to the Government. (1912) 39 Cal 1018 : 16 CWN 664 : 16 Ind Cas 118 (DB).

——**S. 55 (Ss. 336, 344 of old Code) — Release of judgment-debtor on furnishing security to apply to be declared insolvent within a month — Subsequent application — Maintainable.**

A judgment-debtor, who had been arrested, was released under S. 336 of the C. P. C. (old) on furnishing security that he would, within one month, apply to be declared an insolvent. He did not do so. He was not arrested again, and later on he applied under S. 334 to be declared an insolvent.

Held, that he was entitled to do so. (1902) 12 MLJ 438 : 25 M 724.

——S. 55 (S. 336 of old Code) — Arrest — Applicability of S. 250 (O. 21, R. 24 of 1908 Code) to realizing security given under S. 336 — Discharge of surety. (1903) 13 MLJ 484.

——**S. 55 (S. 336 old Code) — Surety for payment of decree — Execution against — Surety bond — Construction.**

The proper course for a decree-holder is to institute a separate suit to enforce his remedy against the sureties. But the right of surety to be proceeded against in a separate suit is capable of being waived by the terms of the bond itself or by subsequent conduct. Held also that in the particular case it was so waived. (1906) 10 CWN 830 : 4 CLJ 311 (DB).

9. Realisation of Security — Concurrent proceedings against judgment-debtor and surety.

——**S. 55(4) — Court, if can proceed both against debtor and surety.**

Under S. 55(4), the Court cannot proceed both against the debtor and the surety. If the judgment-debtor is brought before the Court and is committed to the civil prison, the state of affairs is just the same as if the surety had never come forward so that the Court cannot concurrently proceed against the surety. AIR (Vol 29) 1942 Pat 506: 21 Pat 644: 24 PLT 69: 9 BR 26: 202 Ind Cas 589 (DB).

——**S. 55(4) — Concurrent execution against judgment-debtor and surety.**

It is not open to a Court to proceed against both the judgment-debtor and his surety in execution. When the judgment-debtor is committed to prison the discharge of the surety follows automatically and once the former is committed to prison, the Court cannot concurrently proceed against the surety. AIR (Vol 20) 1933 Nag 38 : 29 NLR 83: 144 Ind Cas 239.

—**Surety's liability.**

Under S. 55 (4) it is not open to the Court to proceed both against the judgment-debtor and the surety; it could proceed only against one or the other. 117 Ind Cas 910: AIR (Vol 16) 1929 Lah 479.

——S. 54, Cl. 4 does not mean that the Court may proceed both against the surety as well as the debtor. Failure of the judgment-debtor to apply within time makes surety liable though, the judgment-debtor may die after the time allowed. 26

Bom LR 415: 86 Ind Cas 257: 48 Bom 500: AIR (Vol 11) 1924 Bom 428 (DB).

——S. 58.

——S. 58 (1) — Civil prison — Court-house, is not civil prison.

The term "Civil prison" means the civil jail and not a Court-house and any reasoning whereby detention in a Court-house can be regarded as an extension of detention in the civil prison is wrong. AIR (Vol 24) 1937 Lah 253: 39 PLR 471: 172 Ind Cas 510.

——S. 58(1) — Civil Prison.

The words "Civil prison" in the present code do not mean any more than the words 'Civil jail' in the old Code. 118 Ind Cas 531: AIR (Vol 16) 1929 Lah 361.

——S. 58(1)(a) — Imprisonment for more than 6 months, legality of.

Judgment-debtor cannot be imprisoned for more than 6 months in execution of a decree. Such an order is illegal. AIR (Vol 24) 1937 Lah 706: 39 PLR 690: 169 Ind Cas 613.

——S. 58(1)(a) (S. 342 of Old Code) — Imprisonment not to exceed six months — Debtor — Arrest — Imprisonment — Period, discretion to fix — Jurisdiction.

The Court cannot fix any term of imprisonment for a debt under S. 342, Civil Procedure Code, when committing a debtor to jail. (1902) 5 CWN 145 (DB).

——S. 58(1)(b)(iv) — Failure to pay subsistence allowance.

Where at the time of the decree-holder's omission to pay subsistence allowance, the judgment debtor was not detained in the civil prison, the section does not apply. "Civil prison" means civil jail and not a Court-house. AIR (Vol 24) 1937 Lah 253: 39 PLR 471: 172 Ind Cas 510.

——S. 58(1)(b)(iv) — 'Omission to pay'.

The words "Omission to pay" in S. 58(1)(b)(iv) include cases where the subsistence allowance though sent sufficiently early by money order does not reach the officer in time; a payment cannot be considered to have been made to the officer until he actually receives the money. 22 Ind Cas 25 : AIR (Vol 11) 1914 Mad 24.

——S. 58(1)(b)(iv) — Subsistence allowance.

The cost of clothing etc. required under S. 33, Prisons Act, is not "subsistence allowance" under S. 58 which includes only the monthly allowance fixed by scale under S. 57.(1912) 5 Bur LT 159: 6 LBR 61: 17 Ind Cas 911.

——S. 58(1)(b)(iv) (S. 341 of Old Code) — Non-payment of subsistence money on first arrest — Re-arrest.

A judgment-debtor who was arrested in execution of a decree against him, but liberated owing to non-payment by the decree-holder of the subsistence money for the debtor can be re-arrested in execution of the same decree. 26 A 317 : 1904 AWN 22 (DB).

[No longer law.—Ed.]

——S. 58(2) — Release before committal.

A judgment-debtor was released while being taken to civil prison — He cannot be held constructively to be detained in prison and is thus liable to be re-arrested. 118 Ind Cas 531: AIR (Vol 16) 1929 Lah 361.

——S. 58(2) — Release, not from Civil prison.

Where the judgment-debtor was not released from detention in civil prison, S. 58 has no application and the judgment-debtor is liable to be arrested, "Civil prison" means "civil jail". 118 Ind Cas 531. AIR (Vol 16) 1929 Lah 361.

——S. 58(2) and (1)(a) and (b) — Period of imprisonment — Rearrest.

A person could be rearrested, but while calculating the period of imprisonment under the new warrant the time of imprisonment under the former warrant should be deducted. (1912) 5 Bur LT 159: 6 LBR 61: 17 Ind Cas 911.

——S. 58(2) (S. 341 of Old Code) — Release of judgment-debtor — Arrest — Interim order under S. 15 — Insolvency Act — Recall of interim protection order — Re-arrest under the same decree — Legality of.

A judgment-debtor, who has been arrested and imprisoned in execution of a decree and has obtained an interim protection order under S. 13 of the Insolvency Act, is liable to be re-taken in execution of the same decree, under the provisions of the Civil Procedure Code. S. 341 pronibits re-arrest only in the cases mentioned in it. 12 C. 652 dissented from. (1902) 4 Bom LR 483: 26 B 652. (DB).

——S. 58, Proviso (1) and (2) — 'Such detention' — Judgment-debtor not in civil prison at time of decree-holder's omission to pay subsistence allowance — Civil prison, if includes court-house.

The words 'such detention' in proviso (1), S. 58, refer to and mean detention in the civil prison so also does 'detention under this section' in sub-s. (2). AIR (Vol 24) 1937 Lah 253: 39 PLR 471: 172 Ind Cas 510.

——S. 59.

——Ss. 59, 55 (3), (4) — S. 59, if controlled by S. 55 (3) and (4) — Judgment-debtor suffering from serious illness — Duty of Court to release him.

The provisions of S. 59 are self-contained and are not controlled by the provisions of S. 55 (3) and (4) and are based on purely humanitarian grounds. If a judgment-debtor is suffering from serious illness, Courts of Justice would be well-advised in ordering his release so as to escape the moral responsibility if anything happens to him in the event of his being sent to Jail. AIR (Vol 21) 1934 Lah 807 (2): 36 PLR 72: 152 Ind Cas 427.

——S. 59 (1) (2) — Discretion of Court in cancelling warrant of arrest — Arrest and attachment, if can be simultaneously made.

Under S. 59(1) a Court may cancel a warrant for the arrest of the judgment-debtor on the ground of his serious illness and under sub-s. (2) where a judgment-debtor has been arrested, a Court may release him if in its opinion he is not in a fit state of health to be detained in the civil prison. The adoption of either or both courses lies entirely within the discretion of the Court.

The argument that arrest and attachment should not be simultaneously made in view of the fact that the judgment-debtor owns considerable property and is a 'lambardar' and 'kursinashin', has no force. The position of the judgment-debtor and his consequent ability to meet the decree imposes an obligation on him to discharge it. AIR (Vol 20) 1933 Lah 307 (2) : 34 PLR 856 : 145 Ind Cas 709.

——S. 60.

1. Agriculturists.
   See also N. 8.
2. Applicability.
3. Artizan.
4. Compulsory deposit.
   See also N. 22.

4A. Common property of husband and wife.
   See N. 19.

5. Contingent and possible right.
6. Debt.
7. Gratuity.
8. House of agriculturist.
   See also Ns. 1, 15 and 23.
9. Implements of husbandry, cattle, etc.
10. Inam.

10A. Insurance policy.
See N. 6 and 19.
11. Jagir.
12. Maintenance.
See also N. 11.
13. Military pay.
See also (1) Army Act (English) 1881, Ss. 136 and 144 (2) Army Act, 1911, S. 120.
14. Objection.
See also N. 28.
14A. Offerings at temple.
See N. 18.
15. Occupation.
See also N. 8.
16. Pension.
See also N. 11.
17. Permanent lease.
See N. 19.
18. Personal service.
19. Power to dispose.
20. Proof.
See also N. 1.
21. Property attachable.
21A. Property exempted from sale for arrears of land revenue.
22. Provident fund.
22A Rent and Profits.
See N. 6.
23. Residence.
See also N. 8.
24. Right to attach.
24A. Right to sue.
See N. 5.
25. Salary and allowance.
26. Scope.
27. Wages.
28. Waiver and estoppel.
See also N. 14.
29. Wrongful attachment.

1. Agriculturist.
See also, N. 8.
(a) Onus.
(b) Who is
(c) Who is not
(d) Legal representative of judgment-debtor.
(e) Punjab Amendment.

(a) Onus.

——S. 60 (1) (c) — Party claiming benefit under — Onus.

A party claiming benefit of S. 60 (1) (c), Civil P. C., is bound to show that the person whose property was attached and sold was an agriculturist within the meaning of S. 60 (1) (c). The term "agriculturist" is used in cl. (c) in the sense of a person who is an agriculturist by profession, that is, a person whose main source of livelihood is cultivation. AIR (Vol 28) 1941 Oudh 395: 1941 OWN 618 : 1941 RD 328 : 193 Ind Cas 675.

——S. 60 (1) (c) — Onus.

The burden is upon the judgment-debtor to establish facts clearly to bring his case within the exemptions contained in S. 60, Civil P. C. and the judgment-debtor has to prove that he is an agriculturist not only in name but in the strict sense of the term. AIR (Vol 23) 1936 Lah 532: 161 Ind Cas 16.

——S. 60 (1) (c) — Burden of proof.

The burden of proving the conditions for the applicability of S. 60 (1) (c) lies on the debtor. 31 Pun LR 842: AIR (Vol 17) 1930 Lah 1034 (DB).

Per Daniels J. — Burden of proving that the case falls under S. 60, lies on the person objecting to the attachment. 87 Ind Cas 564: 6 LRA (Civ) 217: AIR (Vol 12) 1925 All 432 (DB).

——S. 60 (1) (c) — Onus.

A person claiming to be an agriculturist must show what his source of income is and that he is an agriculturist within the strict sense of the term. (1913) 35 All 307: 11 ALJ 437: 19 Ind Cas 125 (DB).

(b) Who is.

——S. 60 (1), Proviso, (b) and (c) — Agriculturist — Meaning of — Person tilling and cultivating own land through servants — If "agriculturist".

The term "agriculturist" as used in S. 60 (1), proviso, Cls. (b) and (c), C. P. Code, is intended to denote a real tiller of the land strictly and properly so called, and cannot include a person who does not cultivate with his own hands. The protection given by Cls. (b) and (c) of the proviso should be confined to persons who are personally engaged in tilling and cultivating the land and whose livelihood depends upon the proceeds derived from such tillage and cultivation of the soil. The protection is not available to large landed proprietors even though they may be tilling the land and cultivating it through their servants. ILR (1947) Bom 687: 49 Bom LR 867: AIR (Vol 35) 1948 Bom 229 (DB).

——S. 60 (1) (c) — Whether person is agriculturist — Test.

The words "tools of artisans, and where the judgment-debtor is an agriculturist, his implements of husbandry and such cattle and seed-grain as may, in the opinion of the Court, be necessary to enable him to earn his livelihood as such" in S. 60 (1) (b) indicate that an agriculturist within the meaning of S. 60 (1) (c) must be a person who tills the soil and thereby earns his livelihood and is expected to have implements of husbandry, cattle and seed-grain. This, however, does not necessarily mean that he must till the land with his own hands, or that he must necessarily have his own implements of husbandry; and old or otherwise disabled man, or a woman may not till the land with his or her own hands but may do it through others such as relatives or hired labourers. Still such person may be an agriculturist to all intents and purposes. Again a person may be a real tiller of land without having his own implements of husbandry. At the time of the cultivation he may borrow or hire such implements. In any case, however, cultivation must be his main source of living though this will not be the sole test. All the tests indicated above must be taken together, and the matter will have to be decided with reference to the facts of each particular case. AIR (Vol 31) 1944 Pat 272: 23 Pat 348 (DB).

——S. 60 (1) (c) — Occupancy 'raiyat' letting out lands and living on such income and having no other income.

The judgment-debtor had about 20 or 25 'bighas' of culturable land with regard to which he had been recorded as an occupancy 'raiyat'. He did not actually cultivate all these lands with his own hands, but got them cultivated under the 'bhag' system by letting them out to 'bagh chasis'. The other income which he derived from his 'zamindari' properties was only Rs. 25:

Held, the judgment-debtor was an agriculturist and his residential house was exempt from attachment. AIR (Vol 29) 1942 Cal 425: 46 CWN 612: 75 CLJ 501: 201 Ind Cas 632 (DB).

—S. 60 (1) (c) — No definition of an agriculturist can be formulated because the circumstances of every individual judgment-debtor have to be taken into consideration to decide whether he is an agriculturist or not. The Legislature has advisedly omitted to define this term and left it to the Courts to decide whether a particular individual situated as he is with reference to his occupation or other circumstances is an agriculturist or not.

The judgment-debtor derived his whole income from his lands and had no other profession or occupation. The lands were mainly under the cultivation of tenants but the landlord had to take interest in the cultivation of his land in order to get the most out of it and had also to see that his share in the produce reached him. Moreover it was in evidence that the judgment-debtor was cultivating about 800 ks. of land through his servants and labourers and not through his tenants. In fact he had been working at the plough himself and had been telling people that he did so on grounds of health:

Held, that all these considerations when taken together led to only one conclusion, that the judgment-debtor was an agriculturist within the meaning of S. 60 (1) (c), Civil P. C. AIR (Vol 29) 1942 Pesh 65 (2): 202 Ind Cas 770 (DB).

——S. 60 (1) (c) — Merely receiving rent from tenants or income of produce derived by employment of servants.

Reading cl. (b) of S. 60, Civil P. C. it is clear that the juxtaposition of the word "agriculturist" along with the word "artizan" implies a person who occupies himself in tilling the soil and whose livelihood depends on this tilling of the soil. It could hardly be said that the term "artizan" meant merely a person who engaged himself in the practice of some handicraft without reference to the fact that the person maintained himself by the practice of that handicraft. The meaning of 'artizan' is not in this section clearly a person who merely engages in some particular handicraft for pleasure or as a hobby or even as an additional source of income, but it means a person who employs himself in a handicraft personally and who depends for his living essentially on the proceeds derived from that handicraft. No doubt in most cases a rough and ready test would be afforded by considering the main source of income or the sole source of income, but that is not an absolutely correct test. The true test is whether a man personally engages in tilling and whether this occupation is essential to his maintenance. A person who merely receives rent from tenants or the income of produce derived by the employment of servants or partners, cannot be said to be personally engaging himself in tilling the soil and cannot be said to depend for his livelihood upon the proceeds derived from so engaging himself in the tillage of the soil. Such a person therefore cannot be called an agriculturist. AIR (Vol 26) 1939 Lah 388: 41 PLR 560: ILR (1940) Lah 23: 184 Ind Cas 261 (FB).

——Big landlord whose main source of income is rent from tenants and a jagir.

Protection under S. 60, Civil P. C., is intended to be given to those who are real tillers of the land and an agriculturist in the section is a person who is really dependent for his living on tilling the soil and unable to maintain himself otherwise. Main, chief or principal sources of income are not the proper tests.

A large landlord whose main source of income is rents from his tenants and a 'jagir' of Rs. 3,500 is not an agriculturist within the meaning of S. 60. AIR (Vol 26) 1939 Lah 40: 41 PLR 225: 180 Ind Cas 242.

——S. 60 (1) (c) — Mere owner of land.

The term "agriculturist" as used in S. 60, must be strictly construed and it denotes a husbandman and a person who carries on and makes his living by tillage and not a mere owner of land. AIR (Vol 25) 1938 Lah 72: ILR (1938) Lah 374: 40 PLR 984 : 177 Ind Cas 60.

——S. 60 (1) (c) — Factors to be considered in determining whether a person is agriculturist — Owner of land not cultivating it himself but letting it out.

In order to decide whether a person is an agriculturist the following factors should be considered: (1) Whether a person is an agriculturist or not is not a question turning on source of income but on nature of occupation. (2) A person may have many occupations. If one of them is agriculture and for that purpose a house or building is occupied, protection can be claimed. (3) A person who owns land and lets it reserving either money or produce is not an agriculturist but a landlord. (4) A person who cultivates the land as a labourer, though neither a land-owner nor a tenant, is an agriculturist. (5) If a man cultivates the land with his own hand or by means of labourers whose activities he directs he is an agriculturist whether he operates on a large or a small scale. If he has no connection with the land except that he owns it and people work for him, he may or may not be an agriculturist according to circumstances.

An owner of land who does not cultivate the land himself but lets out his lands on 'batai' (reserving share of produce instead of money rent), is not an agriculturist. AIR (Vol 25) 1938 Nag 366: ILR (1938) Nag 461: 179 Ind Cas 688 (DB).

[AIR (Vol 7) 1920 Nag 45: 55 Ind Cas 481 (DB) and AIR (Vol 14) 1927 Nag 374: 102 Ind Cas 712 Overruled.]

——S. 60 (1) (c) — Test to determine if a person is an agriculturist — Sole or main source of income.

In order to determine whether a person is an agriculturist within the meaning of S. 60 (1) (c), Civil P. C. the test is not "main source of income"; neither is it "sole source of income". Main, chief, or principal sources of income are not the proper tests. A man's main source of income may be from tilling the soil but his other source or sources of income may be more than sufficient to maintain him. The fact that a man's income from tilling the soil may be larger than his income from his ownership of land or other sources does not make him an agriculturist within the meaning of the section. At the same time there is no reason for depriving an agriculturist of the exemption under the section because he may have invested money in business or businesses and may derive some income therefrom or do coolie work and add to his earnings in bad times. The test of sole source of income if applied would deprive him of the benefit of the section and the test that he must be a tiller of the soil really dependent for his living on tilling the soil and unable to maintain himself otherwise should be preferred. AIR (Vol 24) 1937 Mad 551: 45 LW 704: (1937) 2 MLJ 11: 1937 MWN 524: ILR (1937) Mad 777: 170 Ind Cas 198 (FB).

——S. 60 (1) (c) — An agriculturist is a professed cultivator of land, a farmer or husbandman. The term in S. 60, Civil P. C., does not exclude a large land-owner or a person who does not depend solely or mainly on cultivation for his livelihood, but a person who does not himself till land and earn his living thereby wholly or partly is not an agriculturist within the meaning of the section. AIR (Vol 23) 1936 Lah 737 : 38 PLR 333 : 164 Ind Cas 690.

——S. 60 (1) (c) — Judgment-debtor cultivating for years and having cattle tethered to house — House used directly for agricultural purposes — Mere fact of owning 150 acres when he cultivates only 25 acres himself does not render him non-agriculturist.

A man who has been cultivating for many years, and who has his cattle tethered beneath his house and a granary at the back of it has all the insignia of a cultivator. When he occupies

this house, and uses it directly for agricultural purposes in housing his cattle, his implements, his seed, paddy and his labourers, he must be regarded as occupying the house as an agriculturist and is entitled to exemption from attachment. The fact that the judgment-debtor owns about 150 acres of land but he is cultivating 25 acres himself while the other 125 acres are being cultivated by his son who devotes all the profits to paying off his father's debts, does not render the judgment-debtor a zemindar or rent-receiving landlord. AIR (Vol 23) 1936 Rang 215 : 162 Ind Cas 694 (2) (DB).

——**S. 60 (1) (c) — Test to determine.**

The test applied in deciding whether a person is an agriculturist is whether his main source of income was derived from cultivation or not. The term "agriculturist" used in Cl. (c), S. 60 (1), Civil P. C., is used in the sense of a person who is agriculturist by profession that is, a person whose main source of livelihood is cultivation. AIR (Vol 22) 1935 All 448 : 1935 ALJ 507 : 1935 RD 212 : 1935 AWR 479 : 157 Ind Cas 986 (DB).

——**S. 60 (1) (c) — Cultivation of land by hired labourers by person having different occupation.**

The term "agriculturist" in S. 60 (1) (c), Civil P. C., refers to an occupation and a man is an agriculturist who engages in the cultivation of land, that is, who ploughs land, sows the crop and attends to it. The cultivation of land by hired labourers by a person who has a different occupation does not constitute that person an agriculturist. AIR (Vol 22) 1935 All 292 (1) : 1935 RD 18 : 1935 AWR 47 : 1935 ALJ 306 : 153 Ind Cas 511 (1).

——**S. 60 (1) (c) — Agriculturist holding occupancy land for building purposes — Exemption of house from attachment.**

The mere fact that the judgment-debtors have obtained permission to build houses on a portion of the land which was formerly their occupancy tenancy does not necessarily imply that they have themselves ceased to be agriculturists or that they no longer occupy their house in the capacity of agriculturists. AIR (Vol 19) 1932 All 499 : 1932 ALJ 499 : 16 RD 506 : 138 Ind Cas 67 (DB).

——S. 60 (1) (c) — The term "agriculturist" is used in S. 60 (1) (c), Civil P. C., to denote a person making his living by tilling the soil; in other words, whose sole means of livelihood is gained by cultivating land and does not necessarily mean a person who works with his hands. It includes a small holder of the land who tills the soil but not a large landed proprietor even though his sole income is derived from land. AIR (V 19) 1932 Oudh 76 : 8 OWN 1353 : 16 RD 130 : 136 Ind Cas 335 (DB).

——**S. 60 (1) (c) — Definition of "agriculturist".**

An agriculturlist for the purposes of S. 60 (c) is a person whose main source of livelihood is agriculture. No hard and fast rule can be laid down for cases where a person cultivates his own land and the aggregate income derived from his labour and ownership of the land is spent on the maintenance of himself and his family. Each case must depend upon its own circumstances. The fact that he cultivates his own land and thereby maintains himself and his family will not necessarily make him any the less an agriculturist. On the other hand, land which he cultivates if let to tenants may be considered to be sufficient for his maintenance he will not be considered to be an agriculturist only because he cultivates the whole of what he owns. AIR (Vol 18) 1931 All 20 : 14 RD 716.

——**"Agriculturist".**

The word 'agriculturist' is not confined to a person whose sole means of livelihood is cultivation. It extends to an agriculturist who gains some portion of his livelihood from other pursuits. Therefore a person is an agriculturist within S. 60 (b) and (c) if he gains a substantial portion of his livelihood by cultivation. 26 NLR 295 : AIR (Vol 18) 1931 Nag 8 : 130 Ind Cas 81.

——**Agriculture.**

——Where a person has tilled his land for years, his temporary letting out of the land does not destroy his status as an agriculturist. 119 Ind Cas 225 : 30 PLR 649 : AIR (Vol 17) 1930 Lah 191.

——It is doubtful whether a person who is both a cultivator of land and a zemindar can only be called an agriculturist if his main source of income is derived from agriculture. 9 LRA Rev 130 : 116 Ind Cas 20 : AIR (Vol 15) 1928 All 211.

——One who earns his livelihood wholly or principally by agriculture or who ordinarily engages personally in agricultural labour is an agriculturist. 106 Ind Cas 45 : AIR (Vol 15) 1928 Lah 132.

——**Chief means of livelihood determine the profession.**

Chief means and not simply one means determine the profession. 92 Ind Cas 416: AIR (Vol 14) 1927 Mad 342 (DB).

——**Female occupancy tenant not cultivating field herself.**

Where a widow inherited from her husband an occupancy field of 3.50 acres, a house said to be worth Rs. 500 and a kotha worth Rs. 50, all in the same village, and the widow never cultivated the holding herself but sub-let it every year since her husband's death, she having no bullocks for the purpose.

Held, that she was an agriculturist. 10 NLJ 159 : 102 Ind Cas 712 : AIR (Vol 14) 1927 Nag 374.

——A person who has no other source of livelihood than agriculture is an agriculturist and houses in his occupation are exempt from attachment. 87 Ind Cas 564 : 6 LRA Civ 217 : AIR (Vol 12) 1925 All 432 (DB).

——Becoming Akali is not ceasing to be agriculturist. 7 LLJ 95 : 26 PLR 463 : 88 Ind Cas 543 : AIR (Vol 12) 1925 Lah 331.

——**Who is.**

Where a judgment-debtor's only source of living is not by cultivation of land, he is not an agriculturist. (1921) 63 Ind Cas 681 (DB) (Cal).

——**S. 60(1)(c) — Agriculturist — Transfer of land on lease or mortgage.**

A person does not cease to be an agriculturist merely because he transfers his land by lease or mortgage. He still continues to be an agriculturist and his property is protected from attachment. 16 NLR 89: 55 Ind Cas 481: AIR (Vol 7) 1920 Nag 45.

——**S. 60 (1) (c) — "Agriculturist" — Who is.**

The term "agriculturist" in S. 60 (c) not only means persons who cultivate land in which they have an interest as proprietors or tenants but includes persons engaged in the cultivation of land. Therefore a professed cultivator of land earning his wages from another employer and owning a house is entitled to be protected from the attachment of that house under this section. 41 Bom 475 : 19 Bom LR 281 : 39 Ind Cas 639 : AIR (Vol 4) 1917 Bom 253 (DB).

——**Agriculturist — Zamindari land.**

A person who is a tenant of 50 bighas of land but who also owns 20 bighas of zamindari land, and whose chief occupation and means of liveli-

hood is agriculturist is an agriculturist. 14 ALJ 240 : 30 Ind Cas 727 : AIR (Vol 3) 1916 All 332.

——**S. 60 (c) — Agriculturist — Meaning of.**

An agriculturist whose house is exempt from attachment by S. 60 (c) is one who belongs to the class of common agriculturists who till the field and whose main source of livelihood is cultivation. 20 CWN 874 : 35 Ind Cas 343 : AIR (Vol 3) 1916 Cal 891 (DB).

(c) Who is not.

——**Agriculturist — Large landed proprietors.**

The nrm "agriculturist" is S. 60 (1) proviso Cls. (b) and (c), does not include a person who does not cultivate with his own hand. The protection is not available to large landed proprietors even though they may be tilling the land and cultivating it through their servants. ILR (1947) Bom 687 : 49 Bom LR 867 : AIR (Vol 35) 1948 Bom 229 (DB).

——**S. 60 (1), Proviso (b) and (c) — Agriculturist — Cultivation of insignificant area — If sufficient.**

The cultivation of an insignificant area by judgment-debtor is not sufficient to establish that he is an agriculturist. 222 Ind Cas 138 : AIR (Vol 33) 1946 Lah 267.

——**S. 60 (1) (c) — Judgment-debtors owning only property which was subject matter in application.**

Where the only property owned by the judgment-debtors was the property which was the subject-matter in the application and there was nothing left from which they could derive their livelihood as agriculturists and no attempt was made by them to show that they worked as agriculturists on lands of any other person:

Held, that they were not agriculturists within the meaning of S. 60 and hence their property was not exempt from attachment. AIR (Vol 27) 1940 Cal 5.

——A person who admits to have cultivated land in one year and has not done so in any subsequent year cannot be an agriculturist within the meaning of S. 60, Civil P. C. (1940) 42 PLR 261.

——**S. 60 (1) (c) (as amended by Punjab Relief of Indebtedness Act) — Person neither tilling soil with his own hands nor maintaining himself mainly on agriculture.**

A person who has neither been tilling the soil with his own hands (except a small area for one harvest only) nor maintaining himself solely or mainly on agriculture is not an agriculturist and is not entitled to protection of S. 60 (1) (c). AIR (Vol 26) 1939 Lah 537 : 41 PLR 663.

——**Big landlord having his main source of income from rents.**

A large landlord whose main source of income is rents from his tenants and a jagir of Rs. 3,500 is not an agriculturist. AIR (Vol 26) 1939 Lah 40 : 41 PLR 225 : 180 Ind Cas 242.

——S. 60 (1) (c) — Mere owner of land is not an agriculturist. AIR (Vol 25) 1938 Lah 72: ILR (1938) Lah 374: 40 PLR 984: 177 Ind Cas 60.

——**S .60 (1) (c) — Owner letting out land.**

An owner of land who does not cultivate the land himself but lets out his lands on batai (reserving share of produce instead of money rent), is not an agriculturist. AIR (Vol 25) 1938 Nag 366 : ILR (1938) Nag 461 : 179 Ind Cas 688 (DB).

[AIR (Vol 7) 1920 Nag 45: 55 Ind Cas 481 (DB) and AIR (Vol 14) 1927 Nag 374: 102 Ind Cas 712 Overruled].

——**Kotha owner agriculturist in Lahore Cantonment but not used for agricultural purposes — Agriculturist having no land in Lahore District.**

Kothas in Lahore Cantonment not used for agricultural purposes but owned by an agriculturist having no land in Lahore District, are not exempt from attachment either under S. 60, C. P. C. or S. 35, Punjab Relief of Indebtedness Act. AIR (Vol 24) 1937 Lah 113 : 171 Ind Cas 932.

——**S. 60 (1) (c) — Main source of income not proved to be agriculture — Land not situated near house in dispute — Area of land owned not proved.**

Where it is not established that the judgment-debtors' main source of income is agriculture, their land is not situated near the house sought to be attached but in another village where they have a residential house and they have not proved what the area of the land owned by them is it cannot be held that they are agriculturists in spite of the fact as alleged by them that they are members of an agricultural tribe, within the meaning of S. 60 (1) (c), Civil P. C. AIR (V 23) 1936 Lah 532: 161 Ind Cas 16.

——**S. 60 (1) (c) — Cultivation by hired labourers.**

Cultivation of land by hired labourers by a person who has a different occupation does not constitute that person an agriculturist. AIR (V 22) 1935 All 292 (1) : 1935 RD 18 : 1935 AWR 47 : 1935 ALJ 306 : 153 Ind Cas 511 (1).

——One who earns his livelihood wholly or principally by agriculture or who ordinarily engages personally in agricultural labour is an agriculturist.

The judgment-debtor did not cultivate any land himself being physically unfit to do so, and owned some land which was let out to tenants on the batai system; he did not own any cattle; the house intended to be attached was used for stabling his mare and storage of fodder for the mare.

Held, that he was not an agriculturist. AIR (V 15) 1928 Lah 132 : 106 Ind Cas 45.

——**Zamindar.**

A zamindar must be taken to be a zamindar unless his main source of income is proved to be from cultivation. AIR (V 14) 1927 All 601 : 106 Ind Cas 49 : 8 LRA Rev. 229.

——**Large landed proprietor is not agriculturist and his house is not exempt from attachment under S. 60 (c).**

The term 'agriculturist' is not used in cl. (c) in its etymological sense, but it is used to denote a person making his living by tilling the soil. It means and includes a small holder of land who tills the soil and cultivates it; but a large landed proprietor, e.g., one owning 300 acres of land, even though his sole income is from land, is not an agriculturist within the meaning of cl. (c). The word 'agriculturist' in the clause must be interpreted in a strict sense. AIR (V 13) 1926 Mad 350: 50 MLJ 90: 49 Mad 227: 92 Ind Cas 398 (DB).

——An agriculturist is not a person who obtains his livelihood otherwise than by cultivating himself or through his servants, even, if he may have some sort of interest in a field or two. AIR (V 12) 1925 Oudh 365 : 85 Ind Cas 700.

——**Agriculturist — Source of income.**

Where the chief source of income of insolvent at the time of his application is his zamindari he is not an agriculturist. AIR (V 4) 1917 All 427 : 15 ALJ 540 : 40 Ind Cas 544 (DB).

(d) Legal representative of judgment-debtor.

——**Status of judgment-debtor and not of his legal representative must be seen.**

In order to claim exemption as an "agriculturist" under S. 60, Civil P. C., the status of the judgment-debtor has to be seen and not that of

his legal representative. The legal representative cannot claim exemption as agriculturists in their own right. AIR (V 30) 1943 Lah 19 : 45 PLR 57: ILR (1943) Lah 242: 204 Ind Cas 344 (FB).

——Decree passed for debt of agriculturist debtor against his non-agriculturist legal representative — Property inherited by him, if liable to attachment in execution.

Where on the death of an agriculturist debtor a decree is passed against his legal representatives who are non-agriculturists, the property inherited by them from the deceased is liable to attachment in execution of the decree. AIR (V 27) 1940 Lah 320 : 42 PLR 446 : ILR (1941) Lah 588 : 190 Ind Cas 321.

——Question whether judgment-debtor is agriculturist has to be decided with reference to date of attachment.

The question whether the judgment-debtor is an agriculturist has to be decided with reference to the date of the attachment and whether the property is attachable or not has to be decided with reference to the situation on that date. A man might cease to be an agriculturist within the meaning of S. 60, Civil P.C. Surely it cannot be argued if a man had so ceased to be an agriculturist that his property could not be attached because at the time of the decree he might have fallen within the definition of agriculturist. Similarly, a man might become an agriculturist and his property might not be liable to attachment at the time when it is attached and it cannot be argued that because at the date of the decree he was not an agriculturist, therefore the property was liable to attachment. Where therefore the property is attached when in the possession of and owned by a legal representative who is a non-agriculturist, the property is liable to attachment and sale on that date. It is beside the question to discover whether the original debtor was or was not an agriculturist within the meaning of S. 60. AIR (V 26) 1939 Lah 556 : 41 PLR 524 : 185 Ind Cas 609 (DB).

——Property of agriculturist, if retains immunity in hands of his legal representatives who are not agriculturists, after his death.

Exemption from attachment attaches to the property itself and not to the person holding the property for the time being and consequently if the property happens to come within the meaning of cl. (c) of the proviso to sub-s. (1) of S. 60, Civil P.C., it is immune from attachment. Property exempted from attachment on the ground of the judgment-debtor being an agriculturist retains this immunity even after the death of the judgment-debtor even if the property passes into the hands of his legal representatives who are not agriculturists. Where in execution there is a finding that the property is exempt from attachment, the finding operates as res judicata in a subsequent execution against the legal representatives of the judgment-debtor. AIR (Vol 25) 1938 Lah 608: 40 PLR 409: 177 Ind Cas 835 (DB).

——S. 60 (1) (c) — Attachment of non-ancestral house of judgment-debtor — Respondent taking by inheritance on his death and occupying as agriculturist.

A decree for money was executed against the judgment-debtor in his lifetime and his house attached. Subsequently, it having been found that the house was not ancestral on his death the respondent took it by inheritance and not by reversion and occupied it as agriculturist and objected to the attachment:

Held, that the matter that should be taken into consideration in deciding the question whether the house was or was not exempt from sale under S. 60, Civil P.C. was not the profession of the legal representative but that of the original judgment-debtor himself against whom the decree was and against whom it was being executed. AIR (Vol 23) 1936 Lah 895: 167 Ind Cas 457.

——Punjab customary law.

Ancestral property which devolves in accordance with Punjab agricultural custom includes both lands as well as house and such property is exempt from attachment in execution. Where, however, the judgment-debtor agrees with the decree-holder that in consideration of the latter's undertaking not to have him arrested all his property would be liable then the ancestral property is liable to attachment. In such a case the principle of estoppel plays its part. AIR (Vol 23) 1936 Lah 737: 38 PLR 333: 164 Ind Cas 690.

——S. 60 (1) (c) — Decree against assets of deceased person in the hands of agriculturist successor — Deceased not agriculturist — Exemption of house from attachment.

Where a decree has been passed against the assets of a deceased person in the hands of his successor and the successor is an agriculturist, a house occupied by the latter and which has vested in him cannot be attached in execution of the decree even though the deceased person was not an agriculturist. AIR (Vol 19) 1932 All 508: 1932 ALJ 675: 16 RD 599: 54 All 736: 138 Ind Cas 685 (1) (DB).

(e) Punjab Amendment.

——S. 60 (1) (ccc) (as amended by Punjab Act XII of 1940) — If retrospective — Fact that sale was not confirmed is immaterial — Word "sale" in S. 60 (1) (ccc) means sales as at conclusion of auction and not as confirmed by Court.

There is nothing in the Punjab Amending Act, XII of 1940, which expressly or by necessary implication gives retrospective effect to its provisions so as to make them applicable to cases in which the attachment or sale had been effected before its enactment. Hence S. 60 (1) (ccc), Civil P.C., as amended by the Punjab Act, does not apply to attachment or sale effected before the Amending Act came into force. The fact that the sale was not confirmed when the Amending Act came into force is immaterial inasmuch as the word "sale" in S. 60 (1) (ccc) has the same meaning as in other provisions relating to execution sale in the Civil P.C., namely a sale as at the conclusion of the auction and not as confirmed by the Court.

Moreover, the auction-purchaser has substantial rights in the property during the interval between the auction-sale and the confirmation thereof and these rights cannot be taken away by supervening legislation unless the Legislature has clearly expressed itself that it shall be so; the Punjab Act XII of 1940, which amended S. 60, Civil P.C. does not contain any such provision and hence a judgment-debtor other than an agriculturist cannot claim exemption under S. 60 (1) (ccc) when the sale had been effected before the date on which the Amending Act XII of 1940 came into force, though the sale had not been confirmed on that date. AIR (Vol 29) 1942 Lah 102: 44 PLR 126: ILR (1942) Lah 349: 200 Ind Cas 302 (FB).

——S. 60 (1) (cc) (as amended by Punjab Act (XII of 1940) — Words "belonging to agriculturist", qualify "open spaces or enclosures".

The words in cl. (cc) of S. 60 (1) "belonging to an agriculturist" qualify only the words "open spaces or enclosures". The words belonging to an agriculturist" must be read in conjunction with the words immediately following "and required for use in case of need for tying cattle," and the phrase "belonging to an agriculturist and required for use in case of need for tying cattle" must be

read as a whole. Such a qualification can only apply to "open spaces or enclosures", and not to the description of the animals preceding. Therefore, the amendment of S. 60 (1) by cl. (cc) makes all milch animals exempt whether they belong to an agriculturist or not. AIR (Vol 29) 1942 Lah 88: 44 PLR 66: 200 Ind Cas 159.

3. Applicability.

——S. 60 (1) and Proviso (b) — Applicability and scope — Decree giving mortgage lien or charge — Sale in execution — If prohibited.

S. 60 applies only to money decrees and not generally to all decrees. The proviso to the section cannot extend the scope of the section but must limit its application. It could not have been the intention of the legislature to extend the application of the section itself in such a way as to interfere with the law relating to the transfer of immovable property. The section is restricted in its application to money decrees, and the words "attachment and sale" in the section do not apply appropriately to the enforcement of mortgages or liens. ILR (1946) Kar 311: 227 Ind Cas 206: AIR (Vol 34) 1947 Sind 32 (DB).

——Public officer — Railway servant.

A railway servant is a public officer to whom the provisions of S. 60, Civil P.C. apply. AIR (Vol 32) 1945 Bom 76: 46 Bom LR 757.

——S. 60 (1), proviso — Where agriculturist mortgages house.

Where a decision of the Courts originally wrong or an erroneous conception of the law, especially of real or immovable property has been held for a length of time, and as such, has become the basis upon which rights have been regulated and arrangements as to property made, the maxim communis error facit jus should be applied and the view of the law taken for a long time should not be disturbed.

As it has been held by the Lahore and other High Courts for the last 60 years or so that S. 60 (1) does not apply to mortgage decrees, that view of the law must be followed by applying the maxim 'communis error facit jus'. Hence a house or other buildings (with the materials and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to an agriculturist and occupied by him are not exempt from sale under S. 60 (1), Proviso (c), in execution of a decree for sale passed on the basis of a mortgage of the said property executed by the said agriculturist. AIR (Vol 32) 1945 Lah 123: ILR (1945) Lah 373: 47 PLR 107: 221 Ind Cas 14 (FB).

——S. 60 (1) — Word "or" in proviso.

The word "or" is used in Proviso to S. 60 (1) to include decrees in which no attachment is necessary and mortgage decree is one of this class. AIR (Vol 28) 1941 Pesh 53: 1941 Pesh LJ 53: 194 Ind Cas 716.

——Where agriculturist mortgages house.

Section 60, Civil P.C., does not apply where an agriculturist has himself mortgaged his house. AIR (Vol 27) 1940 Lah 126: 189 Ind Cas 782.

——An amendment to S. 60, under S. 3 or Act IX of 1937 is applicable to proceedings other than those arising from suits. AIR (Vol 27) 1940 Sind 147: 191 Ind Cas 31.

——Restricted to cases coming under S. 60 (h).

Scope of cl. (1) of S. 60 cannot be restricted in its applicability to the case of those to whom cl. (h) applies. AIR (Vol 26) 1939 Pat 77: 17 Pat 706: 19 PLT 768: 5 BR 61: 178 Ind Cas 141 (DB).

——The amended S. 60, Civil P.C., has no application in proceedings arising out of a suit instituted before June 1, 1937. AIR (Vol 26) 1939 Pat 77: 19 PLT 768: 5 BR 61: 17 Pat 706: 178 Ind Cas 141 (DB).

——Distress, if permitted.

No distress is permitted under Civil P.C., and the provisions of S. 60 of the Code cannot be applied by analogy to distraint. AIR (Vol 26) 1939 Sind 276: ILR (1939) Kar. 566: 184 Ind Cas 698 (DB)).

——When does not apply.

Unless there is a definite decision by the Court that either the judgment-debtor was not an agriculturist or the property did not belong to him and was not occupied by him, the house or other building would be immune from the process of execution and attachment. AIR (Vol 23) 1936 Lah 930 : 38 PLR 691.

[Overruled in AIR (Vol 29) 1942 Lah 153 : 203 Ind Cas 166 (FB).]

——Person living upon trade — Pleasure garden surrounding residential house — House and garden, whether exempt.

A pleasure garden, appurtenant to a residential house of a person and not used as a source of livelihood by him, who relied for his livelihood upon trade and contractor's work is not exempt from attachment under S. 60, Civil P.C., nor is the house so exempt. AIR (Vol 23) 1936 Pesh 151: 163 Ind Cas 621.

——Object is to exempt certain property from minor process of attachment.

The object of S. 60 is to exempt certain property which would normally be liable to attachment and sale from the minor process of attachment. There is a clear distinction between attachment and an attachment with a view to sale. There can be attachment without sale but there cannot be in execution a sale without attachment. AIR (Vol 23) 1936 Pesh 109: 2 JR 26.

——S. 60 does not apply to executions under a mortgage decree. AIR (Vol 16) 1929 Rang. 275 (DB).

——An agriculturist can make a valid mortgage of his house in execution of a decree in which the house may be sold. (Contra Ryves, J.).

Per Walsh, J.—The word 'such' in the proviso of S. 60 removes the distinction which the word 'or' would otherwise have in the expression 'attachment or sale' which must therefore mean attachment or sale in execution of decree. S. 60 does not apply to a sale under a mortgage decree.

Per Ryves, J.—S. 60 applies to all decrees. Therefore it forbids the sale of a mortgaged house of an agriculturist. 84 Ind Cas 749: 22 ALJ 321: 5 LRA Civ 201: 46 All. 489: AIR (Vol 11) 1924 All. 328 (FB).

——The income of the Panchotra is not covered by S. 60, C.P. Code nor by S. 70 of Act XVII of 1887. 73 Ind Cas 928: AIR (Vol 11) 1924 Lah 226.

——Interpretation — Strict.

The provision of S. 60, C.P.C., which restricts the right of the decree-holder to realise the decretal amount from the property of the debtor should be strictly construed. 4 PWR 1917: 21 PLR 1917: 39 Ind Cas 375: AIR (Vol 4) 1917 Lah 21.

——Applicability — Mortgage of house of agriculturist.

Per Full Bench (Banerjee J. dissenting).—S. 60 does not apply to execution of mortgage decrees. House of an agriculturist is not appurtenant to his holding. The proviso is not intended to render the sale or mortgage of the house of an agriculturist invalid. Under O. 34 Rr. 4 and 5, a mortgagee is entitled to a decree for sale and also to execute such decree notwithstanding S. 60 (1) (c). (1912) 34 All 25: 8 ALJ 1045: 11 Ind Cas 646 (FB).

3. Artizan.

——S. 60 (1) (b) — Person employing artisans is not himself artisan — Hotel-keeper cannot claim exemption from attachment of vessels used by his employees for preparing food sold by him.

If a person employs a number of artisans to work for him and gives them tools for that purpose, he is not himself an artisan but an employer of labour who would not be entitled to the benefit of S. 60 (1) (b). Hence a hotel-keeper cannot claim exemption from attachment of the vessels used by his employees in the preparation of food which he sells to the public. AIR (Vol 30) 1943 Mad 523: (1943) 1 MLJ 414 : 56 LW 301 : 1943 MWN 437 : 209 Ind Cas 22.

——S. 60 (1) (b) — Tools of artisan — Cooking vessels of sweet-meat seller are not tools.

Cooking utensils used by a sweat-meat seller are not tools of artisans within the meaning of S. 60 (1) (b), and are not, therefore exempt from attachment. AIR (Vol 30) 1943 Mad 523: (1943) 1 MLJ 414: 56 MLW 301: 1943 MWN 437: 209 Ind Cas.22

——S. 60 (1) (b) — If includes musician — His musical instruments, if "tools of artisan."

The musical instruments used to earn a livelihood are not "tools of an artisan" within the meaning of S. 60 (1) (b). In common speech "artisan" does not mean "artist"; it does not include musician. AIR (Vol 29) 1942 Mad 4: 1941 MWN 783: (1941) 2 MLJ 671: 200 Ind Cas 868

——S. 60 (1) (b) — Sewing machines in tailor's shop whether tools of artisan.

A tailor who uses a sewing machine is an artisan and the sewing machine is an artisan's tool. Section 60 (1) (b), does not say that only such tools shall not be liable to attachment as are necessary for the maintenance of the artisan. Hence all the machines which were in use in the tailor's shop at the time of the attachment are artisan's tools within the meaning of S. 60 (1) (b) and exempt from attachment. The fact that only one machine is sufficient for the tailor's maintenance or that he is working in another man's shop subsequent to attachment is no ground for refusing to release the machines from attachment. AIR (Vol 28) 1941 All 157: 1941 ALJ 117: 1941 OWN 52: 1941 AWR HC 55: ILR (1941) All 278: 193 Ind Cas 826

——S. 60 (1) (b) — Utensils of sweet-meat vendor for preparing sweets.

An artisan is not merely a person who is engaged in mechanical employment but a person who works in the production of some commodity and whatever he uses for the production of the commodity may be considered as his tools. Consequently, the utensils used by sweetmeat vendor for preparing sweets are tools even if he is employed by another to make sweets. AIR (Vol 22) 1935 All 848: 1935 AWR 963: 1935 ALJ 1011: 158 Ind Cas 623.

——Instruments of surgeon, whether exempt.

The word "artisan" implies a handicraftsman, that is to say, one who makes certain things as part of his trade or calling and the instruments of a professional man like a surgeon or doctor are not, therefore, exempt from attachment under S. 60. AIR (Vol 20) 1933 Lah 936 (1): 34 PLR 809: 15 Lah 26: 144 Ind Cas 848

——'Cooking vessels', 'artisan', 'tool', meanings of — Gagra whether cooking vessel — Soap maker, whether artisan.

Section 60, ought to receive a liberal interpretation. The expression "cooking vessels" in the said section does not mean only vessels in which food is actually cooked but includes vessels necessary for cooking operations, such as a thali and a gagra.

One who practises the art of soap-making should be considered to be an artisan within the meaning of that word in S. 60 (1), cl. (b), and the paraphernalia of such a person for the soap factory should be considered as tools of an artisan within the meaning of S. 60 and are, therefore, not liable to attachment and sale in execution of a decree. AIR (Vol 19) 1932 All 344: 54 All 399: 136 Ind Cas 280.

——Tool of Artizan.

A sewing machine is a tool. There is no reason why a tool should be confined to primitive implements. AIR (Vol 10) 1923 Nag 289: 65 Ind Cas 416: 19 NLR 22

——S. 60(b) — Artisan — Meaning of.

Musical instruments are not "tools of artisans" within this section and are therefore not exempt from attachment. 'Artisan' is not defined in this or any other Act. The popular meaning is one engaged in a mechanical employment. Musicians and washermen are not artisans. 5 LW 596: (1917) MWN 420 : 38 Ind Cas 415 : AIR (Vol 5) 1918 Mad 927 (DB).

——S. 60(b) — Musical Instruments.

Under S. 60(b) musical instruments are not exempt from attachment as tools of artisans. AIR (Vol 4) 1917 Upp Bur 4: (1916) 2 U B R 133: 38 Ind Cas 414

4. Compulsory deposit

See also N. 22

——S. 60 (1) (k) — Optional subscriber — His deposit compulsory within cl. (k).

Obiter — Even an optional subscriber cannot demand repayment of his deposit at his option, and consequently such deposit also may be regarded as a compulsory deposit within the meaning of S. 60 (1) (k). AIR (Vol 31) 1944 Cal 135: ILR (1944) 2 Cal 187: 214 Ind Cas 108 (DB).

4A. Common property of husband and wife.

See N. 19.

5. Contingent and possible right.

——S. 60 (e).

Benefits arising out of contract for delivery of goods even after breach by promisor. The words "a mere right to sue for damages" are restricted to damages arising from bodily or mental suffering or injury to the person or reproduction of the debtor and not to damages for breaches of contracts. AIR (Vol 36) 1949 All 433: 1949 ALJ 17 (DB).

——S. 60 (1) (m) — Gift to grand-daughters under will.

The testator who had no male issue provided in his will that after his death his wife should become the proprietor. The will then proceeded as follows:— "4. On the death of my wife the whole of my estate being treated as 16 annas right, 3 annas and odd out of it shall pass into the possession of the daughter-in-law but she shall not have the right to transfer the same, 12 annas share shall pass into the possession of the two daughters born of the womb of my daughter who are still living, in equal shares, i.e., each will get six annas share and one anna share shall pass into the possession of the sister-in-law as absolute proprietors having the right to alienate, etc., the property. 5. On the death of my daughter-in-law all properties held in possession by her without the right of transfer as laid down in para. 4 of this will shall pass in entirety into the possession of the two daughters of my daughter in equal shares and that of their heirs and representatives as absolute proprietors thereof. 6. If for any reason, God forbid, any portion of the said estate is not taken possession of by my daughter's daughters and the sister-in-law and they do not get the opportunity of entering upon possession and occupation of it, the entire estate will remain in my daughter-in-law's possession without the right of transfer and on her death the entire estate shall be treated as my estate and the District Magistrate and Collector of Saran as its manager and trustee":

Held, that the right of the grand-daughters to the 15 annas share under the will was not an interest contingent on their surviving the testator's widow but a vested interest and accordingly was not exempt from attachment by virtue of proviso (m) to S. 60, sub-s. (1), Civil P. C. There was no trace in cl. (6) of any intention on the part of the testator to make it a condition of the grand-daughters taking the benefits given to them under cls. (4) and (5) that they should survive the testator's widow and cl. (6) did not operate to cut down the gifts to the grand-daughters from vested to contingent gifts. AIR (Vol 30) 1943 PC 121: (1943) 2 MLJ 163: 56 MLW 441: 10 BR 181: 48 CWN 73: ILR (1943) Kar (PC) 117 Sup: 46 Bom LR 509: 209 Ind Cas 408.

——S. 60 (1) (m) — Interest of coparcener in joint family property, if contingent interest.

The interest of a coparcener in joint family property cannot be said to be a merely contingent or possible right of interest. So far as it is an interest at all it must ex hypothesi be a vested interest. AIR (Vol 29) 1942 Mad 97 : 54 MLW 365: 1941 MWN 985: (1941) 2 MLJ 550: 201 Ind Cas 156 (DB).

——S. 60 (1) (m) — Testator bequeathing income of share of estate to A and his wife W — Upon death of either A or W, his or her share to go to their surviving sons — On death of remaining parent, capital and income to belong to living children equally — Upon death of testator and during life-time of A and W, interest of one of sons of A and W, whether can be attached by his creditors.

Although a contingent interest can be made the subject of a voluntary transfer, such an interest cannot be made the subject of a forced sale in attachment proceedings.

The testator provided by a codicil that the income of three-sixteenth share of the residuary estate should be divided between his nephew A and W his nephew's wife. On the death of one of them, his or her share of the income should belong to their four children or survivors of them in equal proportions, and when the remaining parent dies, the capital and income should belong to the children then living in equal proportions. After the death of the testator and during the life-time of A and W, the creditor of P who was one of the four sons of A and W sought to attach the interest of P in the income and capital of the three-sixteenth share in the estate:

Held, that the interest of P under the codicil was, during the joint lives of his father and mother, unquestionably contingent, both as to income and as to corpus. It was, therefore, expressly protected from attachment by the plain terms of the Proviso (m) to S. 60 (1), Civil P. C. AIR (Vol 26) 1939 PC 6: (1938) 2 MLJ 906: 48 MLW 912: 68 CLJ 339: ILR (1939) Bom 36: 1939 AWR 15: 32 SLR 963: 41 Bom LR 1: 1939 OWN 196: 5 BR 402: 1939 MWN 551: 179 Ind Cas 995.

——S. 60 (1), Provisos (g) and (n) — Grant of field rent-free in consideration of grantee's rights as Deshmukh, Deshpandia and Sir-mukaddam — British Government confirming grant on condition of grantee's rendering loyal service — Fields recorded as vrittee and occupants as malik-makbuza muafidar sarkar.

The word 'pension' as used in the Civil P. C., implies periodical payments of money by Govt. to the pensioner and it does not apply to a person who draws rents not as a pensioner but as a limited owner of the properties which yield them.

In consideration of the rights of the ancestor of the judgment-debtor as Deshmukh, Deshpandia and Sir-mukaddam, certain fields were granted to him rent-free. Since then the descendants of the grantee had enjoyed the grant without let or hindrance. The British Government confirmed the grant for the maintenance of the grantee on condition of his rendering loyal service. In each settlement, the land was recorded as vrittee and the occupants as 'malik-makbuza muafidar sarkar':

Held, that Provisions (g) and (n) of S. 60 (1), Civil P. C., could not apply. The right of the holder in this land was not future or contingent, but present and vested, and the holder had a right to deal with it as he pleased during the period of his own life, subject of course to the right of resumption which Government had reserved to itself.

Held, also that the 'malik-makbuza' rights in the two fields in suit were transferable, subject of course to Government's right to resume the concession exempting them from land revenue. The sale of these fields could in no way be contrary to public policy. AIR (Vol 25) 1938 Nag 269: 1938 NLJ 112: ILR (1939) Nag 679: 181 Ind Cas 65.

——S. 60 (1) (m), O. XXI, Rr. 46, 52 — Property sold in execution of mortgage decree — Sale not confirmed — Objection by third person but not by judgment-debtor — Another decree-holder seeking to attach part of sale proceeds that would come to judgment-debtor after confirmation.

Where the property of the judgment-debtor is sold in execution of a mortgage decree against him, but the sale is not confirmed, objection having been raised by a third person, and another decree-holder seeks to attach the part of the deposit of the sale proceeds which would come to the judgment-debtor after satisfying the mortgage decree in execution of which his property has been sold, the attachment is not of a contingent interest as is contemplated by S. 60 (1) (m), Civil P. C. The judgment-debtor not having himself raised any objection to the confirmation of sale, it must be held that he regards the surplus sale-proceeds, a part of which is sought to be attached, as his own which is payable to him on confirmation of sale. Therefore, S. 60 (1) (m) does not apply and the attachment is not prohibited. AIR (Vol 24) 1937 Nag 391: ILR (1938) Nag 402: 173 Ind Cas 215.

——S. 60 (1) (m) — Will — Estate to widow for life, then to daughter absolutely — Death of testator — Daughter dying during widow's lifetime leaving her husband as heir — Interest of husband, if mere expectancy of succession.

By a will, after making specific bequests, the residual estate was granted to testator's wife for life, then to his daughter for life, then to her husband or life, and then to certain persons absolutely. By a codicil the residual estate was bequeathed by the testator to his daughter absolutely. The testator left surviving him his widow, his daughter and her husband. The daughter died intestate leaving her husband as sole heir:

Held, that the right to the properties in question vested absolutely on the daughter on the testator's death and though a life-interest was bequeathed to the widow, her interest was not a mere possibility but a vested remainder, which was an interest granted out of the original estate. So long as the daughter was alive, her heir had only an expectancy of succession to this vested remainder. After her death, it devolved on her husband by inheritance. The interest of her husband, therefore, was not a mere expectancy of succession and was not exempt from attachment and sale. AIR (Vol 23) 1936 Cal 802: ILR (1937) 1 Cal 583: 168 Ind Cas 102 (DB).

——Share in village profits.

Attachment of share in village profits before it accrues due — Sale in pursuance of it is of no effect. AIR (Vol 23) 1936 Nag 218: 168 Ind Cas 266.

——S. 60(1)(m) — **Interest created by bequest was contingent and not a vested remainder.**

The pertinent clause of a codicil was cl. 5 which said: "The income from this three-sixteenths shall as long as A and W his wife, are both alive, be divided two-thirds to the wife and one-third to the husband. If one of them dies, his or her share of the income shall belong to the four children, or the survivor of them, in equal proportions, and when the remaining parent dies, the capital and income shall belong to the children then living in equal proportions". The testator was dead. Both A and W were alive. The question arose whether C, one of the four children referred to in the above clause received merely a contingent interest in the legacies within S. 60 (1) (m), Civil P. C.

Held, that the bequest in favour of C was contingent within the meaning of S. 60 (1) (m), Civil P. C., and not a vested remainder and was not liable to attachment and sale. AIR (Vol 23) 1936 Sind 65: 30 SLR 50: 163 Ind Cas 206.

——**Right to take accounts, whether assignable — Claim for money on rendition of accounts established in preliminary decree.**

A right to sue is not saleable property, and cannot be transferred, but where the claim for money on rendition of accounts has been established and the claim has merged in a preliminary decree by a competent Court the right under the decree is assignable although the cause of action so far as the right to get money on accounts being taken is concerned, is not. A right to take accounts, and to recover such sums as may be found due, is not assignable, being a right to sue within the meaning of S. 6(e), T. P. Act. But the decree being saleable property belonging to the decree-holder over which or the profits which he has a disposing power which he may exercise for his own benefit, it is liable to be attached under S. 60, C. P. C. AIR (Vol 22) 1935 Cal 751: 40 CWN 145: 62 CLJ 383: 159 Ind Cas 696 (DB).

——**S. 60 (1) (e) — Right to claim compensation, if mere right to sue.**

The right to claim compensation being a mere right to sue, cannot be attached in execution. AIR (Vol 22) 1935 Nag 135: 31 NLR 235: 157 Ind Cas 587.

—Where in a compromise of a suit between two brothers for the possession of immovable property it is provided that certain property should be held by one brother for his life and afterwards should go to his second brother if he survived the first, on a true construction of S. 19 of the Transfer of Property Act the second brother takes a vested and not a contingent interest in the property so settled and it is, therefore, susceptible of being attached and sold in execution of a decree obtained against him subsequent to the compromise. AIR (Vol 21) 1934 Oudh 59: 9 Luck 378: 11 OWN 109: 18 RD 70: 147 Ind Cas 1088 (DB).

——**S. 60 (1) (m) — Interest of residuary legatee — 'Vested interest', definition of.**

The interest of a residuary legatee is a vested interest and can be attached and sold in execution of a decree obtained against the legatee, though such a legatee does not become proprietor until after the administration has been completed and the residues ascertained and made over to him. AIR (Vol 18) 1931 Pat 76: 130 Ind Cas 163.

——**Interest of an heir in hands of administrator holding as trustee is liable to attachment.**

Where an administrator has paid all expenses and debts and has cleared the estate, he is in the same position with regard to the next-of-kin as an executor, who has cleared the estate, is with regard to residuary legatee and he therefore ceases to be administrator and becomes trustee and the interest of one of the heirs in the hands of such administrator is liable to attachment in satisfaction of the debt due to the creditors of the heir although his share is not yet determined and allowed to him. 117 Ind Cas 76: AIR (Vol 16) 1929 Lah 600 (DB).

—If a gift and direction as to payment are distinct the direction as to the time of payment does not postpone the vesting. If there is a present gift with a postponed payment, a vested interest is created. A stipulation that interest shall be given in the meantime shows that a present gift was intended. 92 Ind Cas 1021: AIR (Vol 13) 1926 Mad 371: 50 MLJ 79 (DB).

——**S. 60 — Security for performance of contract — Attachability.**

An attaching creditor can attach money deposited by judgment-debtor as security for due performance and completion of a contract as money due or owing to a judgment-debtor though it is not payable to the judgment-debtor till the completion of contract and may even be forfeited. 12 Bom LT 247: 56 Ind Cas 948: AIR (Vol 7) 1920 Low Bur 46.

——**S. 60 (e) — Improvements — Right to compensation — Attachment in execution of a decree.**

The claim of a mulgani tenant in south Kanara to compensation for improvement cannot be attached nor sold in execution. (1918) MWN 887: 9 LW 78: 36 MLJ 92: 48 Ind Cas 705: AIR (Vol 6) 1919 Mad 864 (DB).

——**Ss. 60 (S 266 of Old Code) — Execution of decree — Attachment — Contingent right — Right of pre-emptor under a conditional decree for pre-emption.**

Held, that the interest in the pre-empted property of a successful pre-emptor who has not yet paid the pre-emptive price fixed by his decree is an interest the attachment of which is prohibited by S. 266(k), C. P. C. (1906) AWN 69: 3 ALJ 183: 28 A 383 (DB).

6. Debt.

(a) General.
(b) Future debt.
(c) Unpaid consideration.
(d) Rent and profit.

(a) General.

——**S. 60 and O. 21, R. 46 — Word "debt" in S. 60 and O. 21, R. 46 — Meaning of — Unpaid purchase price left with vendee is "debt" due by him to vendor within S. 60 and O. 21, R. 46 — Vendor's decree-holder can attach it immediately after completion of sale — Fact that it is payable at future date or to third party makes no difference.**

The word "debt" is not defined in the Civil P. C. But the word "debt" in S. 60 and O. 21, R. 16 has been judicially interpreted as meaning "a sum of money which is now payable, will become payable in the future by reason of a present obligation." It is an actually existing debt, i.e., a perfected and absolute debt; not merely a sum of money which may or may not become payable at some future time or the payment of which depends upon contingencies which may or may not arise.

The unpaid purchase price is the vendor's money in the hands of the vendee, which he is under an obligation to pay to the vendor and in the absence of a contract to the contrary, this obligation arises at the moment the sale transaction is completed. The fact that the money is by agreement made payable at a future date or that the vendor has asked the vendee to pay it to a third party makes no difference. It is nonetheless an existing and completed obligation and, as regards it, the relationship between the vendor and the vendee is that of a creditor and debtor. The sum left with

the vendee out of the purchase price for payment to creditors of the vendor but which the vendee has not actually paid to them is a "debt" due by the vendee to the vendor within the meaning of S. 60 and O. 21, R. 46.

A decree-holder of the vendor can attach the unpaid purchase money left with the vendee immediately after the execution of the sale-deed and need not wait until "reasonable time" has elapsed from the sale and the vendee has omitted to pay the vendor's creditors within that time.

Hence if, at the instance of a person who holds a decree against the vendor, a prohibitory order under O. 21, R. 46, is served on the vendee, before he has paid out the amount to the nominees of the vendor in accordance with the directions set out in the sale deed, the attachment is good and neither the vendee nor the vendor can object. The vendor's nominees have no locus standi to object, for, there is no privity of contract between them and the vendor, and the mere direction of the vendor to the vendee to pay the amount to them creates no jural relationship between them. AIR (Vol 29) 1942 Lah 275 : 44 PLR 415 : ILR (1943) Lah 17 : 203 Ind Cas 462 (FB).

——"Debt" means perfected and absolute debt.

A debt is an obligation to pay a liquidated (or specified) sum of money. The word "debt" in S. 60, Civil P. C., means an actually existing debt, that is, a perfected and absolute debt. A sum of money which might or might not become due, or the payment of which depends upon contingencies which may or may not happen, is not a debt. AIR (Vol 25), 1938 Lah 336 : 40 PLR 73 : 176 Ind Cas 634.

——Insurance.

The term 'debt' includes a sum of money due by one person to another, which is actually payable at the time, or which is due, though not actually payable then. Consequently the amount due under a policy of insurance is a debt within the meaning of S. 3, Transfer of Property Act, and is attachable under S. 60, Civil P. C., though it becomes payable only on the death of the assured. AIR (Vol 24) 1937 Bom 382 : 39 Bom LR 493 : 170 Ind Cas 850.

——Debts, if include shares of debts — Share of debt not attachable — Power of Court to make prohibitory order for ends of justice.

The expression 'belonging to the judgment-debtor' in S. 60, does not mean 'belonging to the judgment-debtor alone', inasmuch as such a reading would make the shares of movable or immovable properties exempt from attachment and sale, as such shares are attachable and saleable. The word 'debts' does not merely mean entire debts but means also share of debts. A share of debts due to the judgment-debtor jointly with another person can be attached in execution of the decree against the judgment-debtor. Section 51 contemplates sale without attachment. Even if a share of a debt cannot be attached under O. 21, R. 46 or under any other rule prescribed, a prohibitory order similar to one under R. 46 can be made under the inherent powers of the Court where the Court finds it necessary for the ends of justice. AIR (Vol 24) 1937 Cal 199: 41 CWN 410: ILR (1937) 2 Cal 48: 67 CLJ 35: 171 Ind Cas 119 (DB).

——A debt due to a judgment-debtor under a pronote standing in the name of a third person who holds it on trust for or on behalf of judgment-debtor is attachable. AIR (Vol 22) 1935 Mad 181: 1935 MWN 1: 68 MLJ 81: 41 LW 15: 58 Mad 693: 153 Ind Cas 944 (FB).

——S. 60 (1) (k) — Debt, meaning of — Sum standing to the credit of an employee in Benefit Fund of Company.

A debt for the purpose of attachment must be a debt that is payable to the judgment-debtor or to his estate, but a sum is not a debt which a person may or may not pay in his uncontrolled discretion. A sum of money standing to the credit of a deceased employee in the benefit fund of the Irrawady Flotilla Co. Ltd., is, therefore, not a debt within the meaning of S. 60, Civil P.C., and is consequently not attachable in execution. AIR (Vol 20) 1933 Rang 23: 11 Rang 116: 142 Ind Cas 360 (FB).

——Accrued debt is attachable.

There is a distinction between the case where there is an existing debt, payment whereof is deferred, and the case where both the debt and its payment rest in the future. In the former case there is an attachable debt, in the latter case there is not. A debt, in order to be attachable, need not be ascertained but must be accruing or have accrued, a debitum in praesenti solvendum in futuro. 72 Ind Cas 881: AIR (Vol 12) 1925 Cal 561 (DB).

(b) Future debt.

——Future debts — Attachability.

An existing debt, though payable at a future date, may be attached, whilst salary, wages or money accruing due may not. AIR (Vol 23) 1936 Nag 218: 168 Ind Cas 266.

——S. 60 (1) and O. 21, R. 46 — Debt — Attachment of — Security — Money not immediately payable.

An attaching creditor can attach any debt due though not immediately payable; he can also attach money deposited by a judgment debtor as security for due performance and completion of a contract as money due or owing to a judgment-debtor though it is not payable to the judgment-debtor till the completion of contract and may even be forfeited. 12 Bur LT 247: 56 Ind Cas 948: AIR (Vol 7) 1920 Low Bur 46 (DB).

——Future and unearned salary of a lawyer's clerk is not a debt. (1909) 6 ALJ 227: 31 All 304: 1 Ind Cas 186 (DB).

——S. 60 (Ss. 266, 268 of Old Code) — Attachment — Debt — Monthly allowance if 'debt' — Contingent and existing debt — Debt payable in future — Attachment of part already accrued due.

A monthly allowance given in payment of an antecedent debt and acknowledged by the debtor as such is attachable in execution, being a debt accruing due and actually existing with a right to payment on and after the first of the following months. The decree-holder applied on the 21st December for the issue of a prohibitory order in respect of a half of the allowance for the month of December, and the order was issued on the 23rd December.

Held, that the attachment was validly made, inasmuch as three weeks of the December allowance had already become an existing debt, though payable on a future date. (1905) 9 CWN 703 (DB).

(c) Unpaid consideration.

——S. 60 and O. 21, R. 46 — "Debt" — Money left with mortgagee for payment to third party — If debt due to mortgagor.

If a mortgagor leaves some mortgage amount with the mortgagee for payment to a third party the mortgagor cannot be considered to be a creditor of the mortgagee for that amount and the mortgagee cannot be compelled to make payment as it is no more than an agreement to lend money and of such agreements no specific performance can be claimed. As the mortgage amount left with the mortgagee is not a debt due to the mortgagor, it cannot be validly attached in execution of a decree against him, and any payment made by the mortgagee on such invalid attachment is therefore not valid and binding on the mortgagor.

AIR (Vol 37) 1950 Lah 240: Pak LR (1950) Lah 587 (DB).

——Unpaid balance of mortgage money.

The unpaid balance of the mortgage money is not a debt and hence is not liable to attachment in execution of a money decree against the mortgagor or his heirs. AIR (Vol 29) 1942 Lah 234: 44 PLR 342: ILR (1943) Lah 746: 202 Ind Cas 347 (DB).

——Unpaid balance of mortgage consideration cannot be attached in execution of a decree against the mortgagor. AIR (Vol 23) 1936 Lah 727: 17 Lah 270: 38 PLR 574: 164 Ind Cas 52 (DB).

[AIR (Vol 22) 1935 Lah 141, Reversed.]

——Purchaser agreeing to pay off encumbrances — It is contract of indemnity and right to enforce it is attachable. 1936 MWN 279.

——Money kept with vendee to be paid to prior mortgagee.

Where a sum of money is kept with the vendee on the definite understanding that he should pay it to the prior mortgagee, and though the mortgage subsisted, the vendee failed to carry out the terms of the contract, the vendor is entitled to have this amount refunded to him and it can, therefore, be looked upon as a debt due to the vendor and is liable to attachment. AIR (Vol 22) 1935 Lah 50 (2): 152 Ind Cas 645.

——S. 60 (S. 266, Old Code) — "Debts" — Execution of decree — Attachment — Mortgage —Right of mortgagor in respect of mortgage-money promised but not paid.

The unpaid portion of a mortgage loan does not constitute a debt due to the mortgagor within the meaning of S. 266, C. P. C. (old), so as to be liable to attachment in execution of a decree against him. (1908) AWN 105: 5 ALJ 491: 30 A 252 (DB).

(d) Rent and profits.

——Profits accruing to ghatwal.

The profits accruing to the ghatwal from his estate are not a salary and S. 60, Civil P.C., has no application to it. The surplus profits of a ghatwali left after the payment of the Government revenue, the wages of the chaukidars employed by the ghatwal and other like charges can be attached and made available for satisfaction of the debts of the holder for the time being. AIR (Vol 26) 1939 Pat. 242: 5 BR 344: 180 Ind Cas 8 (DB).

——Village granted by the East India Company to person as compensation to grantee and his heirs for loss sustained owing to the resumption of emoluments attached to Police services — Grantee entitled only to rent and profits but prohibited from alienating village.

A village was granted to a person on behalf of the East India Company by a deed of grant. The object of the grant was to make a permanent provision for the grantee and his heirs as compensation for the loss sustained by resumption of the emoluments attached to the office which was carried out in consequence of a policy enunciated by the then Government of abolishing all emoluments granted in support of the Police establishments. The grant provided that the grantee and his heirs were to appropriate the rents & profits for their own use. The grant also provided that the grantee was prohibited from alienating the village by grant, sale or otherwise but in default of legal heirs, the village should revert to the East India Company:

Held, (per Abdur Rahman and Venkataramana Rao, JJ)—that the grant was not absolute but conferred on the grantee a limited interest to enjoy the rents and profits of the village for his life and similar interest on his heirs who would succeed him. Making of such a limited grant was competent to the Crown and the prohibition as to alienation was valid. The grant being of limited interest, the village was not saleable property within the meaning of S. 60, Civil P.C. The only interest which was therefore available to the decree-holder was the right to enjoy rents and profits during the life of grantee and they were attachable and saleable in execution. In such a case, the proper order was to appoint a Receiver to manage the property, to collect the rents and profits to be paid to the decree-holder.

Per Burn J.—The village was attachable and saleable in execution of the decree in spite of the prohibition against alienation. AIR (Vol 25) 1938 Mad 623: (1938) 1 MLJ 886: 1938 MWN 440: ILR (1938) Mad 767: 182 Ind Cas 587.

——Right to receive royalty — Attachment and sale of — Nature of right sold.

A right to receive money can only be attached and sold as a debt and the debt must be existing, and not the money which is to come into existence at some future date. AIR (Vol 23) 1936 Pat 572: 3 BR 73: 18 PLT 301: 165 Ind Cas 749 (DB).

——Uncertain future & fluctuating profits cannot be attached. 33 CWN 282: AIR (Vol 16) 1929 Cal 352 (DB).

——S. 60.

——Rent in respect of a period still in existence is not a debt at all as the obligation is not complete, and hence such rent is not susceptible of attachment. 50 All. 507: 108 Ind Cas 229: 9 LRA Rev. 47: 26 ALJ 253: AIR (Vol 15) 1928 All 193 (DB).

——Prospective rent cannot be attached.

An existing debt can be attached, but there is no provision of the Code under which a debt that has not yet fallen due can be attached. An attachment of rents which are only prospective is merely an attachment of a debt that has not accrued due. 89 Ind Cas 794: 3 Rang 235: AIR (Vol 12) 1925 Rang 318 (DB).

——S. 60 (S. 266 of Old Code) — Attachment of property — Arrears of rent — Suit by auction — purchaser.

——Arrears of rent due under a sub-lease, which under the contract were made payable to the lessor's Zamindar, constitute a debt due to the lessor which is liable to attachment and sale under S. 266, (old) C.P.C. (1908) AWN 129 (1): 5 ALJ 265 (DB).

——S. 60 (S. 266 Old Code) — Right to attach profits not yet due.

A mere right to receive profits, the profits in question not having yet accrued due, is not susceptible of attachment in execution of a decree. 1908 AWN 101 (1) (DB).

——S. 60 (S. 266 Old Code) — Future rent and profits — Attachability of — Ghatwali tenure — Order to Ghatwal not to receive rents and profits, effect of.

An order to a Ghatwal not to receive any rents or profits from the tenants may have the effect of attaching such rents and profits. Future rents and profits payable to a Ghatwal by his tenants cannot be attached. (1901) 28 C. 483 (DB).

7. Gratuity.

——Gratuity amount payable to employee of G.I.P. Railway Company — Nature of — Such amount credited to account of deceased employee.

A gratuity given to an employee of G.I.P. Railway Company is in the nature of a gift and it is to be given at the discretion of the Agent and cannot be claimed by the employee as of right. It follows from this that in order to constitute a valid binding gift there must be either delivery or a registered instrument duly signed as required by para 2 of S. 123, T. P. Act. The mere fact that such amount has been credited to the account of a de-

ceased employee does not amount to a delivery as contemplated by S. 123, T. P. Act, as there can be no delivery of movable property to one who is dead. Consequently, such amount in the hands of the Company cannot be attached in execution of a decree against the deceased. AIR (Vol 30) 1943 Bom 453 : 45 Bom LR 816 : 210 Ind Cas 553.

——If attachable — Railway Company promising gratuity to employee — Attachment of, before payment.

Where it was the custom of a Railway Company at the conclusion of the service of their servants to make a gift to them and the Company wrote to one of its servants to nominate a Bank or other agent to receive the amount of the gratuity but before the payment of the gratuity, he applied for being adjudicated an insolvent and a creditor applied for attachment of the gratuity :

Held, that the gratuity which was promised to be paid at the discretion of the Company was not in the nature of a recoverable debt, that it was only a gift which would not be complete until it passed out of the hands of company, and that consequently it was not capable of being attached by the creditor. AIR (Vol 19) 1932 Pat 311 : 11 Pat 584 : 140 Ind Cas 561 (2) (DB).

—Gratuity payable by a University to its servants is not in the nature of a government pension and consequently not exempt from attachment under S. 60 (g). AIR (Vol 11) 1924 Lah 688 : 75 Ind Cas 945.

8. House of agriculturist.

See also N. 1, 15 and 23.

(a) General.

(b) Onus.

See also N. 1.

(c) Mortgage of house.

See also N. 2.

(d) House held attachable.

(e) House held exempt from attachment.

(f) Objection.

See also N. 14.

(a) General.

——There must be definite finding.

Unless there is a definite finding by the Court that either the judgment-debtor was not an agriculturist or the property did not belong to him and was not occupied by him, the house or other building would be immune from the process of execution and attachment. AIR (Vol 23) 1936 Lah 930 : 38 PLR 391.

[Overruled in AIR (Vol 29) 1942 Lah 153 : 203 Ind Cas 166 (FB)].

——S. 60 (1), proviso — Proviso to S. 60 (1), whether mandatory.

Proviso to S. 60 (1), Civil P. C., is mandatory and the Courts have no jurisdiction to attach and sell any of the properties mentioned therein. AIR (Vol 22) 1935 Lah 942 : 160 Ind Cas 749.

——S. 60 (1) (c) — Applicability — Conditions.

In order to claim exemption from attachment or sale, under S. 60 (1) (c), it is not sufficient merely to show that the house or the site in question belonged to an agriculturist, but it must be established further that it was being used or occupied bona fide for purposes of agriculture. The onus to prove this essential fact lies on the debtor. Case-law referred to. AIR (Vol 17) 1930 Lah 1034 : 31 Pun LR 842 (DB).

——The proviso to S. 60 (1) is mandatory and the Courts have no jurisdiction to attach and sell any of the properties specified therein. AIR (Vol 17) 1930 Nag 11 : 119 Ind Cas 677.

——House to be attached was occupied by sons of deceased debtor as agriculturists. They need not prove that it was so occupied by their deceased father. AIR (Vol 15) 1928 All 211 : 9 LRA Rev 130 : 116 Ind Cas 20.

——S. 60 (c) — Agriculturists — House — Exemption.

The requirements of an agriculturist under S. 60(c) must be judged, not with reference to the number of bullocks which he has kept in recent years, but with reference to the possibility of his cultivating the whole of the area himself and the expansion of his cattle, grain etc. It is not necessary that the house protected from attachment and sale should be the dwelling house of an agriculturist, provided it is occupied by him for agricultural purposes. There is no connection between cls. (b) and (c) of S. 60 of the C.P.C. AIR (Vol 6) 1919 Nag 54 : 15 NLR 83 : 51 Ind Cas 129.

(b) Onus.

See also N. 1.

——S. 60 (1) (c) — Unless houses of judgment-debtor are occupied or required for agricultural purposes they cannot be exempt from attachment — Onus.

Where a judgment-debtor claims that certain houses should not be attached, the onus is on him to prove the circumstances qualifying for exemption and unless they are occupied or required for agricultural purposes they cannot be exempt under S. 60 (1). AIR (Vol 22) 1935 Nag 59 : 17 NLJ 271.

——S. 60 (c) — Onus.

Where a person is both a Zamindar & an agriculturist, onus is on him to show what his main source of income is and that he is an agriculturist within strict sense of the term and that he occupies the house as such when he claims exemption for the house from attachment. (1913) 35 All 307 : 11 ALJ 437 : 19 Ind Cas 125 (DB).

(c) Mortgage of house.

See also N. 2.

——S. 60 (1) (c) — Mortgage decree against house — House, if can be sold.

The house of an agriculturist cannot be sold even in execution of a mortgage decree passed against that property. AIR (Vol 28) 1941 Pesh 53 : 194 Ind Cas 716 (DB).

——S. 60 (1) (c) (as amended by S. 35 of the Punjab Relief of Indebtedness Act, VII of 1934) — House of judgment-debtor exempt from attachment and sale — Judgment-debtor mortgaged house with possession and took it on rent.

Where a house of an agriculturist judgment-debtor is not liable to attachment and sale in execution of a decree under S. 60 (1) (c), Civil P. C., as amended by the Punjab Relief of Indebtedness Act, the mere fact that the judgment-debtor mortgaged the house with possession and took it on rent from the mortgagees does not disentitle him to the protection afforded by S. 60 (1) (c), Civil P. C., as the judgment-debtor never gave up possession of the house; and has been using it throughout for purposes subservient to agriculture. AIR (Vol 25) 1938 Lah 736 : 180 Ind Cas 92.

——S. 60 (1), cl. (c) — Agriculturist usufructuarily mortgaging his house but staying in half of it as tenant — His possession, whether possession within S. 60 (1), cl. (c).

When a house has been usufructuarily mortgaged, it must be deemed that the possession is with the mortgagee, even if the mortgagor stays as a tenant in half of the house. The tenant cannot be deemed to be in its occupation as owner, within the meaning of S. 60, cl. (c), Civil P. C., and consequently, the house can be attached and sold in execution of a decree against such tenant, even if he is an agriculturist. AIR (Vol 23) 1936 Oudh 155 : 1935 OWN 793 : 156 Ind Cas 759 (FB).

——An agriculturist can make a valid mortgage of his house in execution of a decree in which the

house may be sold. AIR (Vol 11) 1924 All 328 : 84 Ind Cas 749 : 22 ALJ 321 : 5 LRA Civ 201 : 46 All 489 (FB).

——S. 60(c) — **Agriculturist — House — Transferability of.**

A house in a town belonging to a family which lived by cultivation could not be said to be appurtenant to the agricultural holding and is liable to be sold for a mortgage decree. AIR (Vol 5) 1918 All 250: 45 Ind Cas 546.

——**S. 60 (c) — House of an agriculturist — Mortgage, validity of — Decree for sale.**

Per Full Bench (Banerjee J.) dissenting — The house of an agriculturist is not appurtenant to his holding and it can be validly mortgaged and in spite of S. 60 (1) (c), a decree for sale capable of execution can be passed on foot of such mortgage. S. 60 C. P. C. does not apply to the execution of mortgage decrees. Per Richards, C. J.— It would be a strained construction to hold that S. 60 applies to the execution of mortgage decrees. The proviso to S. 60 is not intended to render the sale or mortgage of the house of an agriculturist invalid. Under O. 34, Rr. 4 and 5 a mortgagee is entitled to a decree for sale, and also to execute such decree notwithstanding S. 60 (1) (c). Per Banerjee, J. — No court should sell a house belonging to and occupied by an agriculturist provided it is of the description mentioned in S. 60 (1) (c) and it makes no difference whether the house was or was not mortgaged by the agriculturist for the debt. (Per Tudball, J.) S. 60 was never intended to apply, to the case of a mortgage decree for the execution of which, provisions are made elsewhere in the Code. (1912) 34 All 25: 8 ALJ 1045: 11 Ind Cas 646 (FB).

——**S. 60 (c) — Decree for sale of agriculturist's house.**

As S. 60 forbids the sale of materials of a dwelling house occupied by an agriculturist a decree for the sale of such a house is bad even though it be a mortgage decree. (1911) 33 All 136: 8 ALJ 190: 9 Ind Cas 931 (DB).

[Contra (1911) 9 Ind Cas 825 (All) (DB)].

(d) House held attachable.

——**S. 60 (1) (c) — Vendor's right to retain possession of house on subsequent acquisition of ex-proprietary right by vendor.**

Where the ownership of the house or the materials thereof has passed to the auction-purchasers by virtue of the auction sale and the vendor has lost all interest therein from that date, the subsequent acquisition of ex-proprietary rights by the vendor cannot have the effect of reviving the ownership in favour of the vendor. AIR (Vol 28) 1941 Oudh 395: 1941 OWN 618: 1941 RD 328: 193 Ind Cas 675.

———**At time of attachment judgment-debtor having two sources of income, zemindary and cultivation — Zamindary, chief source, lost before such sale of attached house.**

Section 60 exempts the house of an agriculturist from both, namely attachment and sale. Where on the date of attachment of her residential house, the judgment-debtor had two sources of livelihood: (1) rent payable to her by the tenants, and (2) profits arising from the cultivation of her 'khudkasht' land but the main source of her livelihood was the former she cannot then be considered to be an agriculturist and there is justification for her residential house being attached. If the main source of her livelihood, viz., zamindary had passed out of her hands before the sale of her residential house, so as to make agriculture the only source of her livelihood, her residential house cannot be sold. AIR (Vol 25) 1938 All 85: 1937 ALJ 1314: 1938 RD 32: 193 AWR 1220: 173 Ind Cas 337.

——**S. 60 (1) (c) — House in respect of which exemption was sought situated in town.**

The judgment-debtor's house in respect of which exemption was claimed was one in a town. The occupant was a 'bania' but he had ceased to do any shop-keeping business and he had two parcels of land in two villages, one at a distance of eight miles and the other at a distance of two miles and aggregating on the whole some 50 acres and he had no other house. It was also found that when he cultivated the land eight miles from his house, the bullocks used for cultivation were put up in the houses of labourers in the neighbourhood of the land and were not brought back to the house in question. The allegation that he came back every night with his labourers and cattle to the house from the land which was only two miles away was not believed:

Held, that it could not be said that the house was the house of an agriculturist and having regard to its situation it would never be selected by an agriculturist for the purpose of agriculture and hence was not exempted from liability to attachment. AIR (Vol 22) 1935 Pat 496: 1 BR 839: 158 Ind Cas 59 (1) (DB).

——**S. 60 (1) (c) — House should be occupied by him as such.**

Where the house in dispute is not occupied by the judgment-debtor as an agriculturist and he has other residential premises it is not exempt from attachment. AIR (Vol 21) 1934 Lah 614(2): 35 PLR 520: 153 Ind Cas 133(2).

——**Two houses — Cattle tied in one — Sufficient room for fodder therein — Other house is not required for fodder.**

Where two houses of an agriculturist are attached and it is found that one is quite sufficient for occupation by him 'bona fide' for purposes of agriculture e.g., tying cattle and stacking fodder, the release of that house is justified. AIR (Vol 21) 1934 Lah 168.

——**Zamindars are not necessarily agriculturists.**

An agriculturist whose house is protected from attachment and sale by S. 60 (c) of the C. P. Code must be an agriculturist belonging to the class of persons who are ordinarily designated as agriculturists, that is, whose principal source of livelihood is by cultivation. Cultivation to a certain extent is carried on by most, if not all of the zamindars in U. P., but their houses cannot be designated as agriculturists' houses. AIR (Vol 14) 1927 All 601: 8 LRA Rev 229: 106 Ind Cas 49.

Where a house of an agriculturist is in ruins and there are no doors in it and there is no roof, it is not exempt from attachment. AIR (Vol 14) 1927 All 214: 99 Ind Cas 376.

——**House of large landed proprietor.**

The expression "and occupied by him" gives the clue to the meaning of cl. (c), i.e., that the houses for which exemption is claimed are occupied by the agriculturists as such. A mansion in a large village in which the owner lives, even though he has no other source of income except that from land, is not such a house as is contemplated by cl. (c); nor is the house of ordinary agriculturist situated at a considerable distance from the land which he cultivates and which is not necessary for effective or convenient cultivation of the land. 49 Mad 277: 92 Ind Cas 398: AIR (Vol 13) 1926 Mad 350: 50 MLJ 90 (DB).

——**S. 60 (c) — Agriculturist — House whether can be sold.**

Where the chief source of income of insolvent at the time of his application is his Zamindari, he is not an agriculturist and his house is not therefore property exempt from sale under S. 60(c) of

the C. P. C. AIR (Vol 4) 1917 All 427: 15 ALJ 540: 40 Ind Cas 544 (DB).

——S. 60 (c) — Vacant site — Not exempt.

The phrase "houses and other buildings" in Cl. (c) of S. 60 does not include a vacant site used for storing manure and fodder and with no structure over it. AIR (Vol 4) 1917 Lah 21: 4 PWR 1917: 21 PLR 1917 : 39 Ind Cas 375.

——S. 60 (c) (S. 266, Old code) — Attachment and sale, exemption from — Agriculturist — Town residence of an agriculturist.

S. 266, Cl. (c) refers to a house occupied by an agriculturist as an agriculturist. It does not extend to the town residence of an agriculturist. (1905) 7 Bom LR 685 (DB).

(e) House held exempt from attachment.

——S. 60 (1) (c) —Agriculturist having shed in or near his field — Whether disentitled to claim exemption of his house.

An agriculturist, like any other person, must have a house in which to live, and the fact that he has a shed in or near his field in which he may keep some implements and perhaps spend an hour or two in the middle of the day while engaged in agritural operations, would not disentitle him from retaining possession of the house in which he ordinarily resides, provided that that house is not on a scale inappropriate to an agriculturist. AIR (Vol 32) 1945 Mad 276: 58 LW 100(1): (1945) 1 MLJ 211.

——S. 60 (1) (c) — Person having no other vocation except agriculture — His house where he keeps his bullocks, carts and plough — Exemption.

Where a person has no other vocation except agriculture and keeps his plough, bullocks and carts in his house. the house is really used for the purpose of carrying on his calling effectively as agriculturist and is exempt under S. 60(1)(c), Civil P. C. AIR (Vol. 29) 1942 Mad 375(1) : (1942) 1 MLJ 87 : 1942 MWN 128(2) : 55 LW 176(1) : 201 Ind. Cas. 781.

——S. 60(1)(c) — Not only house lived in by agriculturist but also other buildings occupied by him are exempt — Conditions governing exercise of privilege.

The deliberate use of the two words "houses" & "buildings" in S. 60 (1)(c) shows that the legislature meant that the residential house lived in by the agriculturist should be protected and that the other buildings occupied by him should also be exempt. On a plain reading of the clause there are only two conditions governing the exercise of this privilege. Firstly the person claiming it should be an agriculturist and secondly he should occupy the house and the buildings. There is not a word in the clause to show that when occupying his residential quarter the agriculturist should also put it to some other agricultural use for enabling him to keep it safe from his creditors. AIR (Vol 28) 1941 Pesh 68: 196 Ind Cas 356.

——The house must be in actual occupation of the agriculturist. AIR (Vol 23) 1936 Bom 315: 38 Bom LR 719: 165 Ind Cas 86.

——S. 60(1) (c) — House used bona fide for agricultural purpose — Judgment-debtor having two open sites where he might carry on agricultural purpose.

Where the house sought to be released under cl. (c) of S. 60, Civil P. C. has been used by the judgment-debtor for tethering his agricultural cattle the mere fact that he has two open sites where he might build a shed and tether his cattle is no justification for not exempting the house, when it has been used 'bona fide' for purposes of agriculture. AIR (Vol 22) 1935 Lah 894: 38 PLR 123: 160 Ind Cas 361 (1).

——S. 60 (1) (c) — All houses, whether exempted.

Section 60 (1) (c), Civil P. C., exempts all the houses and other buildings which form the premises occupied by an agriculturist even if a portion would enable the judgment-debtor to earn his livelihood as an agriculturist. AIR (Vol 20) 1933 Nag 80 : 29 NLR 106 : 141 Ind Cas 824.

——S. 60 (1) (c) — Agriculturist holding occupancy land for building purposes — Exemption of house from attachment.

The mere fact that the judgment-debtors have obtained permission to build house on a portion of land which was formerly their occupancy tenancy, does not necessarily imply that they have themselves ceased to be agriculturists on that they no longer occupy their house in the capacity of agriculturists. AIR (Vol 19) 1932 All 499 : 1932 ALJ 499 : 16 RD 506 : 138 Ind Cas 67 (DB).

——S. 60 (1) (c) — Exemption.

The property of the agriculturist to be exempt under S. 60 (1) (c) must be shown to have been occupied by him as such for purposes of agriculture, that is, in order to enable the owner or occupier to cultivate the land. AIR (Vol 19) 1932 Oudh 76 : 8 OWN 1353 : 16 RD 130 : 136 Ind Cas 335 (DB).

——S. 60 (1) (b) (c) — Bona fide occupation for purposes of agriculture.

The house of an agriculturist is exempt from attachment under S. 60 (1) (c) only if it is occupied by the judgment-debtor in good faith for the purpose of agriculture. AIR (Vol 18) 1931 Nag 8 : 26 NLR 295 : 130 Ind Cas 81.

——House of Agriculturist.

An agriculturist's house occupied by him is exempt from attachment; and this would apply both to his house in the village and also to his hut in the field if he had one. AIR (Vol 17) 1930 Rang 129 : 121 Ind Cas 777 : 7 Rang 766.

——If the objector has properties more than sufficient for his agricultural requirements he cannot claim exemption in respect of all. AIR (Vol 16) 1929 Lah 181 : 115 Ind Cas 478 : 30 PLR 29 : 10 LLJ 543.

——Whether agriculture must be main means of subsistence is doubtful — One of the judgment-debtors being wholly dependent on agriculture, the house belonging to all is protected. AIR (Vol 15) 1928 Nag 23 : 105 Ind Cas 129.

——House dilapidated — Decree-holder cannot ask for sale of site unless the owner is proved to have no intention to rebuild.

Merely because the house requires re-construction or re-building and a short period of a year or so has elapsed since the old house disappeared or became dilapidated, the decree-holder is not entitled to come in and attach the site with the dilapidated house standing thereon in absence of clear proof that the owner has no intention of rebuilding and continuing to make use of the site for the same purpose as before. AIR (Vol 15) 1928 Nag 23 : 105 Ind Cas 129.

——House occupied by agriculturist as such only is exempted. In other words, the house must be used by the judgment-debtor for purposes which are necessary for the cultivation of his land. AIR (Vol 14) 1927 Lah 66 : 98 Ind Cas 857.

——A female occupancy tenant not cultivating field herself can be agriculturist.

Where a widow inherited from her husband an occupancy field of 3.50 acres, a house said to be worth Rs. 500 and a kotha worth about Rs. 50, all in the same village, and the widow never cultivated the holding herself, but sub-let it every year since her husband's death, she having no bullocks for purposes of cultivation.

Held: that the house and kotha must be regarded as occupied by the widow as an agricultu-

rist and thus exempt from attachment. AIR (Vol 14) 1927 Nag 374 : 10 NLJ 159 : 102 Ind Cas 712.

——Even though an agriculturist has two other houses on his land expressly meant to be used for agricutural purposes, his house, in a city where he spends his nights and where he brings his cattle every night from his agricultural lands is exempt from attachment under S. 60. AIR (Vol 13) 1926 Lah 230 : 92 Ind Cas 759.

——**A person who has no other source of livelihood** than agriculture is an agriculturist and houses in his occupation are exempt from attachment. AIR (Vol 12) 1925 All 432: 87 Ind Cas 584: 6 LRA Civ 217 (DB).

——**S. 60 (c) — House of agriculturist — Execution sale.**

The house of an agriculturist, which is appurtenant to his holding, is not liable to sale in execution of a decree obtained upon a mortgage of the house made by him. AIR (Vol 6) 1919 All 222 : 51 Ind Cas 553 (DB).

——**S. 60 (c) — Attachment — Exemption.**

A house of an agriculturist is exempt from attachment and sale in execution of a decree. AIR (Vol 4) 1917 All 10 : 39 All 120 : 38 Ind Cas 171 : 14 ALJ 1031 (DB).

——**Cultivator cultivating land of another.**

A professed cultivator of land earning his wages from another employer and owning a house is entitled to be protected from attachment of that house under this section. AIR (Vol 4) 1917 Bom 253 : 41 Bom 475 : 19 Bom LR 281 : 39 Ind Cas 639 (DB).

——**S. 60 (c) — "Agriculturist" — Zamindari land — Exemption of house from attachment.**

A person who is a tenant of 50 bighas of land but who also owns 20 bighas of Zamindari land, and whose chief occupation and means of livelihood is agriculture, is an agriculturist within the meaning of S. 60 (1) (c) and his Zamindari house is not liable to attachment. AIR (Vol 3) 1916 All 332 : 14 ALJ 240 : 33 Ind Cas 727.

——**S. 60 (c) — Homestead in town of Commillah, if saleable property.**

A homstead in the town of Comillah is not a saleable property within the meaning of S. 266, C. P. C., 1882. (1909) 13 CWN 541: 10 CLJ 110: 1 Ind Cas 362 (DB).

(f) Objection.

See also N 14.

——**Objection to attachment.**

——An objection under S. 60 (1) (c) to sale of property falls within the purview of S. 47 and has to be decided by the executing Court. AIR (Vol 29) 1942 Lah 153: 44 PLR 302: ILR (1942) Lah 559: 203 Ind Cas 166 (FB).

——An objection that house being occupied by agriculturist as agriculturist can be entertained though it is not raised at earlier stage of execution proceedings. AIR (Vol 17) 1930 Nag 11: 119 Ind Cas 677.

9. Implements of husbandry, cattle, etc.

——**Mortgage of implements.**

Where a judgment-creditor has a decree giving him a mortgage lien or a charge over the implements of husbandry of an agriculturist, S. 60 is no bar to execution by sale of such implements. AIR (Vol 34) 1947 Sind 32: ILR (1946) Kar 311: 227 Ind Cas 206.

(See also N. 2 above—Ed.)

——**Motor tractor.**

The "implements" of the husbandman correspond to the "tools" of artisans. Section 60, Civil P. C., speaks of implements and cattle which term applies to bullocks as well. It would be absurd to say that bullocks are implements. A motor tractor which is a substitute for bullocks cannot be regarded as an implement within the meaning of S. 60, and is not exempt from attachment. The more so when at the time it was attached it was being used for driving a flour-mill, i.e., for an industrial purpose. AIR (Vol 26) 1939 Nag 3: 1938 NLJ 416: ILR (1939) Nag 355: 179 Ind Cas 656.

——**Engine or water pump used for irrigation.**

Clause (b) to Proviso (1) to S. 60, Civil P. C., is not intended to force agriculturists back to primitive ways but to protect them in their livelihood as agriculturists by preventing the attachment even of those mechanical means whereby they plough and irrigate and cultivate the soil and obtain their livelihood as agriculturists. The difference between a Persian-wheel and an engine or water pump is not an essential difference so as to apply Cl. (b) to the one case and to repel it in the other. Term 'implements of husbandry' in Cl. (b) to Proviso (1) to S. 60, Civil P. C., should be interpreted in a fair & reasonable & 'even in a generous spirit' and not in a narrow and mean manner. An engine or water pump is necessary for the agriculturist to irrigate and cultivate his fields and earn his livelihood as an agriculturist. AIR (Vol 26) 1939 Sind 96: ILR (1939) Kar 499: 181 Ind Cas 250 (DB).

——**Implements of Husbandry.**

The press and karah which are used for making gur from sugarcane grown in the field are implements of husbandry and as such are not liable to attachment and sale. AIR (Vol 15) 1928 Lah 943: 111 Ind Cas 56.

——**Charak is an implement of husbandry.**

Articles which are described as Charak, an iron pot used for the purpose of manufacturing gur from the sugarcane juice, and wooden planks required for the purpose, are implements of husbandry within the meaning of S. 60, cl. (b). AIR (Vol 11) 1924 Bom 294 : 25 Bom LR 1211 : 81 Ind Cas 679 (DB).

——**Cattle of agriculturist.**

Where an agriculturist claims exemption for his cattle from attachment in execution of a decree, the Court ought to go into the question whether the cattle are necessary to enable him to earn his livelihood as an agriculturist. The fact that the cattle have been pledged as security for a debt will not prevent the operation of S. 60 (b). (1921) 61 Ind Cas 777 (All).

——**S. 60 (b) — Cattle of agriculturist — When exempt from attachment.**

In the case of attachment of the cattle of an agriculturist, the court has to see whether the cattle are necessary to enable an agriculturist to earn his livelihood. AIR (Vol 7) 1920 Sind 14 : 13 SLR 201 : 56 Ind Cas 69 (DB).

——**S. 60 (1) (b) — Execution — Exemption from.**

S. 60 (b), C. P. C. is only intended for the benefit of the indigent agriculturists and not when the judgment-debtor suffers no material inconvenience. AIR (Vol 2) 1915 Mad 320 : 1 LW 519: 25 Ind Cas 117 (DB).

——**S. 60 (b) (S. 266 (c) of old Code) — Execution of decree — Attachment — Khurli not used by judgment-debtor.**

When the judgment-debtor has no land whatever under his own cultivation and owns no cattle, a Khurli belonging to him but not used for any purpose whatever is not exempt from attachment under S. 266 (c) of the Civil Procedure Code, 1882. 1909 PLR (Civil) No. 141 Page 541.

10. Inam.

——S. 60 (1) (g) — Berar Inam Rules, R. VI — Inam under R. VI — Nature of — Whether alienable.

Inams under R. VI, Berar Inam Rules, which have been disposed of in accordance with cl. 2 of R. V are alienable during the life-time of the grantee but not beyond, subject of course to any rights of resumption which Government may choose to exercise. Consequently, it does not fall within S. 60 (1) (g), Civil P. C., and is attachable. AIR (Vol 24) 1937 Nag 202: 170 Ind Cas 78.

——Standing crops on service inam.

Growing crops standing on village inam lands are exempt from attachment under Madras Hereditary Village Offices Act, 1895, as they are annexed to and form part of the emoluments attached to the village offices in question. AIR (Vol 23) 1936 Mad 283: 59 Mad 354: 70 MLJ 266: 1936 MWN 88: 43 MLW 235: 162 Ind Cas 1008 (FB).

——Execution could be only against saleable property — Personal Inam for public service — Not saleable as opposed to public policy.

It is clear law that the Court can only sell in execution, property which the judgment-debtor can lawfully alienate. S. 60 of the C. P. Code forbids the attachment of a right of personal service. If what is sought to be attached is the land and not the right of personal service, that section has no application. S. 6 (h) of the Transfer of Property Act clearly prohibits transfer of property when it is opposed to public policy. Where land is personal inam for doing public service, it cannot be sold by the inamdar; neither would the purchaser get any title, since at any moment the inam could be resumed by the zamindar or Government where the inamdar ceases to render services. So in such a case, the inam lands being property not saleable, could not be sold in execution of any decree against the inamdar. AIR (Vol 9) 1922 Mad 197: 70 Ind Cas 466: 45 Mad 620: 15 MLW 513: 1922 MWN 307: 30 MLT 255: 42 MLJ 477 (FB).

——S. 60 (1) — Inam Land — Blacksmith.

Inam land in a proprietary estate attached to the office of blacksmith is not exempted from attachment and sale in execution of a decree. (1910) 7 MLT 264: 5 Ind Cas 41 (DB).

——S. 60 (1) — Inam — Unenfranchised.

An unenfranchised inam can be attached and sold in execution of a decree of a Civil Court. (1909) 6 MLT 132: 20 MLJ 88: 4 Ind Cas 1057 (DB).

10A — Insurance policy.

See N. 6 and 19.

11. Jagir.

——Annual allowance by way of compensation for forest dues granted along with Jagir — Attachability.

An annual money allowance by way of compensation on account of forest dues granted along with a jagir under 'sanad' issued by Government is not exempt from attachment under S. 60, C.P. Code, although the Jagir and the allowance are granted subject to the condition that they being service grants should not be alienated by the grantee or his successors. As the jagir is not burdened with any condition of service, it must be treated as personal property of the holder.

Even on the assumption that the jagir and the allowance are absolutely inalienable the inalienability would attach only to the right to receive the allowances and not to the specific amount as it accrues due every year. The annual payment is made in recognition of a proprietary right which the grantee's ancestors enjoyed and the amount as it accrues due every year would certainly constitute a debt payable by the grantor to the grantee every year even though the amount is payable on a future date. It may be that for a breach of the condition of loyalty the whole jagir as well as the allowances which are liable to be resumed would be liable to be withheld. But until that is done the grantee would be perfectly free to enjoy the amount that he receives every year in any way he chooses. The mere existence of a condition prohibiting alienation of the corpus of an incorporeal right does not affect in any way the disposing power of the grantee over the usufruct arising periodically from it. AIR (Vol 35) 1948 Nag 194: ILR (1947) Nag 616: 1947 NLJ 517 (DB)

——Grant of income of certain water-mills as Jagir — Jagirdar leasing out water-mill.

There is no distinction between the right of a jagirdar, who has been granted the income as jagir of certain water-mills to recover a certain sum per year as revenue, jagir or royalty, and his right to recover rent from the lessee, whom he has granted lease of the water-mills. The only right that he has in the water-mills is the right to recover rent from the occupants of the water-mills and the rent is really the royalty for the use of the water. The occupation of the water-mills is merely a subsidiary right to the principal right and the principal right is conferred upon him as a jagir by the Government. Therefore there can be no attachment of his income from the lease. AIR (Vol 24) 1937 Lah 211: 39 PLR 434: 172 Ind Cas 426.

——Jagirdars promised freedom from attachment — Such freedom, held does not extend to successors.

Where a letter of the Board of Administration promised a number of jagirdars for the time being, freedom from attachment of their property:

Held, that such immunity was not attached by the Board's order to the property of all their successors. The Jagirdar is not a Ruling Chief and the Civil P. C. makes no mention of exemptions allowed by executive order. AIR (Vol 23) 1936 Lah 737: 38 PLR 333: 164 Ind Cas 690.

——S. 60 (1) (g) — Ala jagirs in Ambala District — Whether political pensions.

Jagirs known as "ala jagirs" in the Ambala District should be treated as political pensions and so exempt from attachment in execution of decrees within the meaning of S. 60 (1), Civil P. C. AIR (Vol 21) 1934 Lah 881: 36 Cr LJ 440: 36 PLR 105: 155 Ind Cas 540 (2).

——Land revenue, grant of — Exemption from attachment.

Land comprising a jagir which is a grant of land revenue is not exempt from attachment in execution of a decree either under S. 60, Civil P. C. or S. 11, Pensions Act. AIR (Vol 19) 1932 Mad 417: 1932 MWN 202: 35 MLW 395: 137 Ind Cas 799.

——Presumption.

There is no initial presumption that a jagir is a political pension and it is for a judgment-debtor to bring his case within S. 60 (g). (1928) 111 Ind Cas 838 (Lah).

——S. 60 (g) — Jagir — Maintenance — Political pension — Liability to attachment.

A Government sannad purported to grant the 'taluka' of a certain pargana, together with all lands cultivated or uncultivated, to one K for life as revenue free jahir for maintenance and stated that after the death of K the said 'ilaka' will continue to stand in the names of his children and grand-children as a permanent zemindari, assessed to a light amount of jama:

Held, that the grant to K was of land rather than of revenue charged on the land and was not a political pension within S. 60 (g).

The word "jagir" primarily points to occupancy, though it may be occupancy of an office such as that of Collector of revenue. Where however a jagir held for life only is, as in this sannad, used in contra-distinction to an ilaka held as a permanent zemindari, it is an almost necessary inference that the occupancy referred to, is an occupancy of land.

Though the grant to K was expressed to be for his maintenance, it was not so in the case of his descendants who became absolute owners of the property.

That in the hands of the latter the subject-matter of the grant was liable to attachment in execution of a decree. AIR (Vol 4) 1917 PC 94: 22 CWN 577: (1918) MWN 384: 47 Ind Cas 632.

[Affirming AIR (Vol 1) 1914 All 475: 36 All 318: 12 ALJ 437: 25 Ind Cas 120].

——S. 60 (g) — Jagir without power of alienation — Standing crops — Whether attachable.

In the case of a jagir without the powers of alienation the standing crops are attachable. AIR (Vol 1) 1914 Cal 765 : 24 Ind Cas 805 (DB).

12. Maintenance.

See also N. 11.

(a) General
(b) Right created by decree.
(c) Equitable execution.

(a) General.

——S. 60 (1) (n) — Scope — Arrears of maintenance — Attachability.

The prohibition against attachment in respect of maintenance contained in S. 60 (1) (n), applies only to future maintenance and not to arrears of maintenance. AIR (Vol 37) 1950 Orissa 220: 16 Cut LT 92 (DB).

——S. 60 (1) (n) — Beneficiary's right in wakf property — Attachability — Principle underlying — T. P. Act (IV of 1882) S. 6 (dd) — Right to future maintenance.

There is a general principle of law that only present rights can be dealt with as property and not inchoate, future rights which have not yet accrued, such as spes successionis, a right to future rent or a future right to maintenance. Such rights may or may not be realised in the future. It is in accordance with public policy that such rights which are generally created for the maintenance or personal enjoyment of the grantee ought to be inalienable. Obviously such rights are not attachable or saleable under S. 60 (1) (n), C. P. Code.

Where the beneficiaries get an allowance under a wakf deed which speaks of kharch parwarish and parwarish and guzare ke waste, and the nature of the allowance granted to the beneficiaries appears to be that of mere maintenance, the right given to the beneficiaries is merely a right to receive a certain amount of money periodically during their life time for maintenance. Such a right is merely "a right to future maintenance" within the meaning of S. 6 (dd) of the T. P. Act and also within the meaning of S. 60 (1) (n), C. P. Code, and it follows that it is neither attachable nor saleable in execution of a decree. AIR (Vol 39) 1952 All 662 (DB): 1950 ALJ 386: ILR (1951) 1 All 740.

——S. 60 (1) (n) — Applicability — Khorposh grant to junior member of impartible estate by holder in lieu of maintenance — Interest of grantee — Nature — Liability to attachment and sale in execution — T. P. Act, S. 6 (dd).

The interest of a 'khorposhdar' in immovable property which is granted to him by the holder of the impartible estate of which the 'khorposhdar' is a junior member, in lieu of maintenance is not a bare right of future maintenance or an incorporeal right. Such right, in the absence of proof of any special or peculiar custom in the family, is an absolute right in the property assigned by way of maintenance and is transferable. S. 60 (1) (n), C. P. Code and S. 6 (dd), T. P. Act, have no application to such a case and do not prohibit the attachment and sale of such an interest in execution of a decree against the 'khorposhdar. 25 Pat 705: AIR (Vol 34) 1947 Pat 404 (DB).

——S. 60 (1) (n) — Right to future maintenance created under deed — Such right heritable but not charged on any property.

A right to future maintenance in order to be non-attachable and non-transferable must be personal as distinguished from being heritable. If the right is heritable, it is not exempt from attachment although it is not charged on any property. AIR (Vol 29) 1942 Oudh 410: 1942 AWR (C C) 241: 1942 OWN 359: 18 Luck 147: 201 Ind Cas 100 (DB)

——S. 60 (1) (n) — Sum provided for paying future maintenance of weak and half-witted son.

Where in his will the testator provided for future maintenance of one of his sons who was weak and half-witted by stating that after his death, out of the income of his property, this son was to get Rs. 100 per mensem for his pocket expenses:

Held, that this sum amounted to a right of future maintenance and could not be attached in execution. AIR (Vol 23) 1936 Lah 944: 38 PLR 702: 167 Ind Cas 844.

——Right of maintenance — Attachability of — Tests.

The true test to see if a right of maintenance is liable to be attached is whether the right of maintenance intended to be attached is a purely personal right, not heritable and not assignable or it is an alienable and heritable right which takes the shape of an annuity or has been granted in lieu of a share in an estate. If it is the former it will be protected under the provisions of the Civil P. C., but if it is the latter, it will not be exempt from attachment.

Where the allowance granted was to continue in the family of the grantee from generation to generation and it was granted to him at the time when his minor son was putting forward a claim to a share in the property and in lieu of this maintenance and certain other advantages, both father and son renounced their right in the estate itself:

Held, that the maintenance allowance was not a mere right to future maintenance as contemplated by S. 60, Civil P. C., and was not, therefore, immune from attachment. AIR (Vol 23) 1936 Lah 55: 17 Lah 378: 38 PLR 707: 163 Ind Cas 103.

——Grant by taluqdar for maintenance of land with heritable rights — Condition of non-transferability — Whether can be attached in execution.

Where a grant is made by a 'taluqdar' of heritable rights for the purpose of maintenance, and a condition is inserted that the grantee should have no power of transfer, then the condition in restraint of alienation must be deemed to have been imposed mainly for the benefit of the grantor, the object being to make it clear that the grantee was to have a status inferior to the status of an under-proprietor, and that he would not be entitled to transfer the grant to any person whom the superior proprietor might consider objectionable.

The right to future maintenance, as contemplated by the Legislature in S. 60(1)(n), Civil P. C., and S. 6 (dd), T. P. Act, means personal right for the maintenance or personal enjoyment of

the grantee. The expression does not cover a grant of land having heritable interest.

A judgment-debtor, in the absence of an objection by the 'taluqdar', is competent to sell his interest which is heritable in the land granted by the 'taluqdar' to the grandfather of the judgment-debtor for maintenance with a condition of non-transferability by a private sale; similarly under similar circumstances, i.e., in the absence of an objection from the 'taluqdar', the same interest is liable to sale by means of execution proceedings. The only person entitled to object against the sale is the 'taluqdar', and if he does not object to the proposed sale, it would be wrong to hold that the interest of the judgment-debtor is not liable to sale in execution of a money decree against him. 'Mt Bhagwati v. Raghubar Dayal' AIR (Vol 23) 1936 Oudh 76: 1935 OWN 1134: 1935 OLR 610: 158 Ind Cas 710 (DB).

——**S. 60, (1) (n) — Annuity given by will — Whether 'right to future maintenance'.**

An annuity given by will is not a right to future maintenance within the meaning of S. 60(1) (n), Civil P. C., and is not exempt from sale or attachment in execution of a decree. AIR (Vol 22) 1935 Lah 811: 37 PLR 261: 159 Ind Cas 644 (1).

—"A right to maintenance" contemplates a bare right of maintenance and nothing more, a right enforceable by law and payable in the future. Appropriate remedy in difficult cases discussed. 63 Ind Cas 181: 43 All 617: 19 ALJ 643: AIR (Vol 8) 1921 All 120.

—A heritable annuity conferred by a will stands on an entirely different footing from the right of maintenance contemplated by S. 60 (n) and is liable to attachment. 27 Cal 38 Diss. 63 Ind Cas 851: 24 OC 250: AIR (Vol 8) 1921 Oudh 164.

——**S. 60 (n) — Widow's estate.**

Property assigned to the female members of a Zamindar's household for their enjoyment in common cannot be attached in execution of decree passed against the female personally, as the right of any such member ceases on her death. The case is different when a decree is passed against the estate. 33 Ind Cas 83 (1) : AIR (Vol 4) 1917 Mad 624 (1) (DB).

——**S. 60 (n) — Maintenance — Right to.**

A mere right to future maintenance is not liable to attachment and sale in execution of a decree. 40 Mad 302: 30 MLJ 361: 34 Ind Cas 381: AIR (Vol 4) 1917 Mad 79 (DB).

——**S. 60 (n) — Interest in property in lieu of maintenance — If attachable.**

S. 60 (1) (n) C. P. C. does not exempt from attachment the interest of a member of a Malabar 'tarwad in properties given to him in lieu of maintenance under a 'karar' which prohibits alienation of such properties except by way of lease. 29 Ind Cas 578: AIR (Vol 3) 1916 Mad 833 (DB).

——**S. 60 (n) — Maintenance — Attachment of right charged on land.**

Where a father transferred to his son all his properties for the consideration of paying off his debts and for a monthly sum to be paid to him which was made a charge on the estate in the hands of the son, the right of the father is an interest in property and is not a right to future maintenance. Such right can be attached and sold out before that event takes place; an order cannot be obtained for depositing the money in Court. (1922) 16 CLJ 354 : 17 CWN 662 : 17 Ind Cas 284 (DB).

——**S. 60 (n) — Right to maintenance of a widow — Standing crops on land in her possession — If can be attached.**

Where land is granted to a widow to be enjoyed by her in lieu of maintenance, the produce of that land is her property and can be attached because what the widow and purchaser get is not a mere right to maintenance but the right to the produce of it. (1911) 10 MLT 493: (1911) 2 MWN 563: 22 MLJ 204: 13 Ind Cas 152 (DB).

——**Maintenance, right to, when attachable — Gift deed of.**

When a question arises whether a right to maintenance is assignable or not, the true test to be applied is, whether the intention of the grantor was to create a purely personal right to receive a certain sum of money in the grantee, and consequently is alienable, or whether his intention was to create an interest in property either a fund or an estate, which should be treated as alienable property. When a claim has been merged in an actual judgment, ordinarily the right to judgment is assignable and the nature of the chose-in-action is immaterial; but this rule is not of universal application. If the right conferred upon the decree-holder is essentially of a personal nature it cannot be transferred by way of alienation or transmitted by inheritance.

Where a father feeling his duty to make adequate provision for his daughter whom he had given in marriage more from the point of view of social rank than worldly property executed a deed of gift in her favour which recited that it was the duty of the grantor to bear the burden of maintaining his daughter, the grantee, and her children that a similar liability rested upon the son of the grantor according to the family custom, that to make some provision for the maintenance of the grantee with her children, the grantor gave her an annual sum of Rs. 600 which was to be paid out of the income of two specified properties owned by the grantor, and lump sum of Rs. 1,000 for the acquisition of a suitable site and Rs. 5,000 for the construction of a house, which two sums were made payable out of the estate of the donor, and that the lump sum granted as also the annual payment, were not to be paid till by reason disagreement between the grantee and the members of the family of the grantor, the former found it necessary to become separate in mess from them and that in due course the grantee received from the holders of the estate the sum of Rs. 6,000 with which she purchased land and built a house, it was held that her interest in the house and not her right to receive the allowance was liable to attachment. (1910) 12 CLJ 146: 7 Ind Cas 80 (DB).

——**S. 60 (S. 266 of old Code) — Bombay Act VII of 1887, S. 5 — Toda giras allowance — Attachment and sale of the allowance — Interest attachable.**

A decree-holder in execution of his decree applied for the attachment and sale of a toda giras allowance which the judgment-debtor was entitled to receive periodically from the Government treasury, and which was to become payable to him during the twenty years following the application. The lower Courts held that the life interest of the holder, computed at its valuation for twenty years, could be attached and sold in execution of the decree.

Held, reversing the order, that it is clear from the language of S. 5 of Bombay Act VII of 1887, that it is not the life-interest of the judgment-debtor in a toda giras allowance but something short of it that is allowed by the Act to be attached. The words "money likely to become due" must be restricted to the case where, for instance, during the life-time of the judgment-debtor, a sum of money is directed by the Collector to be paid to

him on account of a toda giras allowance not immediately but on a date subsequent to the date of the order of direction, and the judgment debtor dies before that date, and to other cases of a similar character. Under what circumstances money is likely to become due on account of a toda giras allowance is a question which cannot be answered exhaustively and must depend on the facts of each case as it arises. (1908) 10 Bom LR 1201: 33 Bom 253 (DB).

——**S. 60 (n) (S. 266, Old Code) — Hereditary right to allowance for maintenance.**

A hereditary right to an allowance for maintenance out of the melwaram of certain lands does not fall within the terms of Cl. (l) to S. 266, (Old) C. P. C. (1907) 17 MLJ 373: 30 M 279 (DB).

——**S. 60 (S. 266, old Code) — Right to future maintenance, if an annuity — Annuity, if attachable.**

An annuity given by will is not a right to future maintenance within the meaning of S. 266, C. P. C., and can be attached in execution of a decree. (1906) 10 CWN 1102.

——**S. 60 (S. 266 of Old Code) — Land granted for maintenance — Maintenance-holder not entitled to sell, etc. — Estoppel by judgment — Uncertainty.**

Where some land is given for the maintenance of a Hindu female, and it is provided that the latter has the right only to enjoy the income and no right to make any alienation by way of sale, etc., such land is not attachable under S. 266, cl. (b), C. P. C. (Old) in execution of a personal decree against the female. (1904) 15 MLJ 7 (DB).

——**Ss. 60 (n) (S. 266, Old Code) — Babuana allowance — Property liable to be attached.**

A babuana allowance is capable of being attached and sold in execution. (1902) 6 CWN 796 (DB).

——**S. 60 (n) (S. 266, Old Code) — Execution of decree — Attachment — Annuity payable to vendor by vendee of immoveable property.**

Held, that where a person made over property to the Court of Wards, partly in consideration of a present payment and partly in consideration of an annuity payable to the vendor, such annuity was the property of the vendor which was capable of being attached in execution of a decree against the vendor. (1901) AWN 50: 23 A 164 (DB).

(b) Right enacted by decree.

Criminal Court directing monthly allowance to be paid by husband for maintenance of wife — It is not assignable by wife and arrears payable to her cannot be attached. AIR (Vol 22) 1935 Cal 578: 62 Cal 404: 39 CWN 281: 157 Ind Cas 1089 (DB).

——**S. 60, O. 33, R. 10 — Suit by widow in forma pauperis for maintenance — Decree making right to future maintenance charge on immovable property — Sale in execution — Government, whether can attach proceeds for court-fees.**

The plaintiff, a widow, had sued for maintenance in 'forma pauperis' and obtained a decree in her favour. Being unable to recover payment of the maintenance allowance from the defendant, the plaintiff applied in execution for sale of the properties upon which she had been given a charge in the decree. The Government wanted to attach the balance of the receipt of the proceeds after paying the plaintiff her maintenance dues, on the ground that the money was a part of the subject-matter of the suit within the contemplation of O. 33, R. 10, Civil P. C.

Held, that the immovable property, the subject of the charge, was not what the plaintiff had recovered in the suit. She had merely obtained a charge on it to secure her right to her future maintenance. To permit an attachment of the property would be tantamount to permitting attachment of the right to future maintenance. That being so, the property, and consequently the sale proceeds of it were not attachable by Government. AIR (Vol 22) 1935 Sind 21: 154 Ind Cas 580.

——**S. 60 (1) (n), O. 33, R. 10 — Suit in forma pauperis — Compromise — Maintenance decree — Application by Government to recover court-fee — Receiver, if can be appointed — Future maintenance, if can be attached.**

Where a widow sued 'in forma pauperis' for recovery of possession of a moiety of a house from her co-widow and her claim was compromised by a maintenance decree of Rs. 8 per month which was made a first charge on the house and subsequently the Government applied under O. 33, R. 10, Civil P. C., for recovery of the amount of the court-fee by appointing a Receiver of the plaintiff's maintenance and directing him to make the payment asked for:

Held, that under S. 60 (1) (n), Civil P. C., a right to future maintenance not being liable to attachment or sale, the Court cannot grant this form of equitable execution over the property, and that even if the Court had jurisdiction to appoint a Receiver, the Court ought not to do so, having regard to the small amount of the maintenance. AIR (Vol 20) 1933 Bom 350: 57 Bom 507: 35 Bom LR 615: 146 Ind Cas 340 (DB).

——**S. 60 (n) and O. 21, R. 53 — Decree for maintenance.**

Decree for maintenance is a right to future maintenance and is thus incapable of attachment, in execution of a decree both under S. 266 (l) and S. 273, C. P. C. (1910) 20 MLJ 97 : 5 Ind Cas 879 (DB).

——**S. 60, Cl. (n), O. 21, R. 53, (Ss. 266 (1), 273 of old Code) — Decree for maintenance, a right to future maintenance and not liable to attachment.**

A decree for maintenance is a right to future maintenance and under S. 266 (l), C. P. C. (Act XIV of 1882) cannot be attached, nor can it be treated as a money decree capable of attachment under S. 273, C.P.C. (1908) 20 MLJ 97 (DB).

(c) Equitable execution.

——**S. 60 (1) (n) — Scope.**

Appointment of Receiver for collection of maintenance due under decree — Power of Court to make in execution. See C. P. Code, S. 51. AIR (Vol 37) 1950 Orissa 220 : 16 Cut LT 92.

——**S. 60 (1) (n) — Right of maintenance though not attachable in view of S. 60 (1) (n) can be dealt with by way of equitable execution — Receiver, if can be appointed.**

The right of maintenance enjoyed by a judgment-debtor in certain landed property, though not attachable and saleable in view of the provision of S. 60, sub-s. (1), cl. (n) is still in a proper case liable to be dealt with by adopting the remedy of equitable execution, namely the appointment of a Receiver who would act under the orders and supervision of the Court and realise the income of the property and after defraying the incidental expenses and his own remuneration would devote the proceeds towards the satisfaction of the decretal amount. AIR (Vol 23) 1936 Lah. 830 : 165 Ind Cas 519.

——**Right of maintenance though not attachable, receiver can be appointed.**

Although the right of maintenance is in point of law not attachable and not saleable under S. 60, the proper remedy lies, in a fitting case, in the appointment of a receiver for realising the rents and profits of the property paying out of the same a sufficient and adequate sum for the maintenance of the judgment-debtor, and his family, and applying the balance, if any, to the liquidation of the

judgment-creditor's debt. AIR (Vol 12) 1925 PC 176 : 87 Ind Cas 295 : 3 Pat LR 142 : 47 All 385 : 52 IA 262 : 1925 MWN 630 : 22 MLW 284 : 6 LR PC 138 : 30 CWN 818 : 41 CLJ 383 : 23 ALJ 634 : 27 Bom LR 849 : 49 MLJ 244.

13. Military pay.

See also

(1) Army Act (Eng), 1881, Ss. 138 and 144.

(2) Army Act, 1911, S. 120.

——The pay of a soldier of His Majesty's regular forces who is subject to the Army Act of 1881 is not liable to attachment under a decree of the Civil Court. AIR (Vol 25) 1938 Sind 237 : ILR (1939) Kar 160 : 178 Ind Cas 793 (DB).

——Per Sulaiman, C. J.—Provisions of S. 136, Army Act, 1881, have been intentionally superseded by the provisions of S. 60, Civil P. C. AIR (Vol 24) 1937 All 139 : 1936 ALJ 1291 : 1936 AWR 1239 : ILR (1937) All 350 : 167 Ind Cas 179 (FB).

——Pay of Commissioned Officers.

The pay of Commissioned Officers subject to the Army Act may be attached under S. 60 (1) (i), to the extent of one moiety. AIR (Vol 24) 1937 All 129 : 1936 ALJ 1291 : 1936 AWR 1239 : ILR (1937) All 350 : 167 Ind Cas 179 (FB).

——S. 60 (1) (i) — Pay of Staff Sergeant.

The pay of a Staff Sergeant to whom the Army Act applies cannot be attached in execution of a decree of a Civil Court, inasmuch as he is not a public officer and S. 60 would not apply to him. AIR (Vol 21) 1934 Bom 31 : 35 Bom LR 1112 : 149 Ind Cas 26 (DB).

——S. 60 (1) (i) — Salary of soldier to whom the Army Act applies.

If the judgment-debtor is a public officer, as defined in S. 2 (17), his salary is exempt from attachment to the extent mentioned in cl. (i) of the proviso to S. 60 (1), and if he is not such a public officer, it is not exempt from attachment to any extent. An officer or soldier to whom the Army Act applies is a public officer within the meaning of S. 60. In order to ascertain if the salary of the judgment-debtor is exempt from attachment, the question in each case will arise whether an officer or soldier, to whom the Army Act applies, is a public officer within the meaning of the proviso to S. 60 (1). AIR (Vol 20) 1933 All 597 : 1933 ALJ 1468 : 55 All 648 : 148 Ind Cas 364 (DB).

——Attachment — Pay of First Class Warrant Officer — Whether can be subject of attachment — Army Act (VIII of 1911), S. 144.

Notwithstanding any specific provisions being repealed, the terms of S. 4 have the same effect and the special law applicable to a First Class Officer in the Army overrides the provisions of the general law under S. 60 (1). Consequently, the pay of a First Class Warrant Officer to whom the Army Act applies cannot be attached in pursuance of a Civil Court decree to the extent contained in S. 60 (1) (i). AIR (Vol 20) 1933 Bom 185 : 35 Bom LR 360 : 144 Ind Cas 897 (DB).

——Military pay.

An Army Assistant Surgeon is included under S. 2, Army Act, as Warrant Officer, and his pay is not attachable even if he is recruited in India. AIR (Vol 13) 1926 All 122 : 48 All 73 : 23 ALJ 929 : 6 LRA Civ 578 : 89 Ind Cas 882 (DB).

——The reference in S. 60(j), C. P. Code to the Indian Articles of War must now be regarded as referring to Army Act (VIII of 1911). AIR (Vol 13) 1926 All 122 : 48 All 73 : 23 ALJ 929 : 6 LRA Civ 578: 89 Ind Cas 882 (DB).

——S. 60 (2) (b) — Army Act, S. 145 — Provisions of.

S. 145 of the Army Act prevails over the C.P.C., hence Civil Courts cannot interfere with the order made by Commander-in-Chief under S. 165 of Army Act (1881). AIR (Vol 6) 1919 Bom 133 : 43 Bom 368 : 21 Bom LR 137 : 50 Ind Cas 427 (DB).

——S. 60 (i) and (2) (b) — British Officer in Indian Army.

A British Officer in Indian Army is liable to have half his salary attached under S. 60 (i). The attachment is a deduction authorised by the Code and is validated by S. 4 of the Army (Annual) Act, 1895, S. 60(2) (b), C. P. C., having been repealed by Act X of 1914 is a dead law and the decision based thereon are obsolete. 21 Bom LR 143 : 50 Ind Cas 683 : AIR (Vol 5) 1918 Bom 32 : 43 Bom 716.

——S. 60 (1) — Pay of non-Commissioned Officer if attachable.

The pay of a non-Commissioned Officer is exempt under S. 144 of the Army Act from attachment in execution of a decree of a Civil Court. (1917) 3 UBR 20 : 11 Bur LT 130 : 42 Ind Cas 90 : AIR (Vol 5) 1918 Upp Bur 39.

——S. 60 (j) and (2) (b) — Pay of Officer of Indian Army — If attachable.

Under S. 60, part of the pay of an Officer of the Indian army while serving in this country can be attached. 39 All 308 : 15 ALJ 264 : 39 Ind Cas 92 : AIR (Vol 4) 1917 All 315 (DB).

——S. 60 (j) — Salary of an officer in Indian army, whether could be attached.

Under S. 60, the salary of an officer in the Indian army is exempt from attachment in execution of a decree; but if wrongly attached, realised and distributed among his creditors, he is not entitled to a refund. 38 Bom 667 : 16 Bom LR 233 : 23 Ind Cas 575 : AIR (Vol 1) 1914 Bom 137.

——Ss. 60 (2) (b) and 60 (i) — Scope of — Deduction of the pay of an officer of His Majesty's forces.

S. 60 (2) (b) does not amount to a declaration that S. 60 (1) does not constitute a law passed by the Governor-General of India in Council authorising the deduction from the pay of an Officer of His Majesty's Regular Forces. 33 All 529; 37 Bom 26 Diss. 1 OLJ 127 : 17 OC 99 : 23 Ind Cas 935 : AIR (Vol 1) 1914 Oudh 199 (DB).

——S. 60 (2) (b) — Proviso — Salary of officer of the Regular Forces.

The salary of an officer of the regular forces is not liable to attachment. 33 A 529 Foll. S. 60, C. P. C. does not encroach on the provisions of Army Act. 37 Bom 26 : 14 Bom LR 777 : 17 Ind Cas 13 (DB).

——S. 60(2) (b) — Military Surgeon — Salary.

Military Assistant Surgeons in Indian Subordinate Service are warrant officers and so soldiers and therefore their pay is altogether exempt from attachment under S. 144 of the Army Act. (1911) 14 OC 82 : 10 Ind Cas 719.

——S. 60 (2) (b) — Officer of the Army.

S. 60 does not apply to the case of an officer of His Majesty's Regular forces and his salary is not liable to attachment under S. 60. (1911) 33 All 529 : 8 ALJ 487 : 9 Ind Cas 1023 (DB).

——S. 60 (g) (S. 266 of old Code) — Attachment of moiety of pay of officer of Indian Staff Corps — Army Act (44 and 45 Vic. C. 58), Ss. 136, 157 — Army (Annual) Act (58 Vic. C. 7), S. 4 — (1902) 25 M 402.

14. Objection.

See also, N. 28.

——Objection not taken at time of sale — Title of auction-purchaser not affected.

Certain lands on which the defendant had built houses were sold in execution of a money decree against the defendant and purchased by the plaintiff. The defendant was an agriculturist but did not raise any objection to the execution

sale of the house sites. The plaintiff then got delivery of possession of the plots. Subsequently, the plaintiff sought to sell the buildings in execution for the balance remaining due under his decree. The defendant raised the objection that they were not liable to sale as he was an agriculturist. This objection was upheld and the houses were declared exempt from sale. Thereupon, the plaintiff brought a suit for possession of the sites and prayed that the defendant be ousted therefrom and the buildings removed. The claim was decreed:

Held, that the defendant was precluded from objecting to the sale of the house sites as he had not raised the objection at the time of their sale; that the plaintiff's title to the sites was not open to dispute and that the order passed was correct. AIR (Vol 33) 1946 Pat 309 (DB).

——S. 60 (1) (c) — Objection to sale of house must be raised before sale.

An objection that a house is not liable to attachment or sale by reason of the proviso (c) to S. 60 (1) of the Civil P. C., as being a house occupied by an agriculturist, must be raised before the sale. It is undesirable that a judgment-debtor should stand by and allow the sale to take place and then come forward and file an objection that he could and should have filed before the sale. AIR (Vol 30) 1943 Nag 330 : 1943 NLJ 475 : ILR (1944) Nag 159 : 210 Ind Cas 85.

——S. 60 (1) (c) — Judgment-debtor not taking plea under S. 60 (1) (c) — Stranger, if can raise such plea subsequent to sale.

Where a judgment-debtor does not object to the sale of the house on the ground of his being an agriculturist within the meaning of S. 60 (1) (c) and allows the house to be sold, it would be no longer open to him, much less to a stranger, to raise the same objection in answer to a suit by the auction-purchaser for possession of the property purchased by him. AIR (Vol 28) 1941 Oudh 395 : 1941 OWN 618 : 1941 RD 328 : 1941 OLR 361 : 193 Ind Cas 675.

——S. 60 (1) (c) — Scope — Agriculturist waiving objection to attachment of house and agreeing to its sale.

There is no statutory bar to an agriculturist voluntarily alienating his houses. The bar under S. 60 is against the compulsory sale of such a house in execution of a money-decree.

Where, therefore, an agriculturist waives objection to attachment and agrees to the sale of the houses in execution of the decree, S. 60 does not protect the houses from attachment and sale. AIR (Vol 26) 1939 Lah 316 : 42 PLR 398.

[Overruled in AIR (Vol 30) 1943 Lah 268: 211 Ind Cas 291 (FB)].

——S. 60 (1) (c), O. 21, R. 90 (as amended by Lahore High Court) — Objection under S. 60 (1) (c), after sale but before confirmation.

An objection made under S. 60 (1) (c), Civil P. C., cannot be entertained if it is first preferred after sale but before confirmation of sale, as such objection falls within O. 21, R. 90, as amended by the Lahore High Court. AIR (Vol 24) 1937 Lah 309 : 174 Ind Cas 261.

——S. 60 (1) (c) — Objection.

An objection under S. 60 (1) (c) should be raised before sale and not afterwards. AIR (Vol 23) 1936 Bom 315 : 38 Bom LR 719 : 165 Ind Cas 86 (DB).

——S. 60 (1) (c) — Objections cannot be dismissed as belated — No prescribed period of limitation within which objections can be filed. (1936) 38 PLR 669.

——Objection to saleability of property can be taken at any stage before the confirmation of the sale. AIR (Vol 22) 1935 All 1016 : 1935 AWR 1105 : 58 All 360 : 1935 ALJ 1137 : 158 Ind Cas 202 (DB).

——S. 60 (1) (c) — Whether can be raised at any stage.

A Court is entitled to entertain an objection to attachment under S. 60 (1) (c), Civil P.C., at any time and decide it on the merits even though it was not raised at preliminary stage. It would not be barred by principle of res judicata. AIR (Vol 22) 1935 Lah 942: 160 Ind Cas 749.

[Overruled in AIR (Vol 29) 1942 Lah 153: 203 Ind Cas 166].

——Judgment-debtor aware of sale — Objection after sale on ground that property is inam and hence inalienable.

A judgment-debtor who is aware of the sale proceedings and who does not make any objection prior to the sale cannot subsequently be allowed to raise an objection under S. 60, Civil P.C., that the property is not liable to attachment and sale on the ground that the property is inam property. AIR (Vol 22) 1935 Nag 30: 31 NLR 217: 156 Ind Cas 995.

——Dismissal of objection under S. 60 for default — Fresh objection.

On an objection under S. 60, Civil P.C., by a judgment-debtor being dismissed in default, a second objection on the same ground can be entertained. AIR (Vol 19) 1932 Lah 643 (1): 34 PLR 527: 141 Ind Cas 620.

——S. 60 (1) (c) — House of agriculturist — Sale without objection—Objection at subsequent stage — Sale of family house for decree against Hindu father — Sons' right to object.

Where a house belonging to an agriculturist passes out of his hands by reason of an execution sale, there having been no intervention on his part at the time when the house was attached, he cannot challenge the validity of the sale at a later stage by a separate action, and, where a Hindu father who is an agriculturist allows the family house to be sold without objection for a decree against him, the sons do not possess a higher right than the father, because the debt was binding upon them and they are bound by the consequences of the execution proceedings in which the father must be deemed to have represented the entire family consisting of himself and his sons. AIR (Vol 18) 1931 All. 112: 52 All. 1027 : 1930 ALJ 1599 : 133 Ind Cas 478 (DB).

——Even if an objection is not taken in the execution department, if the Court otherwise becomes cognizant of the fact that the property attached was the house of an agriculturist it would be its duty to withdraw the attachment. AIR (Vol 17) 1930 All. 727 (DB).

——Attachment — Objection to.

A Civil Court has jurisdiction to determine claims and objections in respect of attachments of standing crops. A claim to the ownership of crops is a claim to something yielded by the land and is not the same thing which might be excluded from the jurisdiction of the civil court as a claim to the land itself. 7 LBR 294 : 26 Ind Cas 684 : AIR (Vol 1) 1914 Low Bur 265.

14A. Offerings at temple.

See N. 18.

15. Occupation.

See also N. 8.

——S. 60 (1) (c) — When can be claimed — Bona fide occupation for agricultural purposes.

In order to claim exemption from attachment or sale under S. 60 (1) (c), Civil P.C., it is not sufficient merely to show that the house in question belonged to an agriculturist, or was being lived in by him, but it must be established further that

it was being used or occupied bona fide for purposes of agriculture. AIR (Vol 24) 1937 Lah 200: 39 PLR 418: 172 Ind Cas 412.

——**S. 60 (1) (c) — House in which agriculturist lives.**

The words 'occupied by', in S. 60 (1) cl. (c), Civil P.C., mean 'lived in by", or "used for agricultural purposes by". If an agriculturist proves either of these conditions, his case can come within cl. (c) of S. 60 (1) and the house will be exempt from attachment. AIR (Vol 21) 1934 Lah 680: 35 PLR 509: 149 Ind Cas 428.

——**S. 60 (1) (c) — Exemption under — When can be claimed — Bona fide occupation for purpose of agriculture — Necessity of.**

Exemption cannot be claimed under S. 60 (1) (c), Civil P.C., unless the house in question is used or occupied bona fide for the purposes of agriculture.

Where this condition is not fulfilled, the property is attachable. (1934) 147 Ind Cas 676 (1) (676): 35 PLR 185.

——The word 'occupied' in S. 60 (1) (c) implies a physical fact and not 'possessed'. AIR (Vol 20) 1933 Lah 1010: 35 PLR 43: 147 Ind Cas 640 (1).

——**S. 60 (1) (c) — Occupation must be in good faith for purposes of agriculture.**

In order to get exemption from attachment under proviso (c), S. 60 (1), Civil P. C., the occupation by an agriculturist of a house belonging to him must be in good faith for the purpose of agriculture. AIR (Vol 20) 1933 Rang 227: 11 Rang 372: 145 Ind Cas 326 (FB).

——**Occupation.**

The word "occupation" in cl. (c) does not necessarily mean "residence" only. 99 Ind Cas 376: AIR (Vol 14) 1927 All. 214.

——**Occupied by.**

The words "occupied by" mean "lived in by" or "used for agricultural purposes by". 92 Ind Cas 759: AIR (Vol 13) 1926 Lah 230.

——**S. 60 (c) — Occupied — Meaning of.**

The words 'belonging to' in S. 266 (c) of Code of 1882 do not mean the same thing as "occupied by", "Occupied by", means 'lived in by' or 'used for agricultural purposes by'. Hence an unused Khurli is liable to attachment in execution of decree. 65 PR 1909: 104 PWR 1909: 141 PLR 1909: 2 Ind Cas 983.

16. Pension.

See also N. 11.

——**S. 60 (1) (g) — Political pension — Cis-Sutlej jagirs.**

Cis-Sutlej jagirs are political pensions within the meaning of S. 60 (1) (g), and are therefore exempt from attachment and sale. 52 PLR 321: AIR (Vol 38) 1951 Sim 225.

——**S. 60 (1) (g) — "Political pension" — Cash allowance on service lands for which service is commuted into fixed annual payment — If exempt from attachment in execution.**

A cash allowance on service lands for which the service has been commuted into an annual fixed payment does not amount to a "political pension", so as to exempt it from liability to attachment in execution of a decree. 49 Bom LR 754: AIR (Vol 35) 1948 Bom 143 (DB).

——**S. 60 (1) (g) — Commutation of.**

Commutation of a pension does not come under the heading either of stipends or gratuities, but even if it were, the proviso to S. 60, Civil P.C., is not intended to apply to money after it had passed into the pocket of the pensioner. It has then ceased to be his stipend or gratuity but it is his money to be used by him to provide himself and his family with the necessities of life. AIR (Vol 29) 1942 Sind 19: ILR (1941) Kar 479: 198 Ind Cas 630 (DB).

——**Pension is a periodical payment.**

The word 'pension' as used in C.P.C. implies periodical payments of money by Government to the pensioner and it does not apply to a person who draws rent not as a pensioner but as a limited owner of the properties which yield them. AIR (Vol 25) 1938 Nag 269: 1938 NLJ 112: ILR (1939) Nag 679: 181 Ind Cas 65.

——**S. 60 (1) cl. (g) — Reference to Pensions Act, propriety of — Assignment of land revenue in return of relinquishment of sovereign rights and in order to retain alliance and good will.**

If an exemption is claimed under cl. (g) of the proviso to sub-s. (1), S. 60, Civil P.C., it is not permissible to refer to the various provisions of the Pensions Act, to find out the true import of the word 'pensions' in the Civil P.C. The word 'pensions' has not been defined in the Pensions Act, nor is it a technical term or a term of art and this being so, it would clearly follow that the term as employed in the Civil P.C. has been employed in its etymological sense. The word 'pensions' as used in cl. (g) is, therefore, wide enough to cover all sorts of periodical payments in whatever shape they are made by the Government.

Where a privilege to realise land revenue was conferred on ancestors of the jagirdar, in consideration of their relinquishment of sovereign rights and in order to retain their alliance and good will, the assignment falls within the definition of "pensions". AIR (Vol 24) 1937 Lah 178: 39 PLR 80: ILR (1937) Lah 415: 171 Ind Cas 6.

——S. 60 (1) (g) — Apart from S. 11, Pensions Act, the Civil Procedure Code makes all political pensions exempt in whatever form they are granted by the Government. If the grounds for grant of pension are political, it is exempt from attachment whether in the form of remission in, or an assignment of, land revenue. (1936) 38 PLR 531.

——The word "pension" alike in the Pensions Act and S. 60 (1) (g), Civil P.C., means periodical payments of money paid by the Government to the pensioner. It has no application to rents drawn as limited owner of the properties which yield them. AIR (Vol 18) 1931 PC 160: 53 CLJ 493: 1931 ALJ 495: 33 CWN 791: 61 MLJ 208: 58 IA 215: 59 Cal 1: 35 MLW 384: 132 Ind Cas 727.

——**Compensation for forest dues in respect of jagir.**

A sum payable by the Goverment as compensation for forest dues in respect of Jagir land taken over by the Government for forest purposes is not a pension but a grant of money or land revenue and is not exempted from attachment. 121 Ind Cas 664: AIR (Vol 17) 1930 Nag 134 (1).

——**Saleability — Question of law and fact.**

The question whether a certain pension is of such a character as not to be liable to be sold is a mixed question of law and fact. 89 Ind Cas 364: 47 All 900: 23 ALJ 841: 6 LRA Civ. 448: AIR (Vol 12) 1925 All 652 (DB).

——**Onus.**

A pension is not ordinarily attachable for sale. The burden of proof that a particular pension is attachable lies on the decree-holder. 68 Ind Cas 854: 44 All 697: 20 ALJ 679: AIR (Vol 9) 1922 All 429 (DB).

——**S. 60 (g) — Wasika allowance — Arrears — Attachment.**

Arrears of wasika allowance accrued due in the lifetime of the wasikadar and after his death paid to the heirs are not liable to attachment for satisfying the debts of the deceased in the hands of such heirs. 21 OC 329: 6 OLJ 137: 49 Ind Cas 511: AIR (Vol 6) 1919 Oudh 252.

——S. 60 (g) — Pension — Meaning of — Pensions Act (XXIII of 1871), S. 11.

The word 'pension' in S. 60 has the same meaning as it has in S. 11, Pensions Act. 24 Ind Cas 805: AIR (Vol 1) 1914 Cal 765 (DB).

——S. 60 (g) — Malikhana allowance — Nature of — Pensions Act (XXIII of 1871), S. 11.

A Malikhana allowance is in the nature of a pension and so cannot be attached in execution of a money decree. (1911) 8 ALJ 126: 13 Ind Cas 194 (DB).

——S. 60 (g) and O. 40, R. 1 — Wasika allowance.

A 'Wasika' allowance is guaranteed by the British Government in consideration of a loan of 1825 by the then ruler of Oudh and it is a political pension within S. 60 (g). The particulars mentioned in S. 60 (g), are exempt from attachment or sale whether before or after they are actually payable. A receiver cannot be appointed in execution of a decree to receive the pension due to the judgment-debtor. (1909) 12 OC 323: 4 Ind Cas 145 (DB).

——S. 60 (g) — Pension — Blending with other property.

Once the money is received, the pensioner is allowed to blend it with his property and it is no longer pension, and it becomes subject to all incidents to which his property with which it is blended is subject. (1909) 12 OC 323: 4 Ind Cas 145 (DB).

——S. 60 (g) — Political pension — Pensions Act (1871) S. 11.

A Zemindari mowrasi holding substituted for a political pension, and held by heirs of grantee as Zemindari holding, cannot be treated as political pension and is liable to attachment. (1909) 31 All 382: 6 ALJ 519: 5 MLT 388: 2 Ind Cas 100 (DB).

——S. 60 (g) (S. 266, Old Code) — Pension, definition of — Zemindari granted as reward for services rendered to Government — Alienability.

See 1904 AWN 144: 1 ALJ 388: 26 All 617.

——Pensions Act, Ss. 4, 11 — Grant made to compensate for resumption of rent-free land — Execution.

A grant of an annuity since made by Government as a compensation for loss sustained by the grantee on account of improper resumption by Government of rent-free lands formerly belonging to the grantee is not pension within the meaning of S. 11 of the Pensions Act and is liable to attachment. (1904) 8 CWN 665 (DB).

——S. 60 (g) (S. 266 old Code) — Pensions Act, S. 11 — Pensions, foreign, payable in India, attaching of.

Pensions payable by the Ceylon Government to members of the former Royal family of Ceylon but actually paid by the Indian Government, though such payment is finally subject to adjustment as between the two Governments, are political pensions within the meaning of Cl. 8 of S. 266, C. P. C., and are, therefore, not attachable; but do not fall within the exception provided by S. 11 of the Pensions Act not being the pensions "granted or continued" by the Indian Government. (1902) 26 M 423 (DB).

——S. 60 (g) (S. 266 old Code) — Political pension due at the time of pensioner's death — Attachment of arrears of pension after pensioner's death — Legality.

Sum accrued due to a political pensioner on his death, but which remained unpaid in the hands of Government retains its character as such and cannot be attached. (1902) 26 M 69 (DB).

——S. 60 (g) (S. 266 old Code) — Pensions Act (No. XXIII of 1871), S. 11 — Pension — Sum of money payable by special arrangement to judgment-debtor out of increased revenue from family estate.

The estate known as the Gursari estate in the district of Jhansi was formerly held upon an 'Ubari' tenure, that is to say, the revenue assessed upon it was much below the usual amount. In 1895 the Government raised the assessment considerably, and directed that out of the increased revenue 'as an act of grace' the members of the family other than the head of the family should have certain shares assigned to them.

Held, that these shares, whether they were to be regarded as assigned Government revenue or as profits due to a person entitled thereto from the estate, were not a 'pension' within the meaning of Act XXIII of 1871, and were not exempt from attachment in execution of a decree. 1902 AWN 161.

17. Permanent lease.

See N. 19.

18. Personal service.

——Remuneration for services rendered — Inamdar alienee of revenue, not of soil.

Moneys payable as reward for services to be rendered to the public are not attachable before receipt thereof. Hence moneys payable by the Government to the inamdar (who is alienee of the revenue and not of the soil) for services useful to Government cannot be attached before they are paid over to the inamdar as the object of the grant would otherwise be defeated.

Semble:— Moneys in the hands of Collector payable to an inamdar is a debt. AIR (Vol 30) 1943 Bom 258 : 45 Bom LR 494 : 209 Ind Cas 588.

——S. 60 (1) (f) — Money due to firm of managing agents from company.

Money due to the firm of managing agents of a company from the company does not constitute a "right of personal service" within the meaning of S. 60 (1), Cl. (f), Civil P. C. AIR (Vol 28) 1941 Cal 240 (241) : 195 Ind Cas 69.

——Ss. 60 (1) (i), 2 (17) (h) — Advocate's fee becoming due from Government but not payable — If can be attached — Government engaging Advocate to conduct suit — Whether becomes public officer.

A debt for the purpose of being attachable need not necessarily had become payable. It is not an uncertain sum, nor merely a right to sue. It is an existing property vested in the judgment-debtor, though the time of its realisation has not come.

Where the letter of Government appointing the judgment-debtor Advocate to conduct the case on behalf of the Government clearly specifies a certain daily fee payable to him, and also says that it would be convenient if the Advocate submitted his bills for the payment of the money at the end of each month, after each day's work, the daily fee stipulated becomes due to the judgment-debtor from the Government and all the daily fees of a month become payable to him at the end of the month. Therefore the remunerations earned by the judgment-debtor till May 16 are attachable when the application is made on May 17. There is no question that when the decree-holder applies for attachment on May 17, fees for the month of April were not only due to the judgment-debtor but in fact had become payable and the fees up to May 17 were due to the judgment-debtor though they had not become payable till then.

An Advocate who is engaged to conduct a case on behalf of a client is for the purpose of that case in the pay of his client, because he is being paid for the work which he performs for him

Similarly if he is engaged by Government to conduct a suit, he is in the pay of the Government and comes under the 2nd category mentioned in S. 2 (17) (h), Civil P. C. Assuming, however, that he does not come within the category of an officer being in the pay of the Government, he certainly comes under the third category because he is being paid by fees for performing a public duty. Conduct of a suit on behalf of the Government for the recovery of public money is performing a public duty which an Advocate undertakes. Civil suits by the Government or against the Government are public suits though with some exception the procedure of trial is the same as of suits between two private individuals. AIR (Vol 26) 1939 Pat 77 : 19 PLT 768 : 5 BR 61 : 17 Pat 706 : 178 Ind Cas 141 (DB).

——Villages or lands given as jagirs for services cannot be attached and sold in execution of a decree as the sale of such property is opposed to the nature of the interest affected and is also contrary to public policy. 116 Ind Cas 661 : AIR (Vol 16) 1929 Nag 232 (DB).

——Saleable property is attachable — Personal inam for public service — Not saleable as opposed to public policy.

It is clear law that the Court can only sell in execution property which the judgment-debtor can lawfully alienate. S. 60 of the C. P. Code forbids the attachment of a right of personal service. If what is sought to be attached is the land and not the right of personal service, that section has no application. S. 6 (h) of the Transfer of Property Act clearly prohibits transfer of property when it is opposed to public policy. Where land is personal inam for doing public service, it cannot be sold by the inamdar; neither would the purchaser get any title, since at any moment the inam could be resumed by the Zamindar or Government where the inamdar ceases to render services. So, in such a case, the inam lands being property not saleable, could not be sold in execution of any decree against the inamdar. 70 Ind Cas 466 : 45 Mad 620 : 1922 MWN 307 : 15 MLW 513 : 30 MLT 255 : AIR (Vol 9) 1922 Mad 197 : 42 MLJ 477 (FB).

——S. 60, Cl. (g) (S. 266, old Code) — Pension, definition of — Zemindari granted as a reward for services rendered to Government — Alienability:

See 1904 AWN 144: 1 ALJ 338: 26 A 617.

——Where it was not proved that there was any connection between the receipt of a share of the offerings and the performance of the service in the temples and it has not been proved that there is any such custom or connection between the share of the offerings and the right to officiate as priest:

Held, that the property was liable to attachment and sale. AIR (Vol 23) 1936 All 131 : 58 All 457 : 1935 AWR 1506 : 1936 ALJ 409 : 159 Ind Cas 812.

——S. 60, (1) (f) — Palas — Transferable right of share in service of deity — Sale when valid.

If the palas are mere rights of personal service within the meaning of proviso (f) to S. 60 (1), Civil P. C., they are not heritable or partible or transferable. Where, however, the right to receive the share is transferable, an alienation of it can be brought about by the procedure of a court-sale so long as the class of persons to whom the sale is to be made is a class of persons who would be entitled to perform the service. AIR (Vol 23) 1936 Pat 10 : 2 BR 192 : 17 PLT 77 : 160 Ind Cas 355 (DB).

——Khadim's share in offerings of shrine — Liability to attachment and sale — Custom.

Where it is found that the khadim's share in the offerings of a shrine is allowed to be sold amongst the khadims themselves, a right to such share is liable to attachment and sale in execution, but such a right is to be sold only to a khadim. AIR (Vol 21) 1934 Lah 57 : 15 Lah 136 : 36 PLR 446 : 148 Ind Cas 246 (2).

——Right of Gangaputra to receive offerings is right of personal service and cannot be attached — But right of occupation of particular spot on bank together with physical articles is liable to attachment. 6 OWN 780 : 120 Ind Cas 822 : AIR (Vol 16) 1929 Oudh 444 (DB).

—The interest of an utpat or priest's share in the net balance of the offerings to the deity can be attached and sold in execution of a decree. 29 Bom LR 102: 100 Ind Cas 1008: AIR (Vol 14) 1927 Bom 143 (DB).

——Jatri bahi of Gayawal.

'Jatri bahi' of a Gayawal judgment-debtor containing merely entries as to the names and addresses of the pilgrims utilizing the services of the judgment-debtor while visiting Gaya on religious pilgrimage come well within cl. (f) of S. 60 as property not capable of attachment or sale in execution of a decree. 68 Ind Cas 944: 1 Pat 619: 3 Pat LT 603: 1922 PHCC 228: AIR (Vol 9) 1922 Pat 556 (DB).

——S. 60 (f) — Religious office — Endowments — Liability to attachment — Offerings to deity.

A future perquisite on account of offering or 'bhog' to the deity will be an uncertain and indefinite income which cannot be attached, the priestly office with emoluments attached to it, being inalienable. (1919) 1 Pat LT 75: 55 Ind Cas 175: AIR (Vol 7) 1920 Pat 651 (DB).

——S. 60 (f) — Birtjijimoni of Mahabrahman.

The birt of a Mahabrahman is a right to personal service and cannot be sold in execution of a money decree. 41 All 656: 17 ALJ 842: 1 UPLR (HC) 101: 51 Ind Cas 539: AIR (Vol 6) 1919 All 208 (DB).

——S. 60 (f) — Birt jijimani — Liability for attachment.

Birt jijimani is a right to personal service within S. 60 (f) and is therefore exempt from attachment and sale in execution of a decree though under Hindu Law such a right is immoveable property. 43 Ind Cas 650: AIR (Vol 5) 1918 All 380.

——S. 60 (f) — Temple offerings — Begalies.

Offerings made at the temple by the worshippers being the personal property of the Begalies (priest) cannot be attached in execution of a decree against a deceased Begali. 126 PLR 1917: 159 PWR 1917: 42 Ind Cas 390: AIR (Vol 4) 1917 Lah 363.

——Ss. 60 (S. 266, Old Code) — Property capable of attachment — Future voluntary offerings to an idol.

Offerings which may in future be made to a Hindu deity cannot be attached in execution of a decree for money against the deity inasmuch as the offerings are voluntary and uncertain. (1902) 6 CWN 728: 29 Cal 470 (DB).

19. Power to dispose.

——Decree against endorser of promissory note — Execution against his sons.

Under S. 60, if the father has a disposing power which he may exercise for his own benefit, over the property of his sons, that property is attachable in execution. So long as there is no partition between father and sons, it is obvious that that power exists. Hence, in a case where a decree is obtained by an endorsee of a promissory note, the decree-holder can execute it against the sons of the endorser. AIR (Vol 32) 1945 Mad 278: (1945) 1 MLJ 218.

——S. 60 (1) — Limits of.

The reference to disposing power under S. 60 (1) must be limited to the context, which is indicated by the words that follow: "whether the sum be held in the name of the judgment-debtor or by another person in trust for him or on his behalf". AIR (Vol 28) 1941 Pat 157: 21 PLT 776: 7 BR 598: 193 Ind Cas 360.

——Decree against a member of Mutual Relief Fund — Wife appointed nominee — Death of employee during service — Ownership of fund and interest of deceased whether vested in wife.

A railway employee against whom a decree was passed was a member of the Mutual Relief Fund and had appointed his wife as a nominee of the policy of the fund. The certificate of membership of the fund provided for the payment of pecuniary relief in the case of death or retirement from service to the member or "his undermentioned nominee or the legal heirs of the nominee". The employee died during service and subsequently the decree-holder sought to execute the attachment of the amount due on the ripe policy of the deceased judgment-debtor in the hands of garnishee, the Mutual Relief Fund:

Held, that the deceased had no interest in the Relief Fund which passed on his death to his legal representatives so as to be attachable. The ownership of the Relief Fund and, therefore, of the interest of the deceased therein had been transferred to the trustees of the fund and there was a vested trust in favour of the wife, the nominee. Although trust in favour of the wife was a contingent trust, the contingency having occurred before the judgment-creditor effected any attachment, the trust in favour of the nominee ceased to be contingent and the amount payable by the Mutual Relief Fund became payable to the wife and was not liable to attachment by the creditors of the deceased. AIR (Vol 26) 1939 Sind 15: 179 Ind Cas 296.

——Compensation money payable for acquisition under Land Acquisition Act still in hands of the Collector.

Compensation money payable under the Land Acquisition Act, 1894, cannot be attached at the instance of the creditors of the person whose land has been acquired, until the amount has been tendered under S. 31 of the Act. The money in the hands of the Collector is money belonging to the Government until tender is made and no relationship of creditor and debtor can be said to have been established between the Collector on the one side and the owners of the land on the other. In these circumstances S. 60, Civil P. C., has no applicability. So, the creditors having money decrees against the person whose land has been acquired cannot attach the amount in the hands of the Collector. AIR (Vol 25) 1938 Lah 533: 40 PLR 817: ILR (1938) Lah 548: 178 Ind Cas 443 (DB).

——Decree against widow — Decree-holder trying to attach life-estate in property — Property held could not be attached — Widow held had no disposing power over estate — Decree-holder held could get Receiver appointed of income of property.

The settlement deed settled the property on the settlor's wife, and out of its income, she had to maintain the settlor himself, his mother and the child then born and also subsequent born children. The settlor died and so did his mother and there were no further children. The settlement contained the all important provision that the widow was not to alienate the property. She became a judgment-debtor and the plaintiff sought to execute his decree on that property and the point was raised that it was not attachable under S. 60 (1)(n), Civil P. C., it being a right to maintenance. There was no provision whatsoever in the settlement deed for the maintenance of the widow. There was a provision for the property going subsequent to her death to the heirs of settlor and settlee:

Held, that the property could not be attached in execution of the decree against the widow as the document did not confer anything more than the provision for a life-estate and since there clearly was a restraint on alienation imposed, this property was not property over which the judgment-debtor had a disposing power. The decree-holder, however, was entitled to have a Receiver of the income of the property appointed although he could not bring that property to sale. AIR (Vol 24) 1937 Mad 864: 175 Ind Cas 305.

—Partition between father and sons — Certain property allotted for benefit of wife and daughters with remainder over to sons — Father has no disposing power over that property — It cannot be proceeded against in execution of decree obtained against the father. AIR (Vol 24) 1937 Mad 424: 45 MLW 212: (1937) 1 MLJ 249: 1937 MWN 113: ILR (1937) Mad 1004: 169 Ind Cas 400 (DB).

——Occupier of State lands — Whether has saleable interest in the lands.

An occupier of State lands possesses the right of cultivating them and of reaping and selling the crops, which gives him a disposing power over the profits. As the right of occupancy of State lands has value and as the Government expressly permits the right to be transferred, an occupier has a saleable interest in the property. AIR (Vol 24) 1937 Rang 74: 14 Rang 619: 167 Ind Cas 920 (DB).

——Mere right to give lease.

S. 60 allows attachment and sale of saleable property over which the judgment-debtor has a disposing power, but a mere right to give a lease is not property which can be transferred and hence it cannot be attached under S. 60. AIR (Vol 23) 1936 Pesh 90: 161 Ind Cas 628 (DB).

——Right of occupier of State lands — Whether saleable property.

An occupier of State lands can have no transferable right of use or occupancy therein. It may be that in practice Government has not ordinarily interfered with transfers made by occupiers of State lands; but this does not mean that in law such a right to make transfers exists. Consequently the right of an occupier of State lands is not saleable property within the meaning of S. 60, Civil P. C. AIR (Vol 21) 1934 Rang 263: 149 Ind Cas 815.

——Pala or turn of worship.

If a shebait has the power of disposition over his pala or turn of worship by custom even though to a limited class of persons, the pala can be attached although ultimately the property may have to be sold to that limited class. AIR (Vol 20) 1933 Cal 757: 37 CWN 978: 58 CLJ 289: 60 Cal 1351: 147 Ind Cas 924 (DB).

——'Wajib-ul-arz' providing that tenants have no saleable interest in house — House of tenant-judgment-debtor, if can be attached.

A decree-holder cannot attach a house in the face of provisions contained in the 'wajib-ul-arz' that the judgment-debtor has no saleable interest in the house. AIR (Vol 20) 1933 Oudh 79: 16 RD 589: 9 OWN 1144: 141 Ind Cas 766.

Dictum — The position of unburdened property which can be attached but cannot be disposed of is judicial contradiction in terms. AIR (Vol 19) 1932 PC 152: 10 Rang 261: 55 CLJ 497: 63 MLJ 167: 59 IA 216: 137 Ind Cas 1.

—Employees' Death Benefit Fund — Fund payable to children on death — No disposing power to

member — Under rules amount vested in certain trustees:

Held, that there was valid trust under S. 5, Trusts Act; the ownership of the interest of the deceased had been transferred to the trustees and there was nothing for the attachment in execution of a money-decree against the defendants as executors of the deceased employee, to operate upon. AIR (Vol 18) 1931 Bom 300: 33 Bom LR 720: 134 Ind Cas 558 (DB).

——Execution sale — Interest of judgment-debtor continues till confirmation — Attachment after sale but before confirmation — Sale set aside under O. 21, R. 89 — Attaching creditor's rights.

Even after auction-sale of property but before the confirmation of the sale, judgment-debtor retains interest in the property which can be attached or sold.

A judgment-debtor's property was sold in execution. Before the confirmation of the sale, another creditor attached it before judgment. After this attachment the judgmen-debtor sold it to a third person and got the sale set aside by a deposit under O. 21, R. 89, Civil P. C.:

Held, that the second purchaser did not get any valid title as against the claims of the attaching creditor. AIR (Vol 18) 1931 Mad 511: 34 MLW 531: 131 Ind Cas 14 (DB).

——Property over which judgment-debtor has no disposing power.

Property is not liable to sale by the Court unless the judgment-debtor has a disposing power over it for his own benefit. The measure of liability to involuntary alienation is the power of voluntary transfer. AIR (Vol 18) 1931 Pat 364: 12 PLT 508: 10 Pat 582: 132 Ind Cas 868 (DB).

——Partner's interest.

Partner's interest in partnership may be attached and sold. 52 Mad 563: 29 MLW 823: 116 Ind Cas 343: AIR (Vol 16) 1929 Mad 641: 57 MLJ 264 (FB).

—There is nothing in S. 60, C. P. Code, preventing the creditors of the sons of the deceased assured from attaching money payable under it. 114 Ind Cas 658: 55 Cal 1315: 47 CLJ 587: 32 CWN 634: AIR (Vol 15) 1928 Cal 518 (DB).

——Interest of a Buddhist couple in marriage property is indeterminate and variable according to contingencies — It is not saleable property within S. 60.

The interests of the parties to the marriage in the property of the marriage are not only impartible, but are also indeterminate. They can be determined only on divorce or on the death of one party. The shares taken by the parties on divorce vary according to the nature of the divorce. The interest of either party, whether at death or divorce, is not in any particular item of property, but is an interest in the estate as a whole, including liabilities as well as assets so that if the liabilities equal or exceed the assets, the interest may be nil or even a minus quantity. Such an impartible and indeterminate interest, depending on and varying according to certain contingencies, is not saleable property within the meaning of S. 60, C. P. Code. 104 Ind Cas 516: 5 Rang 478: AIR (Vol 14) 1927 Rang 274 (DB).

—The estate in the hands of the mother of a deceased proprietor who derives her title by virtue of her marriage in the family is liable to attachment for payment of debts incurred by a previous male holder of the estate. 26 PLR 735: 90 Ind Cas 1052: AIR (Vol 13) 1926 Lah 7.

——Crops grown by heir after tenant's death.

Crops grown on a tenancy by the heir of a deceased tenant after his death, are not the crops of the deceased tenant and cannot as such be liable to attachment and sale in the hands of the heir under S. 60. 69 Ind Cas 520: AIR (Vol 11) 1924 Lah 335.

——Hindu widow.

Where Hindu widow is restricted by deed of compromise from having any disposing power the property so got cannot be attached. 73 Ind Cas 196: 25 Bom LR 293: 47 Bom 597: AIR (Vol 10) 1923 Bom 276 (DB).

——Moveables of judgment-debtor — Extent of right to attach.

The jurisdiction of executing Court to attach moveables belonging to a judgment-debtor in the hands of another or under his control or a debt due by him is correlative and co-extensive with the right which the judgment-debtor himself would have had to sue against his debtor or his trustee. 4 Pat LJ 141: (1919) Pat HCC 155: 48 Ind Cas 943: AIR (Vol 5) 1918 Pat 126.

——S. 60 (1) — "Saleable" — Permanent lease — Immunity from Court sale.

The word "saleable" in S. 60 means saleable by auction at a compulsory sale under the order of the Court and not transferable by act of parties. When a permanent lease did not forbid a Court sale, the tenant has no right to complain if the land is sold by Court. 19 CWN 1182: 23 CLJ 428: 28 Ind Cas 837: AIR (Vol 3) 1916 Cal 175 (DB).

——S. 60 (1) — Buddhist law — Joint property — Wife's interest after divorce.

According to the Buddhist law, the wife ceases to have any interest in the joint property of her husband and herself, from the time of divorce and so attachment of the property, after divorce is futile. 9 Bur LT 74: 33 Ind Cas 118: AIR (Vol 3), 1916 Low Bur 21.

——S. 60(1) — Insurance Policy — Wife named as beneficiary — Attachment.

A policy of insurance for the benefit of one's wife to be paid to her or to trustees fails on assured's death without appointing any trustee or making an assignment. It becomes part of the estate of the deceased, the right of action against the company being in his executors or other representative untraminelled by any trust in favour of his wife. He could divest himself of his beneficial interest under the policy only by assignment in writing as provided by S. 130 of the Transfer of Property Act or by signed declaration of trust as provided in S. 5 of ther Trusts Act. In the absence of such writing it remained the property of the assured and was attachable. (1913) 37 Bom 471: 15 Bom LR 320: 19 Ind Cas 736 (DB).

——S. 60(1) — Fine paid into Court.

The amount of the fine paid into Court is the payer's money as owner and as his own money, can be attached in the execution of a decree against him. 89 PR 1912: 220 PLR 1912: 227 PWR 1912: 16 Ind Cas 779.

——S. 60(1) — Buddhist Law — Wife's share in let-tep-twa property — Attachable — Decree against wife alone.

The 1/2 share of the wife in let-tep-twa property, though not alienable can be attached in execution of a decree against the wife, with the husband's consent. (1910) 3 Bur LT 149: 8 Ind Cas 992.

——S. 60 (S. 266 of old Code) — "Disposing power" Meaning of.

Disposing power includes the power of a Hindu father or manager in a joint Hindu family to dispose of the shares of other members of the family in joint property for necessary purposes. (1902) 26 M 214 (DB).

——S. 60 (S. 266 of old Code) — Attachment of money in the hands of an auctioneer as proceeds of goods sold by him at auction.

Held, that money payable to an auctioneer by purchasers of goods entrusted to him for auction could not be attached by the creditors of the auctioneer except as to such an amount as the judgment-debtor had a disposing power over, which he could exercise for his own benefit; and, further, that if such money was attached the auctioneer was a proper person to raise the objection that it was not attachable under S. 266. (1901) AWN 20.

20. Proof.

See also N. 1.

——S. 60(1)(c) — Judgment-debtor must prove that he is agriculturist and occupies house as such — Objection to sale must be raised before sale — Judgment-debtor cannot raise objection subsequent to sale unless he proves fraud.

Where an exemption is claimed under S. 60(1)(c), Civil P. C., it must be proved that the objector is an agriculturist and is occupying the house, that is it is being occupied bona fide for the purpose of agriculture. The onus of proof is upon the objector. Mere production by the objector of a 'parcha khettuni' is not sufficient to prove that the house is occupied by him as an agriculturist.

A judgment-debtor must raise objections prior to the sale as to his property being exempt from attachment and sale under S. 60. The judgment-debtor cannot object to the sale after the property is sold, unless fraud is proved. The mere fact that the decree-holder applied for possession some three years after the sale is no reason for holding that he was acting fraudulently. AIR (Vol 29) 1942 Oudh 308: 1942 OWN 23: 1942 RD 69: 1942 AWR (CC) 27: 1942 AWR (Rev) 50: 199 Ind Cas 456.

——Amendment by S. 35, Punjab Relief of Indebtedness Act.

Onus of proving facts for exemption under S. 60, Civil P. C. lies on judgment-debtor. (1941) ILR (1941) Lah 441.

——Decree providing for satisfaction out of an estate — Attachment of a house by decree-holder — Onus on decree-holder to prove house to be part of the estate.

Where a decree for arrears of maintenance provides that the decree is to be satisfied out of an estate and a house is attached by the decree-holder the onus lies on the decree-holder to prove that the house is part of the estate. AIR (Vol 21) 1934 Oudh 10: 11 OWN 72: 148 Ind Cas 246 (1) (DB).

——Onus.

Where a person is both an agriculturist and a zamindar, the burden of proving that the house in dispute is strictly of the nature contemplated by S. 60 (c) is on him. 8 LRA Rev 229: 106 Ind Cas 49: AIR (Vol 14) 1927 All 601.

—Judgment-debtor must prove that he is agriculturist in fact for claiming exemption. 100 Ind Cas 104: AIR (Vol 14) 1927 Lah 810.

——S. 60(c) — Agriculturist — Burden of proof.

Where a person is both a zamindar and an agriculturist, the onus lies, on him to show what his main source of income is and that he is an agriculturist within the strict sense of the term and occupies the house as such when he claims exemption for the house from attachment. (1913) 35 All 307: 11 ALJ 437: 19 Ind Cas 125 (DB).

——S. 60 (c) (S. 266 old Code) — Decree — Execution — Attachment — Sale — Possession of the property — Objections under the section.

A purchaser in execution sale being obstructed in seeking possession of the house sued for possession. The defence was that the house was occupied by the defendant as an agriculturist and that therefore under S. 266 (c) its materials could not have been sold. Held the executing Court's order for sale was right in the absence of any proof before it of exemption from liability to attachment. (1903) 5 Bom LR 799 : 28 B 125 (DB).

21. Property attachable.

——Security deposit — Attachability — Government Promissory Notes deposited as security for costs of respondent in Privy Council appeal.

Under S. 60, C. P. Code, Government Promissory Notes deposited by an appellant as security for costs of the respondent in a Privy Council appeal is liable to attachment in execution of a decree against the appellant. The effect of the security deposit is not to take away entirely the disposing power of the depositor. In spite of the fact that the deposit is earmarked for a specific purpose, the depositor still retains a disposing power which he may exercise for his benefit. The extent of the power is dependant on certain contingencies. The fact that the Government Promissory Notes deposited have been endorsed in the name of an officer of Court does not affect the question. The word "property" is used in a wide sense and does not mean only proprietorship but includes any right or power in respect of the same. The effect of the attachment is merely to prevent private alienation and to subject the attached property to claims enforceable under the attachment. 54 CWN 322 : AIR (Vol 37) 1950 Cal 174 (DB).

——Life-estate with power of alienation can be attached and sold for debts of life-tenant.

A life-estate with full power of alienation during the life-time of the devisee is under S. 60 liable to attachment and sale in satisfaction of the debt of the life-estate-holder since he has disposing power which he can exercise for his own benefit. AIR (Vol 33) 1946 Oudh 20 : 1945 OWN 300.

——All interests in properties available to judgment-debtor, if can be attached.

Section 60, Civil P. C., lays down what properties can be taken in execution. The word "property" is used there in a very wide sense. All the interests in the properties which are available to the judgment-debtor for his benefit can be seized in execution. Even if the property does not belong to the judgment-debtor, if he has acquired any right or power in respect of the same which can be sold by him for his benefit, such right or power will be seizable property within the meaning of the section. AIR (Vol 29) 1942 Cal 92 (99) : 74 CLJ 180 : 46 CWN 245 : ILR (1942) 1 Cal 169 : 200 Ind Cas 216 (DB).

——S. 60 (1), O. 21, Rr. 51 and 52 — Amount of cheque not being money belonging to judgment-debtor does not fall under S. 60 (1) — Proper procedure is actual seizure of cheque under O. 21, R. 51 and not prohibitory order under O. 21, R. 52 directing bank's manager to withhold payment.

In view of the enumeration in S. 60 (1) of property liable to attachment in execution of a decree, in order that the amount or part of the amount of the cheque drawn in favour of the judgment-debtor on a bank might be attachable, it must have been money belonging to the judgment-debtor lying in the bank or a debt due to him by the bank. A cheque being a negotiable instrument, unless and until the money is paid to the payee, the amount of the cheque cannot be considered to be his property. The drawer of the cheque has the right to stop payment at any time before the money is actually paid out. The payee may endorse the cheque in favour of some one else and thereby negotiate the same in which case he parts with the property in the cheque itself, but even in such an event the amount of the cheque before it was withdrawn from the bank is still not the property of the endorsee. There-

fore, the amount of the cheque not being money belonging to the judgment-debtor, does not fall within the category of property declared to be liable to attachment in execution of a decree by S. 60 (1). The proper way is to attach the cheque itself by actual seizure under O. 21, R. 51 while it is the property of the judgment-debtor, that is to say, before the judgment-debtor has negotiated or parted with the property in the cheque, and not the issue of a prohibitory order under O. 21, R. 52 on the manager of the bank directing him to withhold payment. AIR (Vol 29) 1942 Rang 59 : 1941 Rang LR 759.

——Money-decree-holder not trying to sell occupancy rights in lands but merely trying to sell shop or house and such right, title and interest as the judgment-debtor who is not a raiyat has in the land — Such interest cannot be said to be protected under S. 47, Chota Nagpur Tenancy Act. There is nothing in S. 60, Civil P. C., to prevent the sale of such judgment-debtor's interest in the land in dispute. AIR (Vol 28) 1941 Pat 485 : 7 BR 772 : 194 Ind Cas 441 (DB).

——Suit for dissolution of partnership — Preliminary decree for accounts — Whether can be attached in execution of another decree.

When a right to sue merges in a decree, it can no longer be said to be subject to the prohibition against alienation attaching to a mere right to sue. Indeed, a preliminary decree may not be capable of immediate execution but nevertheless it creates some rights which must be regarded as property.

Hence a preliminary decree for accounts in a suit for dissolution of partnership and accounts is attachable in execution of another decree. AIR (Vol 27) 1940 Pat 107 : 18 Pat 688 : 6 BR 383 : 186 Ind Cas 623 (DB).

——Right to commit a tort — Non-owner disposing of goods not belonging to him — His action vis-a-vis true owner.

Per Baguley J., (in Order of Reference):— If the non-owner does dispose of goods which do not belong to him, his action vis-a-vis the true owner is in the nature of a tort and it is quite incredible that under S. 60, Civil P. C., the law entitles a creditor to attach and sell his judgment-debtor's right to commit a tort and clearly no right to commit a tort can be envisaged. AIR (Vol 27) 1940 Rang 1 : 1939 Rang LR 649 : 185 Ind Cas 757 (FB).

——Right of patentee.

The rights of a grantee under a grant of Letters Patent are covered by S. 60, Civil P. C., and are "property liable to be attached and sold" within the meaning of the section. AIR (Vol 26) 1939 Cal 283 : ILR (1938) 2 Cal 618 : 42 CWN 1086 : 181 Ind Cas 909.

——S. 60, O. 21, Rr. 54, 64 — Preliminary decree in mortgage suit, if can be attached — Such decree, how can be realized.

A preliminary decree in a mortgage suit is property within the meaning of S. 60. A preliminary decree may not be executable as it stands, but there is nothing to prevent a party from attaching it as being property of his judgment-debtor within the meaning of S. 60. Since it is not a decree such as is contemplated in O. 21, R. 53 (1), but since it is nevertheless property within the meaning of S. 60, the correct procedure is for the Court to sell it under O. 21, R. 64. AIR (Vol 24) 1937 All 652: 1937 ALJ 776: ILR (1937) All 823 : 1937 AWR 649 : 171 Ind Cas 782 (DB).

——Ex-proprietary and occupancy tenancies — Exemption from sale in execution of decree of Civil or Revenue Court by S. 23, Agra Tenancy Act (III of 1926) — Interest in tenancies, if can be attached.

The interest of an ex-proprietary or occupancy tenant cannot be sold in execution of a decree of either Civil or Revenue Court or otherwise by virtue of S. 23, Agra Tenancy Act. Under S. 60 (1) of the Civil P. C., the property liable to attachment and sale must belong to judgment-debtor and must also be saleable; consequently the interest in the tenancies not being saleable under statute cannot be attached and sold and S. 60 (1) has no application to such tenancies. AIR (Vol 24) 1937 All 389: 1937 ALJ 267: 1937 AWR 197 : 1937 RD 210 : ILR (1937) All 542 : 169 Ind Cas 181.

——Attachment before judgment — Claim by wife of defendant — Wife declared owner of house — Husband getting house as heir on wife's death — Decree-holder, if can execute decree.

The decree-holder obtained an attachment before judgment of a house belonging to the defendant. The latter's wife preferred a claim to the property on the ground that it had been sold to her but the claim was disallowed. Subsequently the 1st defendant was adjudicated an insolvent and later an order of discharge was passed in the insolvency proceedings. The house was not reduced to possession by the Official Receiver nor was any proceeding taken in respect of it. There was a subsequent suit to which the decree-holder was not a party, between the 1st defendant and his wife, in which it was established that the house belonged to the wife. The wife died subsequently and the 1st defendant got the house as her heir. The decree-holder then sought to attach and sell the house:

Held, that the plaintiff decree-holder was not seeking to attach and sell any property of the judgment-debtor which was in his hands qua his property. If a creditor could otherwise realise his debt, there was nothing in the insolvency law which precluded him from doing so as the debt was not extinguished. The defendant must be deemed to have taken the property after the death of his wife subject to the result of the adjudication already had against her. The debt was not altogether destroyed by the release and the house was liable to be attached and sold for the debt irrespective of the order of discharge. AIR (Vol 24) 1937 Mad 727 : 1937 MWN 279 : 170 Ind Cas 851.

——Mere right to give lease.

Section 60, Civil P. C., allows attachment and sale of saleable property over which the judgment-debtor has a disposing power, but a mere right to give a lease is not property which can be transferred, and hence it cannot be attached under S. 60. AIR (Vol 23) 1936 Pesh 90 : 161 Ind Cas 628 (DB).

——S. 60, O. 38, Rr. 5, 6, O. 43, R. 1 — Appeal from order of attachment before judgment — Question whether property is attachable, whether can be raised in appeal.

The question whether the property attached was capable of attachment is a question which can be raised in an appeal under O. 43, against an order directing attachment before judgment; the appeal is not restricted to the grounds mentioned in Rr. 5 and 6 of O. 38. AIR (Vol 20) 1933 Cal 757: 37 CWN 978 : 58 CLJ 289 : 60 Cal 1351 : 147 Ind Cas 924 (DB).

——Pala or turn of worship.

If a shebait has the power of disposition over his pala or turn of worship by custom even though to a limited class of persons, the pala can be attached although ultimately the property may

have to be sold to that limited class. AIR (Vol 20) 1933 Cal 757 : 37 CWN 978 : 58 CLJ 289 : 60 Cal 1351 : 147 Ind Cas 924 (DB).

——**Dictum.**

"The position of unburdened property which can be attached but cannot be disposed of is a judicial contradiction in terms." AIR (Vol 19) 1932 PC 152 : 10 R 261 : 55 CLJ 497 : 63 MLJ 167 : 59 IA 216 : 36 MLW 895 : 137 Ind Cas 1.

——**Proprietary interest of surety is not extinguished — It merely becomes the first charge on the property — Liability of property discussed — Such interest is not exempt under Transfer of Property Act, S. 6 or S. 60.**

Per Sulaiman, Banerji and Sen, JJ.— When either immoveable or moveable property is offered as security the proprietary interest of the surety is not automatically extinguished and merely a first charge is created on the security which will have to be available in the first instance for the purpose for which it has been offered. Although the depositor cannot defeat that purpose his power of disposal of his security subject to that charge will subsist, and his interest in the surplus which may remain over is both transferable and attachable. Such an interest does not come within any of the exceptions enumerated in S. 6, T. P. Act, nor is such security exempted from attachment under S. 60, C. P. Code. If the decree-holder desires to be cautious there is nothing in law to prevent him from applying to the Court for attaching the security so as to prevent the judgment-debtor from dealing with it personally any further. It is not only permissible to a decree-holder to attach the security but he has a right to do so subject always of course of the first charge created and the Court has no discretion to refuse his prayer. The only condition which the Court issuing an order for attachment must impose is that the previous charge created in the property is in no way to be affected. O. 21, R. 52 is specially applicable to attachment of property in the custody of any Court of public officer. 1930 ALJ 402 : AIR (Vol 17) 1930 All 225 (FB).

——Non-transferable occupancy is exempt from sale and does not vest in Official Receiver. 121 Ind Cas 876 : AIR (Vol 17) 1930 Sind 75.

——Insolvent's money deposited by him in the Court as security for the costs of an appeal to His Majesty in Council, can be attached, but the order of attachment must be made subject to the result of the appeal. 9 PLT 969 : 8 Pat 478 : 114 Ind Cas 465 : AIR (Vol 16) 1929 Pat 97 (DB).

——Groves situate on ex-proprietary holding partake of the nature of the holding on which they stand, and as such cannot be attached and sold in execution of a decree. 101 Ind Cas 526 : 8 LRA Rev 132: AIR (Vol 14) 1927 All 779.

——**Procedure not followed — Sale is not a nullity.**

(Obiter).—Sale of property liable to attachment and sale under S. 60 is not a nullity simply because the procedure provided for the execution of a particular kind of property in the first Schedule is not followed. Omission to follow the correct procedure under the appropriate order and rule is merely an irregularity. 49 All 292: 25 ALJ 173: 99 Ind Cas 443: AIR (Vol 14) 1927 All 76 (DB).

——**Occupancy holding is liable to attachment and sale in execution.**

The transfer for value of the whole or part of an occupancy holding, apart from custom or local usage inoperative as against the raiyat whether it is voluntary or involuntary. The principle is a general one which applies to the case of creditors other than landlords also. 90 Ind Cas 998: AIR (Vol 13) 1926 Cal 337 (DB).

——**Hereditary but non-transferable lease.**

A heritable but non-transferable lease granted by a Settlement Court in Oudh is not liable to sale in execution of money decree, but nevertheless it is not a succession of life estates and each hereditary owner fully represents the estate. The lessee himself can raise the objection as to non-transferability against the holder of a money decree. Case-law fully discussed. 90 Ind Cas 256: 12 OLJ 543: 2 OWN 737: AIR (Vol 12) 1925 Oudh 702.

——The right to hold the property as a security for the dower debt and to continue in possession thereof until the dower debt is satisfied is property and is both heritable and transferable. 70 Ind Cas 312: 1922 PHCC 348: 2 Pat 84: 4 PLT 272: AIR (Vol 10) 1923 Pat 33 (DB).

——**Equity of redemption.**

The equity of redemption is a substantial right capable of attachment and sale. On attachment and the sale of the judgment-debtor's share in the equity of redemption, the auction-purchaser would acquire the right, title and interest of the judgment-debtor and nothing more. If the judgment-debtor was one of the three mortgagors, the auction-purchaser would step into his shoes, and have all the rights as one of the three mortgagors. 70 Ind Cas 530: 4 UBR 132: AIR (Vol 10) 1923 Rang. 119.

——**Occupancy holding.**

The transfer of the whole or a part of an interest in non-transferable occupancy holding is operative against the tenant, whether it is made voluntarily or involuntarily, e. g., in execution of a money-decree obtained against him, either by the landlord or by a stranger. 1 PLJ 257 and 2 PLJ 530, Overruled. 65 Ind Cas 335: 1922 PHCC 49: AIR (Vol 9) 1922 Pat 19.

——**Right to get reconveyance.**

A right to get a recoveyance of and possession of property worth fifteen lakhs for payment of six lakhs is property of a very valuable kind which is attachable and saleable under the provisions of the C.P. Code notwithstanding the amendment of the Transfer of Property Act. 1921 MWN 519: AIR (Vol 8) 1921 Mad 498 (DB).

——**Property attachable.**

Asthan property cannot be attached and sold in execution of personal decrees against the Mahant. 61 Ind Cas 757: 8 OLJ 210: AIR (Vol 8) 1921 Oudh 119.

——**S. 60 (g) — Standing crops in case of jagir.**

In the case of jagir, without the powers of alienation, the standing crops are attachable. 24 Ind Cas 805: AIR (Vol 1) 1914 Cal 765 (DB).

——**Liability to attachment — Limits of.**

A decree holder can attach all the properties of the judgment debtor as S. 60 or other provisions do not limit the extent of the properties to be attached. He can also attach property for mesne profits even before they are assessed. (1912) 16 Ind Cas 708 (Cal) (DB).

——**Unearned salary of a lawyer's clerk not property.**

See (1909) 6 ALJ 227.

——**S. 60 (S. 266, Old Code) — Attachment and sale of country liquor — Bombay Abkari Act V of 1878, S. 16 — Country liquor not exempt from attachment — Collector's permission necessary for sale only.**

Country liquor is not exempt from attachment and sale in execution of a money decree passed by a Civil Court. It is saleable property and is covered by the first part of S. 268, C.P.C. The Collector's permission is necessary to the sale of country liquor (S. 16 of the Bombay Abkari Act); but it is not necessary to attachment so far as the attachment can be made without removal. (1907) 32 B. 157: 10 Bom LR 13 (DB).

21. A. Property exempted from sale for arrears of land revenue.

——S. 60 (1) (p) — If applies only to movable property.

Section 60 (1) (p), Civil P.C., applies only to movable property. AIR (Vol 22) 1935 Pesh 113: 157 Ind Cas 953.

22. Provident fund.

——S. 60 (k) — Appointment of Receiver to avoid bar under — Permissibility.

See 54 CWN 254: AIR (Vol 37) 1950 Cal 212.

——Ss. 60 and 115 and Provident Funds Act (XIX of 1925) S. 3 — Attachment of the Provident Fund — Judgment-debtor a railway employee taking no objection — Railway company as garnishee if competent to raise the objection — Rejection of objection by trial Court — Revision if lies.

The Provident Fund of the judgment-debtor (a railway employee) is not liable to attachment having regard to the provisions of S. 60, Civil P.C. and S. 3 of the Provident Funds Act. Even if the debtor agrees to the attachment of his salary waiving the rights conferred on him by S. 60, Civil P.C., still the attachment is illegal and should be raised as such an agreement is opposed to public policy, void and unenforceable. The railway company as garnishee is entitled to maintain the objection to the attachment of the Provident Fund. The railway company takes the objection as garnishee and not as representing the judgment-debtor and when the objection is rejected it cannot be said that an appeal under S. 47, Civil P.C., will lie and that a revision was not competent. AIR 1933 Lah 251, not followed.

Where the trial Court on an erroneous view of the law refused to entertain the objection to the attachment it is a failure to exercise jurisdiction vested in it and a revision will lie. 63 LW 244: AIR (Vol 37) 1950 Mad 402: 1950 MWN 108: (1950) 1 MLJ 186.

——Provident fund amount — Attachability.

Moneys standing to the credit of a judgment-debtor in his Provident Fund Account are not exempt from attachment under S. 60, C.P. Code, except where the funds are vested in trustees under rules or cases where there are statutory prohibitions against such attachment. Parties cannot by agreement among themselves alter their personal law or statute law, such as the C.P. Code. 1946 PWN 13: AIR (Vol 33) 1946 Pat 430: 228 Ind Cas 478: 13 B.R. 226.

——Contribution by employee vesting in trustees — Employee to get sums on happening of contingencies.

Where under the Provident Fund Rules, the moneys contributed by the employees are vested in trustees, the money ceases to belong to the employee. The title to it is in the trustees. The employee thereafter is no more than a beneficiary. The employee has no control whatever over the fund so long as it is vested in the trustees. All that he has is a right to obtain sums of money which vary according as to whether certain contingencies happen or do not happen. The employee has no present right to payment but may get a sum of money, which it is impossible to specify at the moment, on the happening of the contingencies. The amounts standing to the credit of the employee are therefore not attachable. AIR (Vol 31) 1944 Nag 144: 1944 NLJ 96: ILR (1944) Nag 711: 218 Ind Cas 63.

——S. 60 (1) — Words "belonging to" in S. 60 (1), meaning of — Contribution to provident fund deducted from salary belongs to judgment-debtor.

Per Dalip Singh, J.—Salary is a debt, when payable, due from the employer to the employee and, therefore, falls within the first part of sub-s. (1) of S. 60 and belongs to the judgment-debtor. The words "belonging to" are used in S. 60 (1) in contradistinction to property which does not belong to but over which the judgment-debtor has a disposing power. It does not follow from this that all property which belongs to the judgment-debtor is necessarily property over which he has disposing power. There are many instances of cases where a person has not a complete disposing power but nonetheless must, be considered the owner, for instance the well-known case of the Hindu widow under Hindu Law or the case of the limited estate in English law. Hence forcible deductions by Government from the judgment-debtor's salary for contribution to the provident fund as well as instalment due for advance taken from that fund belong to the judgment-debtor though he may not have a disposing power over them and must, therefore, be considered as part of his salary in considering whether his salary is attachable or not. AIR (Vol 30) 1943 Lah 60: 45 PLR 46: ILR (1944) Lah 63: 206 Ind Cas 77 (DB).

——S. 60 (1) — Debt due but payable in future — Employee's deposit on provident fund account can be attached but not sold until it is at disposal of judgment-debtor.

A "debt" is a sum of money which is now payable or will become payable in the future by reason of a present obligation. 'Debt' within the meaning of sub-s. (1) of S. 60, Civil P. C., does not mean a debt only presently payable, but it means also a debt due but payable at some future time.

There is no debt until the obligation has been fully incurred, but an obligation may be fully incurred though the date of payment has not arrived.

The contributions of an employee of a company as well as the contributions made by the company to his credit in his account in the provident fund maintained by the company for the benefit of its employees, are the property of the subscriber payable to him or his nominees under the terms of the contract between them embodied in the rules governing the provident fund. When the rules of the company governing its provident fund prescribe that on the completion of a certain period of service, the subscriber to the fund shall be entitled to the return of the amount standing to his credit in the fund on the death or retirement from service, there exists an obligation on the company, once the subscriber has completed the requisite period of service, to pay him the sum standing to his credit in the fund though the date of such payment has not arrived. Consequently, the employee's deposit in the fund constitutes a debt within the meaning of S. 60 (1) owed by the company to the employee. Since the company and the members of the provident fund cannot by private agreement alter the provisions of the statute law including any relevant provisions of the Civil P. C., the aforesaid deposit can be made the subject of a prohibitory order or attachment, but cannot be sold until it was at the disposal of the judgment-debtor (i.e., on his death or retirement from service). AIR (Vol 29) 1942 Sind 47 (48, 49): ILR (1941) Kar 401: 199 Ind Cas 525 (DB).

——S. 60 (1) (i) (k) (as amended in 1937) — Exemption of deposits in Provident Funds is separate from exemption in respect of salaries.

The exemption of deposits in provident funds under cl. (k), S. 60(i), Civil P. C., is separate from the exemption in respect of salaries given by cl. (i), and the result would be that the recurring contributions of the judgment-debtor to the provident fund must, in working out the amount attachable, fall on that moiety of the excess of the salary over the first hundred rupees which is not already

reserved for the judgment-debtor by cl. (i). AIR (Vol 28) 1941 Pat 157: 21 PLT 776: 7 BR 598: 193 Ind Cas 369.

——**"Debt" means actually existing debt — Provident fund amount standing to credit of person cannot be attached in execution of decree against him.**

Even though in a Provident Fund account an amount stands to the credit of a member, he obtains no interest in it until the payment, which shows that the mere fact that a certain amount is credited to a member's account does not indicate that he holds an interest in such amount. The member's right to have the money paid to him will arise only in the event of his dismissal or retirement as provided in the rules of the fund which may or may not happen before his death, or his becoming insane. And this applies both to the contribution or subscription made by the member out of his salary and the contribution made by the company. Hence such money, even though credited to the member's account cannot be attached in execution of a decree against him. AIR (Vol 28) 1941 Rang 256.

——S. 60 (1) (m) — Under R. 9 of Burma Oil Subsidiary Provident Fund Rules, a member has vested interest in deposits made by him and the deposit is, therefore, liable to be attached. AIR (Vol 28) 1941 Rang 239: 198 Ind Cas 737.

——**S. 60 (1) (i) and (k) — Allowances of Railway Guard, if can be considered in determining salary attachable — Amount compulsorily deducted for provident fund — Recoveries of advance taken from provident fund.**

There is no exemption of allowances in any of the clauses of S. 60, Civil P. C. Allowances of a Railway Guard can, therefore, be taken into consideration in determining salary attachable.

The Legislature intended to exempt not only the salary up to Rs. 100 and half the remainder, but also independently of it, such amount as is compulsorily deducted for the provident fund.

Where a Railway Guard had taken an advance from the provident fund and the amount was being deducted from his pay at certain rate per month:

Held, that the recovery of advance from the provident fund could not be deducted from the salary available for attachment. The ordinary provident fund deposit could, however, be deducted. AIR (Vol 27) 1940 Mad 766: (1940) 1 MLJ 936: 1940 MWN 555: 52 MLW 69: 191 Ind Cas 462.

——**Ss. 60, 35, O. 21, R. 46 — Attachment of subscription to provident fund by garnishee order.**

Before the time of the payment of subscription by a judgment-debtor to a provident fund, the money does not belong to the judgment-debtor and at the time of the payment, it becomes a compulsory deposit and is exempted from attachment under S. 60 (1) (k). There is no intervening period between which a subscription by the judgment-debtor to a provident fund can be attached by a garnishee order to the Corporation in which judgment-debtor is an employee. AIR (Vol 26) 1939 Rang 432: 1939 Rang LR 504: 185 Ind Cas 460.

——**S. 60 (1) (k) — Amount standing to credit of Imperial Bank's employee in Provident Fund.**

Under S. 60(1)(k), Civil P. C. the amount standing to the credit of an employee of the Imperial Bank of India in the Provident Fund established by that Bank for the benefit of its employees is exempt from attachment. AIR (Vol 23) 1936 Lah 694: 38 PLR 115: 165 Ind Cas 767.

——**S. 60 (1) (k) — Attachment of provident fund.**

Amount standing to the credit of a person in his provident fund is not attachable in execution of a decree.

Decree-holder as a nominee of the depositor cannot attach provident fund in execution of his decree. By nomination he becomes the owner of the fund and he cannot attach his own property. AIR (Vol 21) 1934 Lah 153: 36 PLR 145: 36 Cr LJ 21: 150 Ind Cas 231 (DB).

——**Compulsory deposit made in General Provident Fund is not attachable even after contributor's retirement.**

Compulsory deposit made in the General Provident Fund is not liable to attachment even after the retirement of the contributor from service. R. 10, General Provident Fund Rules, is merely a rule of procedure directing the Accounts Officer how to proceed on receipt of a notice of attachment. It does not legalize a notice of attachment and consequently does not have the intention of making the deposit attachable after retirement. AIR (Vol 16) 1929 All 417: 117 Ind Cas 622: 1929 ALJ 670: 51 All 845.

——**Provident Funds Act (IX of 1897), S. 2(4) — Compulsory deposit is deposit until payment.**

The words "repayable on demand" in sub-s. (4) clearly show that a compulsory deposit is only a deposit so long as it remains in the fund, and not after it has been paid over to the person to whose credit it had hitherto stood. So it is not exempt from attachment after it has been paid over to the person entitled: 44 Bom 673, Diss. AIR (Vol 14) 1927 Oudh 22: 92 Ind Cas 673: 29 OC 278: 3 OWN 378: 13 OLJ 425: 1 Luck 313 (DB).

——**Provident fund — Deposit.**

A deposit by an optional subscriber within rule 3 of the General Provident Fund Rules is a compulsory deposit within S. 2 of the Provident Funds Act of 1897 and is exempt from attachment by Civil Court. AIR (Vol 11) 1924 Pat 524: 80 Ind Cas 424: 3 Pat 74: 6 PLT 129 (DB).

——Provident Funds Act (IX of 1897) — The fund does not become attachable till paid. AIR (Vol 11) 1924 All 68: 74 Ind Cas 746: 45 All 554: 21 ALJ 454: 4 LRA Civ. 256.

——**Provident Funds Act (IX of 1897), S. 4, sub-s. (1) — "Compulsory deposits" in Railway Provident Funds are not attachable.**

The Rules regulating the General Provident Fund do not apply to the State Railway Provident Institution, which is governed by the Rules contained in the State Railway Open Line Code, Vol. II, App. 1. The amount at the credit of the officer, who has left the service, which consists entirely of deposits which when they were made were "compulsory deposits" within the meaning of R. 30 of the latter Rules and of the Provident Funds Act, is exempted from liability to attachment under the said R. 30 read with S. 60(1)(k) of the C. P. Code and S. 4, sub-s. (1) of the Provident Funds Act. AIR (Vol 10) 1923 Cal 585: 82 Ind Cas 69: 77 Ind Cas 1025: 27 CWN 472: 50 Cal 347 (DB).

——Provident Funds Act (1897), Rule 10 — Money payable to retired employee is attachable. AIR (Vol 9) 1922 Cal 196 (DB).

——**S. 60 (k) ((S. 266) Cl. (g) of old Code) — Attachment of Provident Fund — No Provident Fund established by the Calcutta Corporation.**

See (1908) 12 CWN 633.

——**S. 60 (S. 266, old Code) — Provident Funds Act, S. 4 — Compulsory deposit — Retirement of a member — Attachment.**

When a person retires from his service, the Provident Funds standing to his credit become repayable on his demand or at his option: they are no longer "compulsory deposits" within the meaning of S. 4 of the Provident Funds Act, 1897. From that time forward the sum becomes a debt due to him

by the Provident Fund; and can be attached under S. 266, C.P.C. (1903) 5 Bom LR 454.

22A. Rents and profits.

See N. 6.

23. Residence.

See also, N. 8.

——S. 60 (1) (ccc) (as amended by Punjab Act VI of 1942), S. 60 (1) Proviso — S. 60 (1), (ccc), if retrospective — Property attached before Amending Act — Objection to saleability of property under S. 60 (1) (ccc) cannot be sustained.

The right of a decree-holder to realize the decree by the attachment and sale of a property belonging to his own judgment-debtor is a substantive right and cannot be regarded to be a question of procedure. The decree-holder is possessed of that right from the time when the decree is passed in his favour and it is in enforcement of this right that the judgment-debtor's property is sold in execution. That right is not taken away by Punjab Act VI of 1942 as that Act is neither expressly stated to have a retrospective effect nor can it be considered to have that effect by necessary implication.

Section 60 (1) (ccc) as amended by Punjab Act VI of 1942 is not, therefore, retrospective in operation and hence when the amended section came into force during the pendency of an appeal by the judgment-debtor against an order rejecting his plea of his property being exempt from attachment and sale under S. 60 (1) (ccc) as it stood before the amendment of 1942, the judgment-debtor cannot avail himself of the provisions of S. 60 (1) (ccc) as amended.

An attachment is a necessary preliminary to sale and must inevitably lead to that result. If an objection could not be raised against the attachment, it could not equally be raised against the saleability of the property either. If no objection can be validly raised to the attachment and it continues to subsist, the sale would follow as a matter of course. Hence where property could be and was legally attached long before Punjab Act VI of 1942 was passed, the property remains liable to be sold and the plea that the property cannot be sold under S. 60 (1) (ccc) as amended cannot be sustained. AIR (Vol 31) 1944 Lah 29 : ILR (1943) Lah 666 : 46 PLR 115 : 212 Ind Cas 144 (DB).

——S. 60 (1) (ccc) (as amended by Punjab Act XII of 1940) — Provincial Insolvency Act, Ss. 28, 59 and 60 — Attachment of residential house of insolvent.

Where the residential house of the insolvent was not exempt from attachment and sale at the time when it became vested in Official Receiver, but before the Official Receiver proceeded to sell it. S. 60 (1) (ccc) as amended by the Punjab Act came into force, the insolvent would be entitled to the exemption of his residential house from attachment and sale under S. 60 (1) (ccc) and the Receiver's power to sell it would subsist no longer. AIR (Vol 30) 1943 Lah 19: ILR (1943) Lah 242: 45 PLR 57 : 204 Ind Cas 344 (DB).

——S. 60 (1) (ccc), Proviso (as amended by Punjab Act XII of 1940) — Mortgage of residential house executed by insolvent annulled by Insolvency Court before proviso came into force.

Proviso to S. 60 (1) (ccc), Civil P. C., as amended by the Punjab Act XII of 1940, does not extend to property which had been mortgaged and redeemed in remote antiquity and there was no subsisting charge in it when it was sought to be attached and sold in execution. When the mortgage of his residential house executed by the insolvent was annulled by the Insolvency Court on the application of the Official Receiver and was no longer in existence when the proviso to S. 60 (1) (ccc), came into force the proviso cannot apply. The fact that the order of annulment was passed not at the instance of the insolvent but on the application of the Official Receiver under Ss. 53 and 54, Provincial Insolvency Act, makes no difference. AIR (Vol 30) 1943 Lah 19 : 45 PLR 57 : ILR (1943) Lah 242 : 204 Ind Cas 344 (FB).

——S. 60 (1) (c), (as amended by S. 35, Punjab Relief of Indebtedness Act, VII of 1934) — Judgment-debtor's house lent to and occupied by his sons who were independent proprietors and living apart.

Sons, who are independent proprietors, come under the word "others" in S. 35, Punjab Relief of Indebtedness Act. So, where the house of the judgment-debtor is not occupied by him but is lent to and occupied by his sons who are independent proprietors and are living at a different place, the house is not exempt from attachment. AIR (Vol 26) 1939 Lah 50 : 41 PLR 377 (1) : 182 Ind Cas 631.

——S. 60 (1) (c), (as amended by Punjab Relief of Indebtedness Act VII of 1934) — Applicability of, before amendment — Property validly and legally vesting in Official Receiver in 1933 — Amendment coming into force in 1935 — Receiver, if divested of such property — Succession opening out long after vesting — Legal representative, if can claim exemption.

Under S. 60, as it stood before the amendment by the Punjab Relief of Indebtedness Act, the exemption applied only if the houses were being used or occupied bona fide for purposes of agriculture at the time of attachment.

Amendment of S. 60 (1) (c), Civil P. C., by S. 35, Punjab Relief of Indebtedness Act, which came into force in 1935 does not divest the Official Receiver of property which had validly and legally vested in him in 1933. Nor can the legal representative of the insolvent claim exemption under S. 60 (1) (c), Civil P. C., when succession to them opened out long after the vesting of the property in the Official Receiver. AIR (Vol 25) 1938 Lah 459 : 40 PLR 793 : 178 Ind Cas 195.

——S. 60 (1) (n) — Hindu son given house for residence on arrangement with father — Attachment of house in execution of decree against son.

A person seeking 'equitable execution' must show that he was met by difficulties arising from the nature of the property, which prevented his obtaining relief at law. One principle to be applied is to see whether in lieu of the assets, the amount due under the decree is likely to be realized within a reasonable time from the profits of the attached property. Another principle is that such an appointment should appear in the circumstances to be the best course both for the creditor and the debtor.

In execution of a decree against the son, who was, along with certain property for maintenance, given a house for residence, the house was attached. The son was not residing in the house but had let it out to tenants :

Held, that though in the Punjab a son cannot under Hindu law claim a partition against his father the son's interest in co-parcenary property is liable to attachment and sale during the life-time of the father, although the son has no power to enforce a partition in his father's lifetime. Though, therefore, the right of residence reserved for the judgment-debtor in the house cannot be sold by virtue of the provisions of S. 60 (1) (n), Civil P. C., it was just and convenient that a Receiver should be appointed of that property, to realize the rent of the house with direction that the surplus remaining after expenses were deducted should go

towards satisfaction of the decree. AIR (Vol 24) 1937 Lah 433: ILR (1937) Lah 486: 39 PLR 839: 175 Ind Cas 447 (DB).

——Punjab Relief of Indebtedness Act (VII of 1934), S. 35 — Amendment of S. 60 — Effect of — Judgment-debtor not in actual occupation of house attached — House, if saleable.

By virtue of the amendment of S. 60, Civil P. C., by the Punjab Relief of Indebtedness Act, if a house is reserved for the personal occupation of the judgment-debtor, then it is saleable only if it has remained unoccupied for more than a year, otherwise only a house actually occupied by the judgment-debtor is exempt. Where the house in dispute is not occupied by the judgment-debtor but by his son to whom it must be deemed to have been lent, the house is saleable. AIR (Vol 24) 1937 Lah 100: 171 Ind Cas 418.

24. Right to attach.

——S. 60(1), Proviso cl. (l) — Government of India Notification No. 1489 D/43, Home Department, dated April 29, 1943 — Exemption from attachment of dearness allowance — Private employee.

Notification of Government of India, No. 1489-D/43, Home Department, dated April 29, 1943, exempts from attachment dearness allowance under cl. (l) of the Proviso to sub-s. (1) of S. 60. That clause i.e., Cl. (l) purportts to exempt from attachment any allowance forming part of the emoluments of any public officer, or of any servant of a railway company or local authority, and it does not apply to any allowance received by private employees. Therefore the dearness allowance received by a private employee from his employer is not exempt from attachment by reason of the notification. AIR (Vol 33) 1946 Bom 102: 47 Bom LR 836 (DB).

——S. 60(1)(n) — Allowance received by mortgagor as one of the terms of usufructuary mortgage.

Where the judgment-debtor had mortgaged all his properties by a usufructuary mortgage and by one of the terms of the transaction was entitled to receive an allowance of a certain amount per mensem:

Held, that the annuity or allowance was not exempt from attachment in execution of a decree against him. The fact that the allowance was his sole means of support would not affect the question. AIR (Vol 22) 1935 Mad 815: 1935 MWN 776: 69 MLJ 264: 42 MLW 345: 158 Ind Cas 170.

—Benami transaction — Promissory note — Suit for declaration that pro-note executed by X to Y really belongs to Z and is attachable in execution of decree against Z is maintainable. AIR (Vol 22) 1935 Mad 181: 4 MLW 15: 1935 MWN 1: 68 MLJ 81: 58 Mal 693: 153 Ind Cas 944 (FB).

——Right to attach, nature of.

A right to apply for attachment is a processual right and a privilege whose exercise depends entirely on the discretion of the Court. 28 MLW 344: 113 Ind Cas 416: AIR (Vol 15) 1928 Mad 1173: 55 MLJ 382.

——S. 60 (1) — Moveable property — Belonging to judgment-debtor in the hands of another — Attachment.

The jurisdiction of an executing court to attach moveables belonging to a judgment debtor in the hands of another or under his control or a debt due by him is correlative and co-extensive with the right which the judgment-debtor himself would have had to sue against his debtor or his trustee. 4 Pat LJ 141: (1919) Pat HCC 155: 48 Ind Cas 943: AIR (Vol 5) 1918 Pat 126 (DB).

24A. Right to sue.

See N. 5.

25. Salary and allowance.

(a) Amendment by Act 9 of 1937.
(b) Attachable portion.
(c) Consent.
(d) Order in insolvency.
(e) Private employee.
(f) "Salary", meaning of.
(g) Scope of Proviso (i).

(a) Amendment by Act 9 of 1937.

——Decree in suit prior to 1st June 1937 — Judgment-debtor's salary Rs. 52 only — If could be attached — Act IX of 1937 — Act V of 1943.

A teacher of a High School drawing a monthly salary of Rs. 52 was the judgment-debtor in a case filed against him and a portion of his salary was attached on consent order passed in 1938. In the execution stage the Court held that the salary of the teacher was attachable despite the Amending Act V of 1943 which repealed repealing Act IX of 1937. On the question whether under the law as it stands, salaries of private persons in suits filed against them prior to 1st June, 1937, are exempt from attachment up to Rs. 100 or whether such decrees also are to be regulated by the same procedure as decrees obtained subsequent to 1st June, 1937.

Held, that it was consciousness of the inequity of S. 3 of the Act IX of 1937 discriminating as it did between class of judgment-debtors which led to the later amendment by Act V of 1943, in particular S. 3 being repealed.

Therefore no part of the petitioner's (teacher's) salary was attachable on the ground of even a consent order. The anomalies resulting from S. 3 of Act IX of 1937 making invidious distinctions between different classes of low paid employees, may well have been a determining factor in the repeal of the Act, not merely as unnecessary being already incorporated in S. 60, C. P. Code, but also with the object of doing away with S. 3 of the Amending Act IX of 1937 and bring in all judgment-debtors subsequent to Act V of 1943 on the same footing as far as procedure in execution against them is concerned, irrespective of whether decree were obtained against them in suits prior to or subsequent to 1st June, 1937. 1949 MWN 506: AIR (Vol 37) 1950 Mad 114: (1949) 2 MLJ 107.

——Amendments made by Act IX of 1937 and Act V of 1943 — Effect of amendments explained.

The amendment in S. 60, Civil P. C., effected by Act IX of 1937 having been incorporated in the Code itself, there was no necessity of burdening the statute book with Act IX of 1937, and it was repealed by the Repealing and Amending Act, 1942 but the repeal did not affect the existing rights and liabilities created by that Act. That Act preserved for the holder of a decree passed in a suit filed before 1st June 1937, the right to attach the salary of the judgment-debtor in accordance with S. 60 as it stood before the amendment, and in spite of the amendment he could attach the whole of the salary of a private employee. Act V of 1943 is not intended to take away pre-existing rights that were preserved by S. 3 of Act IX of 1937, since the amendments made by it were only verbal. All that it did was to transfer the second part of Cl. (h) to Cl. (l) and make some other nominal changes. Hence in proceedings arising out of any suit instituted before 1st June 1937, the liability of a judgment-debtor's salary to attachment is governed by S. 60 as it stood before it was amended by Act IX of 1937. AIR (Vol 33) 1946 Bom 102: 47 Bom LR 836 (DB).

——Ss. 60, 73 (as amended by Act IX of 1937) — Attachment of salary before June, 1, 1937, by judgment-creditor saved by S. 3 of Amending Act, whether available for rateable distribution to other creditor not so saved.

An attachment of salary made before June 1, 1937, under S. 60, Civil P. C., by judgment-creditor saved by S. 3 of the Amending Act is available by way of rateable distribution to another judgment-creditor who is not covered by S. 3. AIR (Vol 28) 1941 Sind 96: 194 Ind Cas 582.

——(As amended by Act IX of 1937) — Amendment of S. 60, whether affects S. 73.

All that the amendment to S. 60 provides is that in respect of proceedings arising out of any suit instituted after June 1, 1937, the amount attachable out of the salary of an employee in a Railway Company is half the amount of that salary over a hundred rupees. The amendment, however, does not affect the provisions of S. 73, Civil P. C. Consequently, a holder of a decree obtained in a suit brought after 1937, has a right under S. 73 to come in for a share in the rateable distribution of salary attached under a decree. AIR (Vol 25) 1938 Sind 144: 176 Ind Cas 682.

(b) Attachable portion.

——S. 60(1)(i), (k) — Attachable portion of salary — No exemption can be claimed in regard to any part of such portion on the ground of its being required as contribution for Provident Fund.

Clause (k) is independent of cl. (i). But the exemption under cl. (k) cannot apply unless and until the money has actually been deposited in the Provident Fund. Hence, where the attachable portion of a person's salary is sought to be attached under cl. (i), no exemption can be claimed in regard to any part of such portion under cl. (k) on the ground of its being required as a contribution to the Provident Fund. Such contribution can be recovered from the unattachable portion of the salary. AIR (Vol 31) 1944 Cal 135: ILR (1944) 2 Cal 187: 214 Ind Cas 108 (DB).

——Mode of calculating amount of salary attachable, stated.

For the purposes of calculating the amount of the salary which may be attached under S. 60 (1) (h) and (i), one hundred rupees should first be subtracted from the total figure of the salary and half of the amount left over may be attached. AIR (Vol 30) 1943 Lah 60: 45 PLR 46: ILR (1944) Lah 63: 206 Ind Cas 77 (DB).

——S. 60 (1), Expln. II — "Salary" in S. 60 (1), meaning of.

By the terms of Expln. II to S. 60 (1) the word "salary" in S. 60(1) clearly means the total monthly emoluments to which a person is entitled, including any sum which may be required for the payment of taxes or payments or re-payments to a provident fund, even though these may be recovered by deduction from his salary. In other words, salary means the total gross salary. AIR (Vol 30) 1943 Lah 60: ILR (1944) Lah 63: 45 PLR 46: 206 Ind Cas 77 (DB).

——S. 60, (1) (i) — Alimony.

Government servant with salary of less than hundred rupees ordered to pay alimony to wife under S. 37, Divorce Act — Salary cannot be attached. (Alteration of law suggested). AIR (Vol 30) 1943 Nag 1: 1942 NLJ 450: ILR (1943) Nag 1: 203 Ind Cas 84 (DB).

(c) Consent.

——S. 60 and O. 21, Rr. 48 and 58 — Salary of postal employee does not by his consent become attachable — Decree-holder proceeding to attach salary of postal employee in hands of Government — Government can object to attachment.

The salary due to an employee of the Post Office does not become, in view of his consent, attachable when it was otherwise not so.

Where, in execution of a decree, the decree-holder proceeds to attach the salary of the judgment-debtor, a postal employee, in the hands of the Government, the Government who are in the position of a garnishee are entitled to object that the salary of the postal employee is not attachable particularly as they would be liable for any sum paid by them in contravention of the orders of the Court. The fact that there was a decision between the decree-holder and the judgment-debtor holding that the judgment-debtor's salary was attachable cannot affect the right of the Government who were not parties to the decision and consequently are not bound by it, to object to the attachment of the salary. AIR (Vol 31) 1944 Lah 168 (168): 46 PLR 124: 215 Ind Cas 110 (DB).

——(as amended in 1937) — S. 60 prohibits forcible attachment — Judgment-debtor agreeing to attachment of half salary.

Section 60, Civil P. C., is a prohibition only against forcible attachment or sale, and there is nothing in law to prevent a judgment-debtor from agreeing to attachment of half of his salary even though it is exempt from attachment under S. 60. The execution Court must, therefore, give effect to the decree obtained on the basis of an award which the judgment-debtor has agreed that it may be satisfied by attachment of half of his salary. AIR (Vol 27) 1940 Lah 65: 41 PLR 834: 188 Ind Cas 639.

[Overruled in AIR 1943 Lah 268: 211 Ind Cas 291 (FB)].

(d) Order in Insolvency.

——Order under S. 60, Presidency Towns Insolvency Act, for appropriation of salary — Section 60, Civil P. C. cannot be invoked for the purpose of enabling the insolvent to get rid of an order for the appropriation of his salary under S. 60, Presidency Towns Insolvency Act. AIR (Vol 29) 1942 Mad 27: 1941 MWN 924: (1941) 2 MLJ 845: 54 MLW 570: 201 Ind Cas 112.

——"Salary" in S. 60 (1) (h) and S. 60 (1), Expl. II, cannot mean wages of labourers and domestic servants in such cases as where these might exceed Rs. 100. The word "salary" as used in cl. (h) means something more. But for the words of exclusion in cl. (1), the word "salary" would include all the emoluments referred to in cl. (1). Clause (h) of S. 60 (1), Civil P. C. read with S. 28(5), Provincial Insolvency Act, must be held to exempt the insolvent's salary, when it is less than Rs. 100 per month. Hence it is not open to the Insolvency Court to attach a rider to the order of adjudication that the insolvent should pay a part of his salary into Court every month, where the salary is below Rs. 100 per month. AIR (Vol 29) 1942 Pat 194: 20 Pat 866: 8 BR 554: 23 PLT 400: 199 Ind Cas 635 (DB).

——Salary of insolvent — Only half vests in the Receiver.

The combined operation of S. 28 (5) of the Provincial Insolvency Act & S. 60(1)(III) is to make only half his salary divisible amongst the creditors. AIR (Vol 10) 1923 All 466: 73 Ind Cas 413: 45 All 364: 21 ALJ 216: 4 LRA Civ. 149 (DB).

——Insolvency Court can order reasonable allowance to insolvent from out of his half salary vesting in Receiver. AIR (Vol 10) 1923 All 466: 73 Ind Cas 413: 45 All 364: 21 ALJ 216: 4 LRA Civ. 149 (DB).

——A moiety of the insolvent's pay can be ordered to be given to the Receiver for benefit of creditors. AIR (Vol 9) 1922 Mad 439: 70 Ind Cas 572: 1922 MWN 717 (DB).

——S. 60 (i) — Prov. Insol. Act, S. 16(2) — Insolvency.

Under S. 15 (2), Prov. Insolv. Act read with S. 60, C. P. C., half the insolvent's salary vests in the receiver. AIR (Vol 4) 1917 Upp Bur 1: (1916) 2 UBR 132: 38 Ind Cas 410.

(e) Private employee.

——S. 60 (1) (i) — Private employee — No part of pay is exempt.

The benefit of cl. (i) was not available to a private employee. Before the amendment of 1937, no part of the pay of such an employee, who was not a labourer or a domestic servant, was exempt from attachment. AIR (Vol 33) 1946 Bom 102: 47 Bom LR 836 (DB).

——S. 60 (1) (h), (as amended by Act IX of 1937) — Cl. (h) of S. 60 (1) protects salary of all persons in receipt thereof other than public officers & servants of railway company or local authority.

Clause (h) of sub-s. (1) of S. 60 should be interpreted with reference to the entire section and any interpretation of cl. (h) of sub-s. (1) founded upon the language of that clause alone without reference to the entire section would be unsafe and unwarranted by all canons of interpretation.

On a consideration of the entire S. 60, as amended, there is no doubt that what the Legislature intended to protect from attachment in execution of a decree in the latter part of cl. (h) of sub-s. (1) to S. 60 was the salary of all persons in receipt of salary other than public officers and servants of a railway company or local authority. AIR (Vol 26) 1939 Sind 134: ILR (1942) Kar 237: 182 Ind Cas 185.

——Quaere, Per Biswas, J. — Whether "salary" in S. 60 (i) as amended in 1937, refers only to the salary of labourers and domestic servants or whether it includes salary of a headclerk in a tea estate. AIR (Vol 25) 1938 Cal 325: 177 Ind Cas 352 (DB).

(f) "Salary", meaning of.

——S. 60(1)(l) Notification No. 1489-D/43 dated 29-4-1943 — Dearness allowance of private employee is not exempt.

Clause (1) of the proviso to S. 60 (1) refers to an allowance forming part of the emoluments of any public officer or of any servant of a railway company or local authority. Hence the dearness allowance received by a private employee from his employer is not exempt from attachment by reason of the Notification No. 1489-D/43 dated 29-4-1943 of the Government of India. AIR (Vol 33) 1946 Bom 102: 47 Bom LR 836 (DB).

——"Salary" in S. 60 (1)(h) and S. 60(1), Expln. II cannot mean wages of labourers and domestic servants in such cases as where these might exceed Rs. 100. The word "salary" as used in cl. (h) means something more. But for the words of exclusion in cl. (l) the word "salary" would include all emoluments referred to in cl. (l). Clause (h) of S. 60(1) read with S. 28(5), Provincial Insol. Act, must be held to exempt the insolvent's salary when it is less than Rs. 100 per month. AIR (Vol 29) 1942 Pat 194: 20 Pat 866: 8 BR 554: 23 PLT 400: 199 Ind Cas 635 (DB).

——S. 60 (1) (i) — 'Salary', meaning of.

There is nothing in cl. (i) of S. 60(1), Civil P. C., to indicate that the salary mentioned there is the net salary. AIR (Vol 28) 1941 Pat 157: 21 PLT 776: 7 BR 598: 193 Ind Cas 360.

——Salary, meaning of.

There is nothing which restricts the word 'salary' in S. 60 to an emolument which is payable monthly or to an emolument payable to a man who holds a permanent or a semi-permanent employment. AIR (Vol 26) 1939 Pat 77: 19 PLT 768: 5 BR 61: 17 Pat 706: 178 Ind Cas 141 (DB).

——The emoluments of the judgment-debtor known as his pay must be regarded as 'salary' for the purposes of this section as defined by the explanation. AIR (Vol 26) 1939 Rang 432: 1939 Rang LR 504: 185 Ind Cas 460.

(g) Scope of proviso (i).

——S. 60, Proviso (i) — Salary of public servant — Attachability.

The salary of a public servant, once it has become payable, has to be treated as a debt due to him and is liable to attachment in satisfaction of a decree against him; and it may be attached both before and after it has become actually payable. AIR (Vol 34) 1947 FC 23: 1947 FLJ 56: 49 Bom LR 697: 52 CWN (FR) 2: 1947 MWN 575: (1947) 2 MLJ 389.

——S. 60 (i) and S. 2, Cl. (17) — Honorary Commissioned Officers — Indian Medical Dept. — Salaries if attachable — Army Act, Ss. 190 and 144.

The salary of Honorary Commissioned Officers employed in the Indian Subordinate Medical Dept. is attachable under S. 60 (1) Cl. (i) of the C. P. C. since they are 'public officers' as defined in S. 2, Cl. 17, C. P. C. and "Officers" under S. 190 of the Army Act and are not protected by S. 144 of the latter Act. AIR (Vol 1) 1914 Oudh 199: 1 OLJ 127: 17 OC 99: 23 Ind Cas 935.

——S. 60 (1) — Future Salary.

The future or unearned salary of a clerk is not a debt or saleable property within the meaning of S. 266 of the C. P. C. (1882) and so cannot be attached in execution. (1909) 31 All 304: 6 ALJ 227: 1 Ind Cas 186 (DB).

——Unearned salary of a lawyer's clerk.

Future or unearned pay of a lawyer's clerk is not a debt. (1909) 6 ALJ 227 (DB).

——Attachment of salary to accrue due — Salary in the hands of disbursing officer holding office outside jurisdiction of Court — C. P. C. (old), S. 268 — Court competent to issue order under.

An attachment of salary that is not to fall due in the hands of the disbursing officer can be made only by the court having jurisdiction at the place where the disbursing officer has his office. The attachment should be made by the competent court after transfer of the decree to it for execution. (1903) 7 CWN 821: 30 C 713 (DB).

26. Scope.

——Assets realised — Rateable distribution.

The right of the decree-holder against the judgment-debtor is controlled by S. 60 and not by S. 73, Civil P. C. Hence where a decree-holder brings into Court assets realised in execution under S. 60 (1) as it stood before its amendment in 1937, such of the assets realised in excess of what is permitted by the amendment can be rateably distributed under S. 73 only among those decree-holders whose suits were filed before June 1, 1937 when the amendment came into operation. AIR (Vol 32) 1945 Bom 76: 46 Bom LR 757.

——Words "attachment or sale" in Proviso to S. 60 (1) — Meaning of.

The expression "attachment or sale" in the Proviso to S. 60(1), Civil P. C., is meant to convey what was conveyed in the sub-clause itself by the words "attachment and sale". That is to say, the word "or" in the proviso is also used in conjunctive and not in disjunctive sense. This would mean that the property mentioned in the proviso to S. 60(1), Civil P. C., would neither be liable to attachment nor sale. AIR (Vol 31) 1944 Lah 29: ILR (1943) Lah 666: 46 PLR 115: 212 Ind Cas 144 (DB).

——S. 60 (1) — An executing Court can go behind a compromise decree and find that it is inexecut-

able on account of its coming into conflict with S. 60 (1). AIR (Vol 30) 1943 Lah. 268: 45 PLR 432: ILR (1944) Lah 379: 211 Ind Cas 291 (FB).

——Section 168A, Bengal Tenancy Act, is not in conflict with or repugnant to Ss. 51 and 60, Civil P.C. Consequently, S. 168A is valid and not void to any extent. AIR (Vol 29) 1942 Cal 587: 76 CLJ 500: 46 CWN 999: 204 Ind Cas 168 (DB).

——Scope of Ss. 51 and 60 in considering the validity of S. 168A (1), Bengal Tenancy Act, under S. 107 (1), Government of India Act, discussed. AIR (Vol 29) 1942 Cal 429: 46 CWN 540: 75 CLJ 190: 201 Ind Cas 24 (DB).

——Order 21, R. 48 is expressly subject to the provisions of S. 60. AIR (Vol 28) 1941 Bom 389: ILR (1941) Bom 415: 43 Bom LR 758: 197 Ind Cas 462.

——Section 60 does not control S. 73. The proviso of S. 60 is designed to protect certain judgment-debtors and not to give one decree-holder priority over another. AIR (Vol 28) 1941 Nag 239: 1941 NLJ 331: 195 Ind Cas 609.

——Exemptions from attachment are cumulative.

Exemptions from attachment running from subheads (a) to (p) of S. 60, Civil P.C., are cumulative and any man is entitled to all the benefits if he is qualified to do so. AIR (Vol 26) 1939 Rang 432: 1939 Rang LR 504: 185 Ind Cas 460.

——Process of attachment and sale cannot be separated. Only saleable property can be attached. Decree may sometimes be satisfied before the process is complete. In Collector's cases property is sometimes mortgaged or leased and not sold but that is because the Code itself provides an alternative to sale in those special cases. It does not indicate that an attachment is an end in itself. Consequently, whenever the Court is for any reason prohibited from selling the property or dealing with it otherwise in lieu of sale, the attachment must be raised. AIR (Vol 25) 1938 Nag 281: ILR (1939) Nag 398: 173 Ind Cas 877 (DB).

——Voluntary transfer of house for satisfaction of decree, if prohibited.

Section 60, Civil P. C., does not prohibit a voluntary transfer of the house of a judgment-debtor for satisfaction of the decree. AIR (Vol 24) 1937 Lah 939: 170 Ind Cas 896.

27. Wages.

——S. 60 (1) (h) — Clerk in mill doing no manual labour is not labourer or domestic servant.

A clerk in one of the departments of a mill doing no manual labour cannot be regarded as a labourer or a domestic servant. AIR (Vol 33) 1946 Bom 102: 47 Bom LR 836.

——Amount of bonus, whether wages.

The term "wages" as used in S. 60, Civil P. C., includes the amount of bonus payable by agreement to an employee in view of exceptional circumstances and made dependent on the nature of the work and the number of days for which he works. AIR (Vol 32) 1945 Bom 119: 46 Bom LR 795: ILR (1945) Bom 46.

——S. 60 (1) (h) — Wages of labourer.

The second clause of S. 60 (1) (h), Civil P. C., is designed to protect to a limited extent salaries of servants who are outside the class of labourers or domestic servants. If the Legislature intended that the latter clause should control the preceding clause, it would have omitted the latter altogether without causing any embarrassment or difficulty. Consequently a remuneration of a labourer is not liable to attachment at all. AIR (Vol 29) 1942 Bom 191: 44 Bom LR 264: ILR (1942) Bom 287: 202 Ind Cas 157.

——S. 60 (h) — Jobber required to do personal manual labour.

A person would be regarded as a labourer within the meaning of S. 60 (h) of the Code, if he does or is expected to do that class of work which requires manual labour as the work of spinning does. The manner of fixing the remuneration could not be regarded as a safe test for determining whether the earnings are wages. Where the doing of personal manual labour by the jobber is a term of his employment, he is a labourer and the remuneration earned by him "wages of a labourer" within S. 60 (h), Civil P. C. AIR (Vol 29) 1942 Bom 191: 44 Bom LR 264: ILR (1942) Bom 287: 202 Ind Cas 157.

——Scope of cl. (1) of S. 60 cannot be restricted in its applicability to the case of those to whom cl. (h) applies. AIR (Vol 26) 1939 Pat 77: 17 Pat 706: 19 PLT 768: 5 BR 61: 178 Ind Cas 141 (DB).

28. Waiver and estoppel.

See also N. 14.

——Agreement waiving protection under, validity.

It is not open to a judgment-debtor to waive the protection which S. 60, C. P. Code, gives him, and an agreement or compromise which has that effect is not enforceable in law and is therefore, void. AIR (Vol 38) 1951 Sim 225: 52 PLR 321.

——S. 60 (i) — Scope — Decree in contravention of on compromise or consent — Legality — Jurisdiction of Court to pass — Public policy — Contract Act, S. 23 — "Waiver" — Effect of.

A public servant or a railway servant whose salary is exempt from attachment under S. 60 (i), C. P. Code, cannot contract himself out of this statutory protection. Such a contract is opposed to public policy under S. 23, Contract Act; the principle of waiver does not apply to such a statutory prohibition. Hence a Court has no jurisdiction to pass a decree on compromise or consent providing for payment of the salary of the defendant in contravention of S. 60 (i), C. P. Code. Such a compromise is unlawful and void. AIR (Vol 37) 1950 Bom 155: 51 Bom LR 1024 (DB).

——S. 60 (1) (c) — Waiver of privilege — Mortgage of property by agriculturist — If amounts to.

The protection conferred by S. 60 (1) (c), C. P. Code, is for the benefit of the agriculturist and can be waived by him. When an agriculturist mortgages a house which would otherwise be protected by S. 60 (1) (c), he must be taken to have waived the privilege and the house can be sold in execution. AIR (Vol 35) 1948 Nag 392: ILR (1948) Nag 530 (DB).

——House attached in execution of money decree — Consent order granting instalments to judgment-debtor and judgment-debtor agreeing to continuance of attachment and sale of house in default of payment — Judgment-debtor is estopped from claiming exemption from attachment and sale subsequently.

In execution of a money decree the house of a judgment-debtor was attached and judgment-debtor made an application for instalments. The parties arrived at a compromise and the Court passed a consent order. Under the consent order the judgment-debtor was granted instalments and the house attached was to remain under attachment & charged till realisation. The judgment-debtor, in a subsequent execution, objected to the attachment and sale of house under S. 60 (1) (c), Civil P. C.:

Held, that as to what is the chief source of the livelihood of judgment-debtor is essentially a question of fact and upon the solution of this question depends the answer to the question whether he is an agriculturist within the meaning of S. 60 (1) (c). Therefore, if a judgment-debtor enters into a compromise with the decree-holder upon the footing that the property in question is liable to be

sold, he is, in effect, making a representation that he is not an agriculturist and that the property is saleable and after the compromise it is not open to him to resile from that position and urge that the property in question is not saleable. By reason of the consent order, the judgment-debtor was estopped from raising an objection to the saleability of the house. AIR (Vol 33) 1946 All 432.

——Protection of agriculturist's house, nature — Failure to raise objection at attachment and sale — Effect.

Though undoubtedly S. 60 (1) (c) was enacted to protect agriculturists, there is no public policy against the alienation of an agriculturist's house and the protection may be waived. The prohibition against the sale not being absolute, there can be no bar to the application of the principle of constructive 'res judicata'. Hence the sale in execution of a house belonging to an agriculturist cannot be set aside if he failed to raise objection both at the time of attachment and at that of the sale. AIR (Vol 31) 1944 Mad 548: ILR (1945) Mad 211: (1944) 2 MLJ 46: 57 LW 434: 1944 MWN 473: 220 Ind Cas 15 (DB).

——Protection of S. 60, Proviso (1) cannot be waived.

Per Full Bench:— Section 60 (1), Proviso (i), Civil P. C., is mandatory and based on considerations of public policy and not on account of any preferences given or privilege granted to a public officer or servant of a railway company or local authority. It is, therefore, not open to such a person to barter away or waive the protection given by S. 60 (1), Proviso (i) in public interest and any agreement which has that effect must be held to be not enforceable by law and, therefore, void. AIR (Vol 30) 1943 Lah 268: ILR (1944) Lah 379: 45 PLR 432: 211 Ind Cas 291 (FB).

[Overrules AIR (Vol 20) 1933 Lah 251: 145 Ind Cas 169; 42 PLR 398: AIR (Vol 26) 1939 Lah 316; 41 PLR 398: AIR (Vol 26) 1939 Lah 539: 185 Ind Cas 317 and 41 PLR 834: AIR (Vol 27) 1940 Lah 65: 188 Ind Cas 639.]

——No question of Court's jurisdiction to sell property arises until judgment-debtor alleges and proves ground of exemption under S. 60. Where no objection is taken the sale is within jurisdiction. AIR (Vol 29) 1942 Lah 153: 44 PLR 302: ILR (1942) Lah 559: 203 Ind Cas 166 (FB).

[Overrules AIR (Vol 22) 1935 Lah 942: 160 Ind Cas 749 and 38 PLR 691: AIR (Vol 23) 1936 Lah 930.]

——Objection under S. 60 (1) (c) is not permissible after sale. Code does not contemplate any objection being raised except those covered by Rr. 89, 90 and 91 of O. 21. AIR (Vol 29) 1942 Lah 153: 44 PLR 302: ILR (1942) Lah 559: 203 Ind Cas 166 (FB).

——S. 60 (1) (i) — Protection cannot be waived by agreement with creditor.

The provisions of S. 60, Civil P. C., which are imperative are intended to give protection to persons on grounds of public policy and not merely to confer a personal benefit upon them.

Hence an agreement by a person getting a salary of Rs. 100 that his creditor who has obtained a decree against him may take a certain sum per month out of his salary in satisfaction of the decree is not enforceable in law. AIR (Vol 29) 1942 Mad 391: 1942 MWN 179: 55 MLW 130: (1942) 1 MLJ 292: ILR (1942) Mad 640: 203 Ind Cas 200.

——S. 60 (1) (i) — Agreement by judgment-debtor allowing decree-holder to receive certain amount of salary from his superiors.

An agreement that the decree-holder should receive Rs. 6 per month from the judgment-debtor's salary from his superiors before it is paid to him means that, that such part of his salary was transferred to the decree-holder for his decretal debt until it was satisfied. It does not amount to creating a charge on a part of the salary, but it purports to assign the same in favour of the decree-holder who can recover it from the authorities. The agreement, therefore, amounts to a voluntary transfer and the case falls both under S. 6 (f), T. P. Act and S. 60, Civil P. C. AIR (Vol 28) 1941 Bom 389: ILR (1941) Bom 415: 43 Bom LR 758: 197 Ind Cas 462.

——An agriculturist can surrender his house which is exempt from attachment under S. 60, by voluntarily entering into a valid agreement with his decree-holder. (1940) 42 PLR 261.

——S. 60 (1) (i) — Where a railway employee agrees to a compromise decree in favour of his creditor agreeing to pay the decretal amount by monthly instalments, he contracts himself out of any benefits of S. 60, Civil P. C. in the matter of the attachment of his salary. AIR (Vol 26) 1939 Lah 539: 41 PLR 631: 185 Ind Cas 317.

——Agriculturist mortgaging his agricultural house — Protection is waived.

The protection given under S. 60, Civil P. C. is for the benefit of the judgment-debtor and can be waived by him. Therefore, if he chooses specifically to mortgage his agricultural houses, he must be taken to have waived the privilege conferred upon him by this section. AIR (Vol 25) 1938 Nag 544: 1938 NLJ 445: 180 Ind Cas 690.

——S. 60 — Estoppel.

Where the judgment-debtor agrees with the decree-holder that in consideration of the latter's undertaking not to have him arrested all his property would be liable then the ancestral property is liable to attachment. In such a case the principle of estoppel plays its part. AIR (Vol 23) 1936 Lah 737: 38 PLR 333.

——S. 60 (1) (i) — Agriculturist — Compromise with decree-holder disclaiming right to object to attachment.

Quaere: Where a judgment-debtor, who is an agriculturist makes a compromise with the decree-holder disclaiming any right to object to the attachment of his lands, whether the decree-holder can attach it in spite of the provisions of S. 60, Civil P. C. AIR (Vol 23) 1936 Lah 737: 38 PLR 333: 164 Ind Cas 690.

——S. 60 is prohibition only against forcible attachment — Agriculturist himself mortgaging his house.

Section 60 is a prohibition against forcible attachment or sale. There is nothing in this enactment to prevent an agriculturist voluntarily selling or otherwise alienating his house. Where an agriculturist voluntarily agrees to mortgage his house, S. 60 does not apply. AIR (Vol 22) 1935 Lah 164 (1) (DB).

——Whether can be claimed by son of judgment-debtor.

Exemption under S. 60 can be claimed only by the judgment-debtor. If for some reason or other the judgment-debtor has waived that privilege, his son cannot complain of his action. AIR (Vol 20) 1933 Lah 251: 145 Ind Cas 169.

——S. 60 (1) (m) — Sale of ancestral property by Civil Court — Omission to object — Effect of waiver — Possible right.

Proceedings which are wholly without jurisdiction can have no legal effect and as a general rule even a waiver on the part of any of the parties cannot cure the defect of jurisdiction.

Where the decree-holder sold such right as might be determined in favour of his judgment-

debtor by the Privy Council with reference to an agreement:

Held that such possible right or interest was not liable to attachment and sale under S. 60 (1) (m), Civil P. C. AIR (Vol 18) 1931 Oudh 398: 8 OWN 927: 134 Ind Cas 602 (DB).

——**Estoppel.**

Judgment-debtor has no right after sale to claim exemption under S. 60. AIR (Vol 17) 1930 Lah 106: 121 Ind Cas 303.

——**Agriculturist judgment-debtor may waive his right and agree to sell his house.**

The house of an agriculturist is not absolutely unsaleable. The judgment-debtor can waive the privilege under S. 60, cl. (c) and sell the house of his own free-will; consequently where the judgment-debtor has entered into an agreement to give the house in security for the amount of the decree he is estopped from pleading that the house is not saleable. AIR (Vol 14) 1927 Pat 233: 6 Pat 254: 8 PLT 563: 102 Ind Cas 616 (DB).

——**Saleability decided upon by the trial Court — Executing Court cannot question.**

If the point was expressly raised by the defendant concerned in the suit itself and decided against him and a decree under O. 34, R. 4, was passed for the sale of that pension, it no longer remains open to the judgment-debtor to say that the pension was of such a character as not to be saleable at all. It would not be proper for the execution Court to reopen the question which has already been decided in the original suit. In cases where no attachment is necessary and the sale takes place in pursuance of a mortgage decree directing a sale of the mortgaged property S. 60 will not be applicable to decide the saleability of the property so as to prevent the Court from selling the property. AIR (Vol 12) 1925 All 652: 47 All 900: 23 ALJ 841: 6 LRA Civ 448: 89 Ind Cas 364 (DB).

——An agriculturist can make a valid mortgage of his house in execution of a decree in which the house may be sold. If the agriculturist fails to raise the point in the suit itself, he cannot raise it in the execution. 84 Ind Cas 749: 22 ALJ 321: 5 LRA Civ 201: 46 All 489: AIR (Vol 11) 1924 All 328 (FB).

——**S. 60 (c) — Land of agriculturist.**

Where agriculturist judgment-debtor agreed under a compromise to have immovable property attached in execution, he cannot at the time of execution be protected by saying that the property is non-transferable. 24 CWN 575: 57 Ind Cas 249: AIR (Vol 7) 1920 Cal 424 (DB).

29. Wrongful attachment.

——An application objecting to an execution sale on the ground that the property sold was exempt from sale under S. 60 (1) (c), and seeking to have the sale set aside on that ground is governed by Art. 166, Limitation Act, even though the question arising in the application is one falling within the purview of S. 47, Civil P.C. AIR (Vol 30) 1943 Pat 75: 21 Pat 774: 9 BR 180: 24 PLT 97: 204 Ind Cas 601 (DB).

——**Application to set aside sale such as on ground of exemption provided in S. 60 falling under S. 47 — Limitation — Art. 166, Limitation Act (IX of 1908).**

It is true that no limitation is specifically provided for applications falling under S. 47, Civil P.C. But, if the application is one for setting aside a sale, on the ground such as of exemption under S. 60, Civil P.C., which falls within the scope of S. 47, it comes within the purview of Art. 166, Limitation Act. The judgment-debtor cannot ignore the auction sale on the ground that the Court had no jurisdiction to sell the property, because the Court would have jurisdiction to sell, unless and until the facts showing that the property is exempt from attachment or sale are alleged and proved by the judgment-debtor. If the judgment-debtor fails to allege, before the sale, facts entitling him to claim exemption under S. 60, Civil P.C.—which lie within his knowledge and the burden of proving which would naturally rest on him—it cannot be said that the Court had no jurisdiction to sell the property and hence the sale was a nullity. It follows, therefore, that if a judgment-debtor does not raise the objection to the sale before the property is sold, his objection to the saleability of the property taken after the sale, must be taken to be tantamount to an application to set aside a sale and as such, governed by Art. 166. The sale referred to in Art. 166 is clearly the auction-sale. There can obviously be no question of setting aside a sale after it has been confirmed and become absolute under O. 21, R. 92. AIR (Vol 29) 1942 Lah 153: 44 PLR 302: ILR (1942) Lah 559: 203 Ind Cas 166 (FB).

[Overrules AIR (Vol 26) 1939 Lah 112: ILR (1939) Lah 103: 184 Ind Cas 393]

——Money decree against estate of deceased represented by his son — Houses alleged to be deceased's property attached and purchased by decree-holder — Objections by son that houses belonged to himself and were exempt from attachment under S. 60 fall under S. 47 — They can be raised before executing Court up to date of confirmation of sale. AIR (Vol 26) 1939 Lah 256: 41 PLR 288.

——Attachment and sale of preliminary decree for partition — Decree cannot be sold in execution of a money-decree and even though the decree-holder does not object to its attachment, it is open to the judgment-debtor to object to its sale before it is held. AIR (Vol 21) 1934 Mad 692: 67 MLJ 669: 40 MLW 599: 1934 MWN 1001: 7 RM 287: 58 M 285: 152 Ind Cas 789 (DB).

——Ss. 60 (1) (c), 47 and O. 21, R. 58 — An objection by a judgment-debtor that certain property which has been attached is not liable to sale under S. 60, Civil P.C., falls within S. 47, Civil P.C. and not under O. 21, R. 58. Such an application is governed by Art. 181, Limitation Act where the judgment-debtor has not been dispossessed and the time begins to run from the date when the property was attached. AIR (Vol 18) 1931 Bom 446: 33 Bom LR 781: 133 Ind Cas 858 (DB).

——The attaching creditor is liable in damages to the person whose property was wrongfully attached even if he has acted honestly. 112 Ind Cas 848: AIR (Vol 16) 1929 Lah 200.

——**Damages recoverable though defendant acts in good faith.**

Generally speaking, it is not incumbent on the plaintiff to allege and prove that the person at whose instance a wrong attachment has been made acted thereanent maliciously or without probable cause. Proof of malice is not necessary when the property of a stranger, not a party to the suit, is taken in execution. The decree-holder may have acted in perfectly good faith and innocently, but is nevertheless liable if damages have been caused by his mistake. 94 Ind Cas 573: 8 NLJ 170: AIR (Vol 12) 1925 Nag 390.

——Money deposited under decree to the credit of decree-holder, who has already assigned his interest in the decree, cannot be attached by his creditors unless the transfer is proved to be not bona fide. 1912 MWN 176, Diss; 86 Ind Cas 626: 6 PLT 504: 3 Pat LR 18: 1925 PHCC 43: AIR (Vol 12) 1925 Pat 372. (DB).

——**S. 62.**

See also Civil P.C., O. 21. R. 43.

——S. 62 (3), if contains any limitations — Scope.

In S. 62 (3), there is no limitation that the particular room in question must be in the occupancy of the judgment-debtor. The Code apparently contemplates that it is sufficient that the decree-holder or the person making the attachment should consider that there may be property of the judgment-debtor in those rooms. AIR (Vol 22) 1935 All 490: 36 Cr. LJ 545: 1935 ALJ 367: 1935 AWR 206: 154 Ind Cas 631.

——Pardanashin lady.

Warrant of Civil Court — Judgment-debtor absent from his house — Pardanashin wife of judgment-debtor in house warning her resentment if there would be intrusion — Judgment-creditor pushing open the door and causing physical and mental pain to the lady, liable under S. 352, Penal Code — S. 62 (3), Civil P. C., applies and the bailiff is the person who is to take such action as is necessary under S. 62 & not the judgment-creditor. AIR (Vol 21) 1934 Sind 52: 34 Cr. L.J. 963: 1934 Cr Cas 508: 145 Ind Cas 259 (DB).

——S. 62 — Actual residence at date of plaint is not necessary.

The word, 'residing' for the purpose of jurisdiction does not necessarily mean keeping within the jurisdiction. If a person has a residence within the jurisdiction it is sufficient residence although he may not be staying there at the exact time when the proceedings were initiated against him. 5 LRA Civ. 695: 87 Ind Cas 795: AIR (Vol 12) 1925 All 140 (DB).

——S. 62 — Outer door closed — Opening by getting over roof.

An attachment by an amin by entering the house which had been closed after the same had been opened by certain persons who opened it by getting over the roof is not invalid. 1 LW 519: 25 Ind Cas 117: AIR (Vol 2) 1915 Mad 320 (DB).

——S. 63.

1. Applicability, scope and object.
2. Attachment.
3. Claim to property and objection to attachment.
4. "Court of highest grade".
5. "More courts than one".
   See Notes 1 and 2.
6. Non-compliance — Effect.
7. Rateable distribution.
   See N. 6 and S. 73.
8. "Receive and realise".
9. Revision.
10. Sale by inferior Court — Procedure.

1. Applicability, scope and object.

——Applicability — Requisites.

The object of S. 63 is to prevent different claims arising out of attachment and sale of the same property by different Courts. The section applies only where property not in the custody of any Court is under attachment in execution of decrees of more Courts than one. Where a valid attachment is made only by one Court, and an attachment by another Court is void, the section has no application. ILR (1946) Nag 400: 1946 NLJ 329: 222 Ind Cas 652: AIR (Vol 33) 1946 Nag 170.

——Ss. 63, 73 — It is only when attachments of some property are made by more than one Court, that the Court of the highest grade among the attaching Courts has the power under S. 63 to realise the assets and order rateable distribution. ILR (1939) 1 Cal. 488 (DB).

——Section 73 is to be read with S. 63. AIR (Vol 25) 1938 Lah 754: 41 PLR 91: 179 Ind Cas 376.

——Sections 63 and 73 must be read together. AIR (Vol 24) 1937 Nag 80: ILR (1937) Nag 213: 171 Ind Cas 371.

——Principle of section.

The principle underlying Section 63 is the principle of convenience, the principle of fair distribution and not the principle of exclusion. AIR (Vol 23) 1936 Cal 723: 40 CWN 1307: ILR (1937) 1 Cal 391: 166 Ind Cas 178 (2).

——Whether exception to S. 73.

Section 63 is an exception to the rule mentioned in S. 73. AIR (Vol 23) 1936 Mad 797: 59 Mad 1028: 1936 MWN 655: 71 MLJ 328: 44 MLW 358: 166 Ind Cas 769 (DB).

——Sections 63 and 73 must be read together. AIR (Vol 22) 1935 Bom 176: 59 Bom 310: 37 Bom LR 78: 159 Ind Cas 505 (DB).

——Ss. 63, 73 — Scope of — Set-off allowed to decree-holder — Right to rateable distribution.

Sections 63 and 73 should be read together, and S. 63 lays down a general rule of procedure as to which Court shall deal with the proceeds realised in execution by one Court where the property has been attached in execution of the decrees of several Courts of different grades. In a case to which S. 63 applies, the receipt of assets by one of the Courts contemplated in that Section amounts to a constructive receipt of assets by each of such Courts, and if so, the attaching decree-holders in each of them are entitled to a rateable distribution in the assets in the actual custody of one of them.

The right to rateable distribution, which an attaching creditor is entitled to in the cases above-mentioned, cannot be forfeited, even though when the sale was effected, a set-off was allowed in favour of the decree-holder. AIR (Vol 22) 1935 Mad 988: 1935 MWN 1046: 42 MLW 733: 161 Ind Cas 115.

——Exception to S. 73.

Section 73 should be read subject to S. 63. AIR (Vol 21) 1934 Cal 559: 61 Cal 240: 152 Ind Cas 69.

——Object of section.

Section 63 sets at rest conflict of views prior to 1908 and validates proceedings even by inferior Courts during attachment by the Superior Court. It enjoins that the Superior Court should realise the property in cases where the inferior Court had notice of execution by superior Court. 84 Ind Cas 265: 47 MLJ 720: 20 MLW 864: 1924 MWN 551: AIR (Vol 11) 1924 Mad 889 (DB).

——Object of section is to prevent confusion in execution of decrees. 62 Ind Cas 33: 2 PLT 719: 6 PLJ 332: AIR (Vol 8) 1921 Pat 140 (DB).

2. Attachment.

——S. 63 and O. 21, R. 49 — Charging order — If amounts to attachment.

For the purposes of S. 63, C. P. Code, a charging order under O. 21, R. 49 should be deemed to be an attachment. ILR (1947) Lah 417: 229 Ind Cas 307: AIR (Vol 34) 1947 Lah 13 (FB)

——Section does not apply when attachment by Court of superior jurisdiction is void.

In order to bring the case within the scope of S. 63 it is necessary that several decree-holders who are executing their decrees against the same judgment-debtor in different Courts must have attached the same property or properties belonging to the judgment-debtor. Where the attachment of the property by the Court of higher grade is void as being made in contravention of Sch. III, Para. 11 (1), the first requisite under S. 63 is not complied with and S. 63 has no application. AIR (Vol 33) 1946 Nag 170.

——Ss. 63 and 73 — Court of superior jurisdiction when can order rateable distribution.

It is only when attachments of the same property of the judgment-debtor are made by more than one Court that the Court of the highest grade among the attaching Courts has the power

under S. 63 to realise the assets and to order rateable distribution. In the absence of such attachment one of several executing Courts cannot, even though of a higher grade than any of the other Courts, order rateable distribution of assets held by another Court. AIR (Vol 33) 1946 Nag 170.

——Ss. 63, 73 — Prior attachment, whether essential under Ss. 63 and 73 — Mere application for execution before assets are received.

Prior attachment is not necessary under S. 63. It is not necessary under S. 73 also. So far as creditors seeking rateable distribution are concerned only an application for execution before the assets are received by the Court entitling to receive them is required. AIR (Vol 24) 1937 Nag 80: ILR (1937) Nag 219: 171 Ind Cas 371.

——Ss. 63, 73 — Power of High Court under S. 63, whether ousted by S. 73 — Decrees passed by same Court.

The object of S. 63 is to deal with the several attachments, no matter whether the decrees passed are by the same Court, or by different Courts. By which Court the decrees have been passed, is an immaterial detail, the emphasis being upon the word 'attachment' and not upon the word 'decrees'. In other words, the phrase "in execution of decrees" is explanatory of the word "attachment" and may well have been left out without affecting the sense. AIR (Vol 23) 1936 Mad 797: 44 MLW 358: 59 Mad 1028: 1936 MWN 655: 71 MLJ 328: 166 Ind Cas 769 (DB).

——Ss. 63, 73, O. 21, R. 17 — Application by decree-holder who had attached before judgment — Attachment before judgment, when becomes attachment in execution — Defective execution petition, whether saves limitation — Re-presentation after amendment.

There is nothing in principle or authority in support of the view that a person who has obtained an attachment before judgment cannot avail himself of S. 63, until some order has been passed by the Court upon his application for execution. The more reasonable view is that from the time he applies for execution he elects to avail himself of the attachment before judgment and from that moment the attachment before judgment becomes an attachment in execution for the purposes of S. 63.

Even if there are defects in an execution petition, the petitioner will be entitled to the benefit of S. 73 if the petition was in substantial compliance with the law. In any event under O. 21, R. 17, when the execution petition is re-presented with the necessary amendment it must be deemed to have been a valid presentation on the date of the original presentation itself. AIR (Vol 23) 1936 Mad 91: 59 Mad 303: 1935 MWN 1300: 69 MLJ 908: 43 MLW 40: 161 Ind Cas 93 (DB).

——Ss. 63 and 73 — Attachment before judgment.

Money attached before judgment is liable to rateable distribution in execution of decrees against the same defendant. 7 Bur LT 277: 26 Ind Cas 941: AIR (Vol 1) 1914 Upp. Bur. 15.

3. Claim to property and objection to attachment.

—Ss. 63 (1), 73 — Plaintiff, defendant No. 1 and defendant No. 2 having separate decrees against defendant No. 3 — Plaintiff in execution attaching certain property through Court at H — Defendant No. 1 obtaining decree from Court at A and getting same property attached and sold in execution through Court at A — Plaintiff's application for rateable distribution to Court at A dismissed — Defendant No. 2's application for rateable distribution granted and proceeds distributed between defendant No. 1 and defendant No. 2 — Suit by plaintiff claiming right of rateable distribution in sale proceeds:

Held, that the case was governed by S. 63(1), & not by S. 73. The property was attached by the plaintiff in the Court of the Munsif of H and, therefore, the plaintiff was entitled to ask the Court of the Subordinate Judge of A that the plaintiff should receive rateable distribution of the sale of the same property which had taken place under the orders of the Court at A. The question of rateable distribution was one which came under the words "shall determine any claim thereto" appearing in S. 63. AIR (Vol 26) 1939 All 159: 1939 ALJ 4: ILR (1939) All 162: 1938 AWR 870: 183 Ind Cas 714 (DB).

——Ss. 63, 73 — Sections must be read together — "Any claim" in S. 63 includes claim for rateable distribution under S. 73 — Second application for execution, in the Court of highest grade, necessity of.

Sections 63 and 73 must be read together, and since the Court of highest grade has been empowered to determine "any" claim with respect to the property, it must include claims for rateable distribution under S. 73. Consequently, there is no need for a second application for execution in the Court of highest grade by the decree-holder applying for rateable distribution. AIR (Vol 24) 1937 Nag 80: ILR (1937) Nag 219: 171 Ind Cas 371.

——Ss. 63, 73 — Right to set-off purchase price against decree amount, whether controlled by S. 73.

The fact that the decree-holder purchased the property with the leave of the Court that held the sale and was allowed to set-off the purchase price against the decree amount does not oust the power conferred by S. 63 on the Court of the higher grade, to call for the proceeds and rateably distribute them. The purchase by the decree-holder does not confer upon him an unqualified right, but is subject to terms of S. 73. AIR (Vol 23) 1936 Mad 797: 44 MLW 358: 1936 MWN 655: 71 MLJ 328: 59 Mad 1028: 166 Ind Cas 769 (DB).

——Ss. 63, 73 — Attachment by different Courts — Realisation by higher Court — Attaching creditors of lower Court — Right to rateable distribution.

Where property is attached by different Courts and money is realised in accordance with S. 63 by the Court of the highest grade, the attaching creditors of the Courts of the lower grade are entitled to share rateably irrespective of the fact that their decrees have not been transferred to that Court. AIR (Vol 22) 1935 Mad 988: 1935 MWN 1046: 42 LW 733: 161 Ind Cas 115.

—The right to rateable distribution which an attaching creditor is entitled to in the cases to which S. 63 applies cannot be forfeited even though when the sale was effected, a set off was allowed in favour of the decree-holder. AIR (Vol 22) 1935 Mad 988: 1935 MWN 1046: 42 MLW 733: 161 Ind Cas 115.

——Ss. 63, 73 — Property of judgment-debtor attached and ordered to be sold at the instance of one decree-holder — Application by another decree-holder, mentioning that property was under attachment.

Where the property of the judgment debtor has already been attached and ordered to be sold at the instance of one decree-holder and another decree-holder makes an application in the form prescribed for application for execution and prays for a rateable distribution of the assets to be realised, mentioning that the property was already under attachment, for the purposes of S. 73, the application is a sufficient application for execution of decree as required by that section and the applicant is entitled to a rateable distribution, and in the

circumstances, there is no necessity for a fresh attachment or even for a prayer for the same. AIR (Vol 21) 1934 Oudh 110: 11 OWN 161: 1934 OLR 269: 147 Ind Cas 1071.

——Ss. 63, 73 — Stay of execution under S. 63 by superior Court — Decree-holder in inferior Court, if entitled to apply for rateable distribution without further application.

Holders of decrees of inferior Courts, whereof execution has been stopped by the superior Court under S. 63, are entitled to apply to the latter for rateable distribution under S. 63 read with S. 73 of the Code without any further application. AIR (Vol 20) 1933 All 563: 1933 ALJ 921: 55 All 622: 1934 All LR 10: 146 Ind Cas 575.

——Ss. 63, 73 — Assets held by Court of higher grade — Formal application for execution, whether necessary.

It is not necessary that a formal application for execution has to be made to the Court for rateable distribution in cases to which S. 63 applies. It is only when the holders of the decree have no right or claim under S. 63, and their only remedy is under S. 73, that they must comply with the provisions of S. 73, and apply for execution. AIR (Vol 18) 1931 Nag 127: 14 NLJ 17: 134 Ind Cas 273 (DB).

——Effect of stay.

The holders of the decrees of inferior Courts, whose execution had been stopped by the superior Court under S. 63, are entitled to rateable distribution under that section read with S. 73 without any further applications. 87 Ind Cas 783: 29 CWN 575: AIR (Vol 12) 1925 Cal 966 (DB).

——Stay of execution after attachment.

Property was attached in execution of decrees of two Courts higher and lower — Proceedings in lower Courts were stopped — Application thereafter to higher Court for rateable distribution is a continuation of the lower Court proceeding and is not barred by S. 48. 64 Ind Cas 493: 15 Mad LW 245: 1921 MWN 507: AIR (Vol 9) 1922 Mad 3: 41 MLJ 378.

——Prior attachment by inferior Court.

Where an attachment by an inferior Court is prior to that of a superior Court, no application is necessary to the latter to entitle the decree-holder, attaching earlier, to rateable distribution, but if the decree-holder attaching through an inferior Court does so after an attachment has been effected by the superior Court, he cannot claim rateable distribution without an application to the superior Court. 21 Cal 200, Not Foll. 63 Ind Cas 11: 25 CWN 740: AIR (Vol 8) 1921 Cal 87 (DB).

——Ss. 63 and 73 — Rights of attaching decree-holders of different Courts.

Where decree-holders of money decrees passed by different Courts attach money due to their judgment-debtor before the actual receipt of the assets by the Court of the highest grade, they are entitled under Ss. 63 and 73 to share in the rateable distribution on application to such Court without getting their decrees transferred to it. 8 Bur LT 201: 8 LBR 204: 29 Ind Cas 21: AIR (Vol 2) 1915 Low Bur 59.

——Ss. 63 and 73 — Decree-holders of different Courts — Rateable distribution — Highest Court — Transfer, if necessary.

Under Ss. 63 and 73, C. P. C., decree-holders of different courts attaching in execution are entitled to rateable distribution in the Court of highest grade without transfer of decree. 26 MLJ 406: 1 LW 403: 23 Ind Cas 909: AIR (Vol 1) 1914 Mad 454 (DB).

——Ss. 63 and 73 — Simultaneous execution of decree — Rateable distribution — Determination of objection to claim — Application for execution to the Court executing the decree.

S. 63 C. P. C. contemplates only such claims or objections as can be summarily enquired into and an application for rateable distribution does not fall within it. A superior Court may consider the sale of a property by an inferior Court in ignorance as being proceedings taken in the superior Court itself, and may go into the question of rateable distribution. (1910) 11 CLJ 69: 14 CWN 396: 3 Ind Cas 105 (DB).

——Ss. 63, 73 (Ss. 285, 295 of old Code) — Attachment by several Courts — Execution of decree simultaneously against same property — Rateable distribution — Claim to attached property — "Shall determine any claim thereto and any objection to the attached property thereof", meaning of.

To entitle a decree-holder to come under S. 295 of the Code of Civil Procedure (Old) the following conditions must be present: (a) The decree-holder claiming a share in a rateable distribution should have applied for execution of his decree to the Court which holds the assets realized; (b) such application should have been made prior to the realisation of the assets; (c) the assets must have been realised by sale or otherwise in execution of the decree: (d) the attaching creditors as well as the decree-holder claiming to participate in the assets should be holders of decrees for payment of money; (e) such decrees should have been obtained against the same judgment-debtors. No rateable distribution can be claimed under the section unless all the conditions enumerated above are present. Although a decree may be executed in more than one Court a decree cannot be executed simultaneously against the same property in more than one Court.

All that the Court is competent to do under S. 285 of the Civil Procedure Code is to determine, first, any claim to property attached in execution of more Courts than one, and, secondly, any objection to the attachment thereof.

An application for rateable distribution cannot be deemed to be an application for determination of any claim to attached property of any objection to the attachment thereof. S. 285 of the Code of Civil Procedure is governed by the immediately preceding section with which it must be read, and the words "shall determine any claim thereto" and "any objection to the attachment thereof" mean any claim or objection of the sort which can be summarily enquired into and decided in execution proceedings as provided in the immediately preceding section or elsewhere in the Code as in sections 278 to 281. (1909) 14 CWN 396: 11 CLJ 69: 3 Ind Cas 105 (DB).

4. "Court of highest grade".

——Ss. 63 and 38 — Superior Court calling up execution proceedings from inferior Court — Power to sell attached property.

A Subordinate Judge, first class, has power to call up execution proceedings from the Court of a Subordinate Judge, second class, and sell the attached property. Even if such an action on his part is an excess of power, it is not open to the judgment-debtor to challenge his jurisdiction if he submits to his jurisdiction by presenting applications under S. 47 and O. 21, R. 90, C. P. Code. ILR (1947) Lah 417: 229 Ind Cas 307: AIR (Vol 34) 1947 Lah 13 (FB).

——Ss. 63 and 73 — Rateable distribution of assets — Power of Court of superior jurisdiction — Condition pre-requisite.

The Court that wants to decide the question of rateable distribution, if it wants to proceed under S. 63 read with S. 73, C. P. Code must be the Court that has attached the property. Then alone that Court gets the jurisdiction to decide all claims relating to rateable distribution, but if the Court of superior jurisdiction has not attached any property, which is a condition pre-requisite under the terms of S. 63 to clothe that Court with jurisdiction to call for assets from the Court of lower grades and distribute the assets, the Court of superior jurisdiction cannot be approached for distribution. The only Court that has then to be approached for rateable distribution is the Court which holds the assets, and under S. 73, C. P. Code, before the receipt of such assets, an application must be made to the Court for execution of a decree for payment of money passed against the same judgment-debtor — a decree which has not yet been satisfied. It is then that the Court will distribute the assets. ILR (1946) Nag 400: 1946 NLJ 329 : 222 Ind Cas 652: AIR (Vol 33) 1946 Nag 170.

——Section 73 is to be read with S. 63. AIR (Vol 25) 1938 Lah 754: 41 PLR 91: 179 Ind Cas 376.

——Ss. 63, 73 — Two decree-holders — Same property attached — One getting his execution transferred to other Court — Claim for rateable distribution in assets realised by another.

A and B had obtained decree against X in Courts of Subordinate Judge, Second and First Class, respectively. In execution, both had attached the same property in the respective Courts. A got his execution transferred to Subordinate Judge, First Class, where B's execution was proceeding. The property was sold in execution of B's decree. A claimed rateable distribution:

Held, that the Court of Sub-Judge, First Class, was the proper Court to deal with matters mentioned in S. 63 and the question of rateable distribution of assets is a matter which falls under that section. As soon as the proceedings relating to the execution of the decree of the petitioner were transferred by the Sub-Judge, Second Class, to the Sub-Judge, First Class, the petitioner became entitled to a rateable share in the assets realised by the Sub-Judge, First Class, and no further application for execution in such Court was necessary. AIR (Vol 23) 1936 Lah 519 : 38 PLR 281 : 163 Ind Cas 59.

——Ss. 63, 73 — Small Cause Court having higher pecuniary jurisdiction than Additional Small Cause Court is Court of higher grade.

The Small Cause Court which has a higher pecuniary jurisdiction than the Additional Small Cause Court, is a Court of higher grade within the meaning of S. 63. Consequently, the Additional Small Cause Court had no jurisdiction to deal with an application for a share in the assets realised by the Small Cause Court. AIR (Vol 23) 1936 Nag 270: ILR (1937) Nag 122: 167 Ind Cas 156.

——Tests.

The grade of the Court depends upon the pecuniary or other limitations of the jurisdiction of the particular Court. AIR (Vol 18) 1931 Nag 127: 14 NLJ 17: 134 Ind Cas 273 (DB).

——Simultaneous attachment.

Property attached simultaneously by the District Court and a subordinate Court can only be realised by the District Court as it is of a higher grade than the Subordinate Court. (1909) 1 Ind Cas 78 (All) (DB).

5. "More Courts than one".
See Notes 1 and 2.

6. Non-compliance — Effect.

——Sale in contravention of S. 63(1).

If there is no application for rateable distribution before the Court which holds the sale and the Court allows a set-off for the whole amount, the sale is undoubtedly protected under S. 63, sub-s. (2). Sale by a Court attaching it subsequent to attachment by another Court, although in contravention of S. 63(1), is rendered valid by S. 63 (2). AIR (Vol 24) 1937 Cal 55: 41 CWN 350: 65 CLJ 399: 169 Ind Cas 713 (DB).

——Sale by Court of lower grade instead of higher grade — Effect.

In view of S. 63(2), a sale held by a Court of lower grade, when it ought to have been held by a Court of higher grade, is not invalid. It is incumbent on the Court of the higher grade to accept the sale and to call for the proceeds for the purpose of distributing them rateably amongst all the decree-holders. AIR (Vol 23) 1936 Mad 797: 44 MLW 358: 1936 MWN 655: 71 MLJ 328: 59 M 1028: 166 Ind Cas 769 (DB).

——Ss. 63, 73 — Decree-holder-purchaser allowed to set-off decree amount against purchase-money — Application for execution of another decree against same judgment-debtor pending before inferior Court before sale — Application by these decree-holders for rateable distribution.

The applicant obtained a decree in a suit in the Court of the First Class Subordinate Judge, against the defendant in the suit, and filed a 'darkhast' asking for the sale of immovable property of the judgment-debtor, and the 'darkhast' was sent to the Collector for execution. The applicant got leave to purchase the property at the court-sale and to set-off the purchase money against the decretal amount; the sale took place and realized substantially the exact amount due upon the applicant's decree. At the date of the sale there were 'darkhasts' outstanding which had been filed in the Court of the Second Class Subordinate Judge of D in favour of various opponents, & opponents Nos. 2 to 6 applied to the First Class Subordinate Judge of D for rateable distribution of the sale proceeds and that distribution was ordered. The applicant in revision against the order contended that in terms of S. 73 the Judge had no power to order rateable distribution because applications to him to enforce the decrees in the Second Class Subordinate Judge's Court had not been made before the moneys were received and further that it could not be ordered because of the direction that he was allowed to set-off the decree amount:

Held, that Ss. 63 and 73 must be read together and that S. 63, on the facts of the present case, in substance prevented the holders of decrees of inferior Courts from enforcing those decrees and imposed upon the superior Court, that is, the Court of the First Class Subordinate Judge, the duty of distributing the assets and thereby, in effect, executing not only the decree of his own Court, but the decrees of the inferior Court. AIR (Vol 22) 1935 Bom 176: 59 Bom 310: 37 Bom LR 78: 159 Ind Cas 505 (DB).

——S. 63 (2) — Property under attachment by two Courts of different grades — Sale of property by Court of lower grade.

When property which has been attached by two Courts of different grades, is sold by the Court of the lower grade, the sale is not rendered invalid on that ground. AIR (Vol 22) 1935 Oudh 154: 11 OWN 1618: 1935 OLR 66: 153 Ind Cas 853 (DB).

——Two Courts selling same property in execution — Which sale valid.

Where two different Courts sell in execution the same property, the sale by the Court which attached

later but sold first is valid, unless it was done with the knowledge of the prior attachment. AIR (Vol 21) 1934 Pat 511: 7 RP 275: 1 BR 157: 13 Pat 765: 152 Ind Cas 902 (DB).

——Scope.

The word 'proceeding' in S. 63(2) is wide enough to include, not only the sale, but also the order allowing the decree-holder to set-off the decretal amount against the purchase-money. AIR (Vol 18) 1931 Bom 350: 33 Bom LR 537: 55 B 473: 133 Ind Cas 817 (DB).

——Sale in contravention.

Where the property is sold by a Court which did not attach the property in the first place, then the Court (which first attached the property) instead of holding a second sale should rather accept the sale held by the first Court and require the transfer of the proceeds realised by the sale held by the Court which ought not to have sold, the property to the Court, which should have sold the property. 62 Ind Cas 33: 6 PLJ 332: 2 PLT 719: AIR (Vol 8) 1921 Pat 140 (DB).

——Attachment by superior Court — Attachment and sale by inferior Court — Sale whether invalid.

A subsequent attachment and sale by an inferior court of immoveable property already attached in execution of a decree of a superior Court is not necessarily illegal and without jurisdiction. (1917) MWN 505: 33 MLJ 217: 22 MLT 119: 6 LW 404: 41 Ind Cas 612: AIR (Vol 5) 1918 Mad 663 (DB).

——S. 63 and O. 21, R. 90 — Property under attachment of superior Court — Purchaser not in fault — Sale whether can be impeached — Irregularities.

A sale held in contravention of S. 63(1) is not null and void but is irregular. The mere fact that the Court ordering the sale had notice of an attachment by a Superior Court, does not oust the jurisdiction of the former court and the sale cannot be treated as a nullity. The title of a purchaser at a judicial sale not himself in fault, cannot be impaired at law or in equity by showing any mere error or irregularity in the proceedings. Errors and irregularities must be corrected, by a direct proceeding. If not so corrected, they cannot be made available by way of collateral attack on the purchaser's title. There cannot be a collateral impeachment of a judicial sale, and a direct impeachment is possible only to the parties to the proceedings interested therein. Persons not parties to such proceedings cannot impeach a judicial sale on the ground that it was held in contravention of S. 63, C. P. C. 32 Ind Cas 927: AIR (Vol 4) 1917 Mad 602.

——Property under attachment in two Courts — Sale by Court of lower jurisdiction — Bona fide purchaser without notice.

A sale by the Court of lower jurisdiction of property under attachment in execution of the decrees of two separate Courts is irregular but not invalid, and a purchaser takes an indefeasible or a defeasible title according as he knows or does not know of the irregularity. The purchaser must show that he made the purchase bona fide and without notice of the pre-existing attachment or without being aware whether by direct and formal notice or otherwise, his title was liable to be questioned because of the superior Court's attachment. 32 Ind Cas 41: AIR (Vol 4) 1917 Mad 320 (DB) [Case before addition of sub-s. (2) to section — Ed.].

——Attachment by two Courts — Sale under second attachment — Effect.

Where there are two successive attachments by two different Courts, it is only the Court which first attached the property that can bring it to sale; a sale by the other is a nullity and need not be set aside in a suit. AIR (Vol 2) 1915 Mad 61 : (1914) MWN 796 : 25 Ind Cas 906 (DB). [Case before addition to Sub-s. (2) to the Section — Ed.]

——Ss. 63 and 73 (2) — Property sold by Court of lower grade — Contravention of S. 63 — Suit for refund under S. 73 (2).

Where, before a sale of a certain property in execution of a decree actually took place, the same property was attached by a Court of a higher grade in execution of another decree against the same judgment-debtor and in spite of notice of this fact, the Court of the lower grade sold the property and distributed the proceeds without giving any share to the judgment-creditor whose execution was pending in the higher Court: Held, that the Court of the lower grade acted in contravention of S. 63 of the Code & that the judgment creditor in the higher Court can bring a suit under S. 73(2) of the Code for refund of his share of the assets.

Obiter :— (1) On the facts of this case such a suit would lie even if the Court of lower grade had no notice of the proceedings in the Court of higher grade. (2) Under both Codes, the application for execution should be made to the Court which held the assets and a decree-holder wishing to share in a rateable distribution must get his decree transferred to the Court which holds the assets, if it is not there already. (1910) 1 UBR 53 : 8 Ind Cas 1176.

——Sale by Subordinate Court — Validity of.

Under S. 285 of the C.P.C., 1882, a Munsif has no jurisdiction to sell a property which is under attachment in execution of a decree pending in the Subordinate Judge's Court. The sale is a nullity and passes nothing to the purchaser. 27 A. 56 foll. But S. 63, C.P.C. of 1908 has made a change in the law and such a sale is merely irregular. (1909) 31 All 527 : 6 ALJ 703 : 3 Ind Cas 31 (DB).

——S. 63 (S. 285 old Code) — Execution of decree — Attachment by two Courts of different grades — Sale by Court of lower grade, validity of — Statute, construction of — Jurisdiction.

Where the same property is under attachment by two Courts of different grades, a sale effected by the Court of a lower grade is not a nullity; but a valid title passes to the purchaser. S. 285, Civil Procedure Code, is directory and deals with procedure. It is not intended by this section to take away the jurisdiction conferred by S. 284 of the Civil Procedure Code (old). (1907) 6 CLJ 130 : 34 C 836 (DB).

——S. 63 — O. 21, R. 46; O. 38, R. 12 (Ss. 265, 268, 490 of old Code) — Attachment before judgment —Original Court — Small Cause Court — Payment into Small Cause Court — Voluntary payment — Debtor liable to pay again.

A debt due to the judgment-debtor was attached before judgment in an original suit on 23rd February 1904. A decree was passed on 16th April 1904 and notice was issued to the debtor of the judgment-debtor on 7th September 1904 to pay the money into Court. In the meanwhile on 19th July 1904 a Small Cause decree had been passed in a suit against the same judgment-debtor in which also there was an attachment before judgment. The debt was again attached in execution of the Small Cause decree on 13th December 1904 and the money due was paid into Small Cause Court in pursuance of the attachment in execution of the Small Cause decree. The receiver appointed to collect the debts due to the decree-holder sued the debtor of the judgment-debtor for payment of money attachment.

Held that the payment was a voluntary payment and having been made at the defendants'

own risk in the Court of inferior jurisdiction with a full knowledge of the attachment by the higher Court, the defendants are liable to pay again and that there was no realization of the money paid by the defendants into the Small Cause Court in the proper sense of that term by that Court. The effect of S. 490, C.P.C. (old) is to put a person attaching before judgment in the same position as if he has attached after decree if a decree is passed in his favour after the attachment before judgment. (1906) 17 MLJ 488.

7. Rateable distribution.

See N. 6 and S. 73

8. "Receive and realise".

——Ss. 63, 38 — S. 63, if controlled by S. 38 — Decree of Court of lower grade called up by Court of highest grade — Later Court, if can sell property attached in execution.

The words "realize such property" in S. 63 must obviously refer to bringing such property to sale. Nowhere in S. 63 is there any restriction as to how and in what manner and in what petition the Court of highest grade should realize the property and inasmuch as S. 63 overrides S. 38 with regard to claim petitions, it overrides S. 38, in this matter also. Where the facts come within the definition of the situation as given by S. 63, it is obviously S. 63 which must be applied and S. 63, if the facts apply, cannot be controlled or governed by S. 38. Consequently, where, acting under S. 63, the decree of the Court of lower grade is called up by the Court of highest grade, the latter Court can sell the property attached in execution of that decree. AIR (Vol 26) 1939 Mad 169 : (1939) 1 MLJ 112 : 48 MLW 664 : 1938 MWN 1098 : ILR (1939) Mad 248 : 180 Ind Cas 44 (DB).

——Ss. 63, 73 — Application, where to be made.

In a case in which the Court is determining under S. 63 the right to rateable distribution, the true construction of S. 73 is that an application need only have been made to the Court which granted the decree before the receipt of the assets and need not be made to the Court which holds such assets; in other words, that the Court to which application for execution must be made means appropriate Court and includes an inferior Court which granted a decree to be executed. AIR (Vol 22) 1935 Bom 176 : 37 Bom LR 78 : 59 Bom 310 : 159 Ind Cas 505 (DB).

——Subsequent attachment by High Court.

S. 73 must be read with S. 63. A sum was attached in execution of two small cause decrees—There was subsequent attachment in execution of High Court decree on original side where the money was paid — Decree-holders in Small Cause Court need not apply for execution to High Court again. AIR (Vol 15) 1928 Rang 157 : 110 Ind Cas 744 : 6 Rang 131 (DB).

9. Revision.

——Order based on misapprehension.

Order under S. 63 based on clear misapprehension of section — High Court will set aside the order in revision though another remedy by way of suit is open to the aggrieved party. AIR (Vol 23) 1936 Mad 91 (93) : 59 Mad 303 : 43 MLW 40 : 1935 MWN 1300 : 69 MLJ 908 : 161 Ind Cas 93 (DB).

10. Sale by inferior Court — Procedure.

——Ss. 63 and 64 and Madras Co-operative Societies Act (6 of 1932) — Rules under, R. XXII (20) (a) — "Private transfer" — Sale under an award at the instance of a Co-operative Society — Sale in contravention of rule — Not a nullity.

A sale in execution of an award under the Madras Co-operative Societies Act (which has the force of a decree) at the instance of a Co-operative Society is not a "private transfer" within the meaning of S. 64 of the Code, and that section will not save the rights of a prior attaching decree-holder.

The absence of an enabling provision like sub-s. (2) of S. 63 of the Code in rule XXII (20) (a) of the rules made under the Co-operative Societies Act does not necessarily imply that a sale in contravention of the rule is a nullity. AIR (Vol 36) 1949 Mad 649 : 1949 MWN 259 : (1949) 1 MLJ 393.

——Ss. 63 and 73 and O. 21, R. 72 (as amended in Allahabad) — A and B obtaining decrees against same judgment-debtor — Execution proceedings on A's decree taken in Munsif's Court while those on B's decree in Civil Judge's Court — A attaching house of judgment-debtor and purchasing it in execution of his decree and allowed to set-off purchase-money against decretal dues — Before sale to A, B attaching same house and purchasing it in execution of his decree — Civil Judge, held could call upon Munsif to direct A to deposit purchase-money in his Court and distribute same rateably between A and B.

A and B obtained decree against the same judgment-debtor, A's decree being for some amount exceeding Rs. 1,200, and that of B for Rs. 7,000. Execution proceedings on A's decree were taken in the Court of the Munsif, Benares, and on the decree of B in the Court of the Civil Judge, Benares. A attached a house belonging to the judgment-debtor in execution of his decree on 9th February 1942 and purchased it himself on 12th November 1942. The sale was confirmed on 1st February 1943. The Munsif permitted him to set-off the purchase-money against the amount due under the decree in accordance with O. 21, R. 72. Prior to the sale of the house in execution of A's decree B got the same house attached in execution of his decree on 27th April 1942 and eventually purchased it on 17th December 1942 for Rs. 1,400. B then applied to the Civil Judge to request the Munsif to direct A to deposit the sum of Rs. 1,200, for which the house had been sold to him in the Munsif's Court so that it might be rateably distributed between A and B :

Held that (1) the Civil Judge being a superior Court could call upon the Munsif to direct A to deposit the amount of Rs. 1,200, for which the house had been sold to him in his Court and distribute the same rateably between A and B.

(2) It was primarily for the execution Courts to deal with such matters and their jurisdiction was in no way excluded by S. 73 (2) under which an aggrieved party (B in this case) could agitate his claims in a regular suit. AIR (Vol 33) 1946 All 291 (DB).

——Ss. 63 and 73 — Rateable distribution — Attachment under O. 21, R. 48 — Assets received by Court of lower grade — Application under Ss. 63 and 73 to Court of higher grade — Application transferred to Court of lower grade where assets were received.

Where the various executions against an officer are pending in the Court of Additional Small Causes and the applicant-decree-holder applies under Ss. 63 and 73 to the Court of Small Causes and the application is sent to the Court of Additional Small Causes where the assets were received, the applicant-decree-holder is entitled to rateable distribution from the date of her execution application and not from the date of her application under Ss. 63 and 73. It cannot be said that because the office of the Accountant-General postpones the remission of the salary to a latter date there is no effective attachment. Section 73 does not require the transfer of decrees to the Court where the process of realisation takes place as a condition precedent to an application under S. 63 of the Code and, therefore, a fortiori it is not

necessary for the decree-holder seeking rateable distribution to apply for execution of his decree to the Court where the realisation takes place. If the process of realisation takes place in the Court of an inferior grade it is the duty of such Court to send the sale proceeds to the superior Court which, under S. 63, is the proper Court to distribute the assets. But where this is not done, it cannot deprive the decree-holder in the higher grade Court to his right to rateable distribution. AIR (Vol 28) 1941 Oudh 277 : 1941 AWR 66 : 1941 OWN 115 : 1941 OLR 24 : 193 Ind Cas 38.

——Ss. 63, 73 — Application under S. 63 — Decree, if should be transferred to Court where process of realisation takes place.

Section 73 does not require the transfer of a decree to the Court where the process of realization takes place as a condition precedent to an application under S. 63, and, therefore, a fortiori it is not necessary for the decree-holder seeking rateable distribution to apply for execution of his decree to the Court where the realization takes place. Section 63 contemplates a case where attachments of the same property have been made by different Courts at the instance of different decree-holders of the common judgment-debtor and it is the duty of the Court of the inferior grade to send the sale proceeds to the superior Court. AIR (Vol 25) 1938 Oudh 12 : 1937 OWN 1040 : 171 Ind Cas 222.

——Ss. 63, 73 — Decree in Small Cause Court — Execution in such Court by attachment of salary — Other decree-holders applying to High Court for execution of their decrees against same judgment-debtor and also attaching salary — Garnishee discontinuing paying instalments in Small Cause Court and paying them in High Court — Decree-holders in Small Cause Court applying to High Court for rateable distribution.

A Court of Small Causes passed certain decrees. The decree-holders applied in that Court for execution. The Court attached the judgment-debtor's salary and the money was actually being realized by the Court. The other decree-holders against the same judgment-debtor applied to the High Court for execution of their decrees by attachment of his salary. The garnishee began sending monthly instalments to the High Court and discontinued sending them to the Court of Small Causes. Thereupon the decree-holders in Small Cause Court applied to the High Court for execution. Their right for rateable distribution with regard to money received prior to their applications being received in the High Court was challenged:

Held, that they were entitled to rateable distribution in all the money received in the High Court by attachment of the salary of judgment-debtor. AIR (Vol 25) 1938 Sind 175 : 177 Ind Cas 195.

——Ss. 63, 73 — Attachment of same property of judgment-debtor by different Courts at instance of different decree-holders — Sale proceeds realised by one Court — Procedure.

Section 63 contemplates the case where attachments of the same property have been made by different Courts at the instance of different decree-holders of the common judgment-debtor and provides for the distribution among them of the proceeds of the attached property by one of Courts only. The principle underlying it is the principle of convenience, the principle of avoiding multiplicity of proceedings, the principle of fair distribution and not the principle of exclusion. The distribution is to be made by the superior Court, and if all the Courts be of the same grade, the distribution is to be made by the Court which first attached the property. In such cases it is the duty of the Court of inferior grade or the Court of same grade which had attached last of all, as the case may be, to send the sale proceeds to the Court of superior grade for distribution, or if all the Courts be of the same grade, to the Court which first attached the property and the Court of superior grade or of the same grade which had first attached the property, as the case may be, is to distribute the sale proceeds amongst all the attaching decree-holders. AIR (Vol 23) 1936 Cal 723 : 40 CWN 1307 : ILR (1937) 1 Cal 391 : 166 Ind Cas 178 (2).

——Ss. 63, 73 — Set-off allowed to decree-holder purchaser — Another decree-holder applying for rateable distribution — Procedure.

Where after the purchase at the court auction by a decree-holder with Court's leave, and the decree-holder is allowed to set-off the decretal amount, another decree-holder applies for rateable distribution, the purchaser must be allowed to make his choice; either he may elect to have a re-sale or to pay into Court so much of the price as may become due on rateable distribution to the rival decree-holder. AIR (Vol 23) 1936 Mad 797: 1936 MWN 655: 71 MLJ 328: 44 MLW 358: 59 Mad 1028: 166 Ind Cas 769 (DB).

——Court of higher grade has preferential right of sale over Court of lower grade — Power to stop sale in lower Court and to take control itself necessarily follows — Sale held but confirmation stayed — Confirmation cannot be avoided. (1936) 1936 MWN 824.

——Where execution has taken place and money has been realised by an inferior Court, the superior Court which had attached the property at an earlier date than the date of the sale, is entitled to cali for the proceeds lying in Court. AIR (Vol 22) 1935 Mad 988: 1935 MWN 1046: 42 LW 733: 161 Ind Cas 115.

——Ss. 63, 73 — Rival decree-holders — Attachment of amount by Courts of different grades — Court of superior grade, jurisdiction of to reccive amount — Priority.

Two decrees were passed against the same judgment-debtor, one by a District Munsiff's Court, the other by a sub-Court. Certain property of the judgment-debtor had been brought to sale for default in payment of Government revenue and on the sale being confirmed, the purchase-money was in the hands of the Tahsildar who conducted the sale. This amount was attached by the two decree-holders.

Held, that it was the Sub-Court, being the Court of the superior grade, that had the jurisdiction to receive the amount and determine all claims thereto; that the mere fact that the prior attachment was the one made by the decree-holder in the District Munsif's Court did not entitle that decree-holder to claim priority in payment; that the money could not be considered to have reached the Court from the date of the order or from the date of its receipt by the Public Officer. AIR (Vol 20) 1933 Mad 342 (2): 37 MLW 366: 1933 MWN 660: 65 MLJ 347: 144 Ind Cas 252.

——Attaching creditor — Right to apply for setting aside sale — Sale by inferior Court — Attaching creditor of superior Court — Right to rateable distribution.

Where property attached by a superior Court is wrongly sold by an inferior Court, the assets realised have to be sent to the superior Court, and the decree-holder who has attached through the superior Court being a person entitled to apply for rateable distribution before assets are received by the superior Court is entitled to apply under O. 21, R. 90 for setting aside the sale. AIR (Vol 19) 1932 All 2: 53 All 759: 1931 ALJ 880: 133 Ind Cas 426 (DB).

——Under S. 63, it is competent to the Court of a higher grade to call for the sale-proceeds realised by the Court of inferior grade and rateably distribute the same among the decree-holders who have qualified themselves under S. 73, Civil P. C. AIR (Vol 18) 1931 Bom 350: 33 Bom LR 537: 55 B 473: 133 Ind Cas 817 (DB).

——Order by Court granting permission to the decree-holder to set-off the decretal amount against the purchase money — Another Court of superior grade before which execution against the same property is pending has no power under S. 63 to cancel that permission. It can only call for excess amount, if any, deposited in Court. AIR (Vol 18) 1931 Bom 350: 33 Bom LR 537: 55 Bom 473: 133 Ind Cas 817 (DB).

——Ss. 63, 73 — Attachment by Courts of different grades — Sale by higher Court — Right of decree-holder of lower Court — Transfer of decree whether necessary.

Where property is attached by two Courts, one of inferior and the other of superior grade, and is sold by the Court of higher grade, the decree-holder at whose instance the property was attached by the inferior Court, is entitled to rateable distribution of the sale-proceeds even if his decree has not been transferred to the Court of the higher grade for execution. AIR (Vol 18) 1931 Rang 111 (2): 132 Ind Cas 832.

——Superior Court should call for the sale-proceeds to its Court.

Where the property of the same judgment-debtor is attached by the Subordinate Judge as well as by the District Munsif, and the latter, in ignorance of the attachment by Subordinate Judge, sells the property, the proper way is that the Subordinate Judge should call for the proceeds of the sale from the District Munsif's Court in order that they might be distributed in the Subordinate Judge's Court in accordance with the principle of S. 63: 46 Cal 64, Diss. from. AIR (Vol 14) 1927 Mad 67: 51 MLJ 661: 98 Ind Cas 628.

——After attachment of property by First Class Subordinate Judge there was subsequent attachment and sale by Second Class Subordinate Judge. First Class Subordinate Judge is entitled to call for sale proceeds to his Court for rateable distribution. AIR (Vol 12) 1925 Bom 420: 49 Bom 655: 27 Bom LR 917: 89 Ind Cas 980 (DB).

——Same property attached by Civil and Revenue Courts but was sold by Revenue Court — It cannot be sold afterwards by Civil Court.

The omission of the word "Civil" which was before "Court" in the definition of "decree" in the old C. P. Code, has not altered the law in this respect from what it was at the time when 22 All 182, was decided. AIR (Vol 8) 1921 All 142(2): 43 All 612: 19 ALJ 643: 63 Ind Cas 909 (DB).

——Attachment by Court.

Property being attached in prior decree of a different Court cannot be sold by a Court executing a subsequent decree. Sub-s. (2) protects such sale when it has taken place in ignorance of prior rights. AIR (Vol 8) 1921 Pat 140: 2 PLT 719: 6 PLJ 332: 62 Ind Cas 33 (DB).

——Ss. 63 and 73 — Decree against same judgment-debtor — Courts of different grades — Sale by inferior Court — Procedure.

Where the same property has been attached in execution of two decrees, one passed by a Court of superior grade and the other by a Court of inferior grade, the sale should be held by the Court of superior grade. Where however the sale has been held by a Munsif, the subordinate Judge is not to direct the Munsif, to transmit the proceeds to his Court, but should move the District Judge to have the proceeds so transferred and the sale proceeds should be then rateably distributed in accordance with the provision of S. 73, C. P. C. AIR (Vol 6) 1919 Cal 545: 46 Cal 64: 27 CLJ 145: 44 Ind Cas 249 (DB).

——Ss. 63, 73, (Ss. 285, 295 of old Code) — Rateable distribution — Attachment by several Courts of superior grade — Revision — Appeal.

After sale, but prior to realisation of proceeds by the District Munsif's Court, a decree-holder who had attached before judgment in a subordinate Court applied to the subordinate Court for execution:

Held, that the subordinate Court was entitled to call up execution proceedings and decide the question of rateable distribution between the various decree-holders.

Quaere: Whether the Subordinate Judge had jurisdiction to order a refund by the holders of decrees in the District Munsif's Court to whom the Munsif had distributed the moneys, as if he were hearing an appeal against the Munsif's order. (1902) 1 CLJ 97: 29 C 773 (DB).

——S. 64.

See also Civil P. C., O. 21, R. 58

1. **Applicability.**
   See also N. 13.
2. **Attachment.**
3. **Attachment before judgment.**
4. **Claim enforceable under attachment.**
5. **Claim for rateable distribution — Explanation.**
6. **"Contrary to such attachment."**
7. **Effect of attachment.**
8. **Insolvency after attachment — Effect.**
9. **Prior contract for sale and antecedent liability.**
10. **Private transfer or delivery of property or interest.**
11. **Removal, discontinuance, suspension or revivor of attachment.**
12. **Sale under later attachment.**
13. **Scope and object.**
    See also N. 1.
14. **Transfer how far void.**
15. **Waiver of benefit.**

——Bona fide transfer.

A bona fide purchaser in good faith though he might have been aware of an order of attachment would be protected if the purchase was made before the actual attachment. Order 21, R. 54(3) (All) is repugnant to S. 64. AIR (Vol 33) 1946 All 438: ILR (1946) All 788: 223 Ind Cas 599: 1946 ALW 161: 1946 OWN (HC) 153: 1946 ALJ 187: 1946 AWR (HC) 393 (DB).

1. **Applicability.**
   See also N. 13.

——For purposes of S. 64, whether property must have been sold or assets come into executing Court.

Per Abdur Rahman, J.—It is not necessary for the purposes of S. 64, that the property should have been sold or that the assets must have come into the executing Court although this may be necessary for the purposes of S. 73. AIR (Vol 27) 1940 Mad 385: (1940) MWN 207: 51 MLW 270: (1940) 1 MLJ 482: ILR (1940) Mad 526: 188 Ind Cas 81 (FB).

——Adjustment within the meaning of O. 21, R. 2 — S. 64 has no application. AIR (Vol 27) 1940 Pesh 18: 1940 Pesh LJ 18: 188 Ind Cas 757.

——Section 64 contemplates attachment with all the formalities complied with — Prohibitory order of Official Assignee outside jurisdiction of Court not to pay dividend due to creditor of insolvent —

Order is not valid for such order can only be made by the High Court within whose jurisdiction the Official Assignee is — It is not a valid attachment of money and hence S. 64 is of no avail. AIR (Vol 26) 1939 Mad 811: 1939 MWN 573: 189 Ind Cas 406.

——Section, if applies to conveyance in obedience to Court's decree.

Section 64, which declares private alienations of property after attachment to be void, does not cover the enforced execution of a conveyance in obedience to a decree of a Court. AIR (Vol 23) 1936 Nag 163: ILR (1936) Nag 172: 166 Ind Cas 950 (2).

——Benefit of S. 64 cannot be had where transfer takes place before attachment.

The benefit of S. 64, Civil P. C., cannot be extended to a case where attachment of the property in execution of decree was not in existence on the date on which the sale was made. (1936) 164 Ind Cas 1031 (1032): 1936 OWN 861: 12 Luck 365 (DB).

——Whether applies to both attachment before and after decree.

Section 64, Civil P. C., applies to attachment before judgment as well as to attachment made after a decree has been obtained. AIR (Vol 21) 1934 All 165: 1933 ALJ 1501: 147 Ind Cas 509.

——Injunction — Section does not apply.

Section 64 relates to private alienation of property after it has been attached by order of a Court and does not apply when no order of attachment is passed but only an ad interim injunction is issued restraining the alienation of a house. S. 64 has no application to a case in which the alienation has been made after the issue of such an injunction. AIR (Vol 17) 1930 Lah 858.

——Attachment does not invalidate transfer of money decree.

There is no provision in sub-r. (1) or (2) or (6) of R. 53 of O. 21, which prohibits the holder of a decree for payment of money from transferring the decree attached, and the transfer is in no way affected on account of the attachment of the decree, but is a valid transfer giving the transferees a good title and entitling them to have their names substituted in place of the assignors and to apply for execution under O. 21, R. 16. AIR (Vol 16) 1929 Pat 1: 7 Pat 726: 9 PLT 822: 113 Ind Cas 673 (DB).

——Attachment of money decree is governed by O. 21, R. 53 and not by S. 64. AIR (Vol 16) 1929 Pat 1: 7 Pat 726: 9 PLT 822: 113 Ind Cas 673 (DB).

——Sale must follow attachment.

An attachment referred to in S. 64 is the attachment under which the execution sale is held and not an attachment of a creditor who is paid off. AIR (Vol 15) 1928 Bom 545: 30 Bom LR 1488: 115 Ind Cas 414 (DB).

——Decree satisfied — Section does not apply.

Where a case does not fall strictly within S. 64 the principle of S. 64 cannot be applied in considering that case. The moment attachment comes to an end by reason of satisfaction of the decree, all claims under the attachment cease to be enforceable. AIR (Vol 15) 1928 Bom 545: 30 Bom LR 1488: 115 Ind Cas 414 (DB).

——Mortgage pending attachment is void.

Attachment before judgment — Suit decreed — Mortgage of property to third person — Property sold in execution of decree and purchased by decree-holder — Mention of mortgage in execution application does not prevent decree-holder from challenging the mortgage, nor does it prevent the provisions of S. 64 from applying, so as to make the mortgage void. AIR (Vol 15) 1928 Bom 444: 30 Bom LR 1136: 113 Ind Cas 353 (DB).

——Attachment before judgment — Section applies.

Attachment before judgment is not a process in execution of a decree, for at the time of the attachment there is no decree and therefore there can be no process that could be issued in execution of the same. An attachment before judgment, made while the estate is still under the Collector's control, is therefore not void under paragraph 11. The object of the provision in the latter part of paragraph 11 (1) is to protect the debtor as far as possible from the risk of losing his property wholly or for all time and mere attachment before judgment does not defeat that object. Attachment in S. 64 covers attachment before judgment. AIR (Vol 9) 1922 Nag 238: 68 Ind Cas 188.

——Section not applicable to claims under decree.

Section 64 refers only to claims enforceable under the attachment effected prior to the alienation and not to claims enforceable under the decree in execution of which the attachment was made. AIR (Vol 8) 1921 Oudh 176: 8 OLJ 358: 66 Ind Cas 642 (DB).

——Bona fide transfer.

No question of bona fides of transfer arises under S. 64. AIR (Vol 6) 1919 Mad 594: 42 Mad 565: 36 MLJ 284: 26 MLT 45: 50 Ind Cas 261 (DB).

——Execution sale — Claim suit — Pendency of.

Private alienation by a claimant though not strictly within the words of the section must be held to be subject to the result of the claim litigation. The section avoids private transfers contrary to the attachment though the alienation is made between the final decision in any claim proceedings and the subsequent suit thereon. A judgment-debtor who is not a party to claim proceedings or to the subsequent litigation arising therefrom, cannot be held to have been represented by his decree-holder. When the right to attach certain property as the property of the judgment-debtor is admitted ,a prior attachment in one suit does not affect a sale under a later attachment in another suit and the fact that the right to attach in the first suit is being questioned by a stranger does not make any difference. AIR (Vol 5) 1918 Mad 1095: 40 Mad 955: 32 MLJ 374: (1917) MWN 284: 5 LW 519: 21 MLT 377: 38 Ind Cas 778 (DB).

2. Attachment.

——S. 64 and O. 21, R. 50 — Sub-r. (3) to R. 54 added by Allahabad High Court is repugnant to S. 64 — For purposes of S. 64 attachment cannot be held to have been made unless all provisions contained in sub-rr. (1) and (2) of R. 54 have been complied with.

Attachment is not made within the meaning of S. 64 of the Code by the mere making of an order for attachment. In virtue of sub-rr. (1) and (2) of O. 21, R. 54, an attachment cannot be said to have been made unless and until the provisions of both sub-rules have been complied with. In other words, the order of attachment (u/sub-r. (1)) cannot take effect as against anybody unless and until the provisions of sub-rule (2) have been complied with. It follows that for purposes of S. 64 it cannot be held that an attachment has been made unless and until all these provisions have been complied with and the provision contained in sub-r. (3) of R. 54 added by Allahabad High Court is not only inconsistent with the provisions of sub-r. (2), but is also repugnant to S. 64 by providing that an attachment is to be effective before it has actually been made, whereas S. 64 provides for certain results to accrue only where the

attachment has actually been made. AIR (Vol 33) 1946 All 438 : ILR (1946) All 788 : 223 Ind Cas 599 : 1946 ALW 161 : 1946 OWN (HC) 153 : 1946 ALJ 187 : 1946 AWR (HC) 393 (DB).

——What is attached.

An attaching decree-holder attaches, not the physical property, but only the rights of the judgment-debtor in the property. AIR (Vol 26) 1939 Mad 702 : ILR (1939) Mad 853 : 49 MLW 460 : 1939 MWN 329 : (1939) 2 MLJ 822 : 185 Ind Cas 562 (DB).

——Validity.

Quaere:— Execution of warrant of attachment, whether judicial act in respect of which presumption that it took place at the earliest period of day could be made. AIR (Vol 25) 1938 Nag 309 : ILR (1938) Nag 573 : 177 Ind Cas 971.

——"Attachment" referred to in S. 64 refers to attachment under which execution sale is made.

The attachment referred to in S. 64, Civil P. C., is the attachment under which the execution sale is made. AIR (Vol 21) 1934 All 1057 : 1935 ALJ 4 : 4 AWR 1236 : 154 Ind Cas 230 (DB).

——S. 64, O. 38, R. 5 — Attachment, when becomes effective — Service of prohibition on defendant.

The mere passing of an order of attachment or the mere issue of an order from the office is not sufficient to make the attachment but the process must be followed by actual attachment and the person prohibited cannot be deemed to know that he is prohibited unless the prohibition is served upon him or is made known in the manner recognised by law. Until, therefore, an attachment is actually effected, the debtor is free to alienate his property and such alienation would be valid. It follows, therefore, that in judging whether an alienation made by the judgment-debtor can be avoided, the date that must be looked to as the starting period of possible avoidance is not the date of the order of the attachment but that of actual attachment, that is, the actual attachment cannot have a retrospective effect from the date of the order. The words "where an attachment has been made" in S. 64, Civil P. C., mean an actual attachment effected in the manner prescribed by law, and do not refer to the order of the attachment passed by the Court. AIR (Vol 21) 1934 All 165 : 1933 ALJ 1501 : 147 Ind Cas 509.

——Validity, when complete.

Mere order to make an attachment does not amount to an actual attachment. Attachment is not complete until it has been effected in the manner provided by rules. If this requirement is not fulfilled there is in fact no attachment of debt and the provisions of S. 64 are not applicable. If there is a valid attachment of debt, the satisfaction of the decree in which the debt might have been merged would be void under S. 64 against all claims and objections under the attachment. AIR (Vol 21) 1934 Pat 619 : 1 BR 97 : 152 Ind Cas 795 (DB).

——Attachment, when effectual.

An order for attachment does not become effectual till the prohibitory order is fixed on the Court house. AIR (Vol 20) 1933 Cal 212 : 36 CWN 733 : 59 Cal 1176 : 142 Ind Cas 452 (DB).

——S. 64, O. 21, R. 44 — Copy of warrant of attachment not affixed on property — Validity of attachment.

Where a copy of the warrant of attachment was not affixed on the property, the attachment must be declared to be invalid. Section 64 does not then apply to the case. AIR (Vol 20) 1933 Rang 267 : 145 Ind Cas 818.

——Order for attachment — Alienation before service of processes — Validity.

An attachment is not effective to invalidate a subsequent transfer unless the order of attachment has been issued and in execution of that order all the processes of attachment prescribed by the Code to effect a valid attachment have been served. AIR (Vol 18) 1931 Pat 58 : 9 Pat 860: 12 PLT 398: 129 Ind Cas 142 (DB).

——Vesting order not analogous to attachment.

Per Ramesam and Madhavan Nair JJ.—There is no analogy between a vesting order by which the rights of insolvent are vested in the Official Assignee and an attachment of property by Court. 112 Ind Cas 541 : 51 Mad 417 : 1928 MWN 294 : 28 MLW 109 : AIR (Vol 15) 1928 Mad 735 : 55 MLJ 175 (FB).

——Ultra vires attachment does not affect transfer.

Where, before the mortgage of the plaintiff, the property was attached before judgment by defendant but the procedure laid down by R. 5 was not followed.

Held, the attachment order was 'ultra vires' and the plaintiff was bound to succeed on his mortgage. 68 Ind Cas 188: AIR (Vol 9) 1922 Nag 238.

——S. 64 and O. 21, R. 54 (1), (2) — Attachment when effective — Notification under O. 21, R. 54 (2).

An attachment operates as a valid prohibition against the alienation of the attached property only from the date on which the necessary proclamation is made under O. 21, R. 54 (2) of the C. P. C. 42 Mad 844 : 37 MLJ 375 : 10 LW 391 : (1919) MWN 678: 26 MLT 281: 53 Ind Cas 207 : AIR (Vol 7) 1920 Mad 804 (FB).

——S. 64, and O. 21, R. 54 (2) — Attachment when effective — Prohibition against alienation — Bona fide purchaser.

A judgment-debtor prohibited from making alienation, must have an opportunity of knowing that he is prohibited, by a proclamation mentioned in O. 2, R. 54 (2) and then only the attachment of his property is effectual to prevent alienation. No question of bona fides arises under S. 64, C. P. C. 42 Mad 565 : 36 MLJ 284 : 26 MLT 45 : 50 Ind Cas 261 : AIR (Vol 6) 1919 Mad 594 (DB).

——S. 64 and O. 21, R. 54 — Attachment when effective.

The attachment referred to in S. 64 means one made in the manner prescribed in O. 21, R. 54 and published as there prescribed. The words in S. 276 of the old Code of 1882 which have been omitted from the present S. 64 are not material and have been omitted as being surplus. 39 Ind Cas 857 : AIR (Vol 4) 1917 Cal 832 (DB).

——S. 64 and O. 21, R. 54 — Attachment when effective.

An order of attachment of property under the C. P. C., takes effect only from the date of its actual promulgation under O. 21, R. 54, C. P. C., and not from the date of the Court's order. 32 Ind Cas 276 : AIR (Vol 3) 1916 Cal 135.

——S. 64 and O. 21, R. 54 — Attachment when effective.

A private alienation of property after an order for attachment which has not been effected, is valid unless proof is given that all the requirements of O. 21, R. 54, C. P. C., have been complied with and the proclamations have been made. 1 OLJ 549 : 26 Ind Cas 204 : AIR (Vol 1) 1914 Oudh 308.

——Validity of attachment — Attachment for larger amount.

Attachment for a larger amount than due is valid to the extent of the amount due. (1910) MWN 227: 7 MLT 429: 20 MLJ 821: 6 Ind Cas 209 (DB).

——S. 64, O. 21, R. 53 (Ss. 273 and 276 of old Code) — Attachment when takes effect.

Under S. 273, C. P. C. (1882) attachment only takes effect from the date of the receipt of the notice by the Court whose decree is attached. A transaction which is prima facie valid can only be invalidated by the attaching decree-holder showing to the satisfaction of the Court that the alienation was made during the pendency of the attachment. (1910) 20 MLJ 330 (DB).

3. Attachment before judgment.

——S. 64 and O. 21, R. 57 — Execution petition "struck off" — If a dismissal for default — Effect on attachment before judgment — Private sale in the meanwhile and subsequent sale of same in execution — Execution sale, if prevails over earlier private sale — Attachment of undivided share in ignorance of prior partition — Attachment, if can be deemed to be of the share of the judgment-debtor.

Where there was an attachment before judgment, on an application to execute the decree passed in the suit the order was "defendant's notice returned unserved for want of proper address and residence. Petition may be renewed with correct address. Struck off. Attachment will subsist". Subsequently another execution petition was filed for the sale of the attached property, which was ordered and the decree-holder purchased the property and the sale was confirmed. But the same property had been in the meanwhile purchased under a private sale. On a question as to which sale would prevail.

Held, in the circumstances, that the attachment before judgment had not ceased to exist and the sale in pursuance of the attachment must prevail over the private sale. AIR (Vol 36) 1949 Mad 823: 1949 MWN 195: (1949) 1 MLJ 436.

——S. 64, O. 38, R. 7, O 21, R. 54 — Attachment before judgment — Procedure — Proper procedure not followed.

Unless all the processes of attachment which are required by law to effect a valid attachment have been served, there is no such attachment of the property as would invalidate its transfer under S. 64, Civil P. C. Under O. 38, R. 7, the attachment before judgment must be effected in the same manner as the attachment in execution of a decree. Under O. 21, R. 54, the attachment of immoveable property is to be made by an order prohibiting the defendant from transferring or charging the property in any way and all persons from taking any benefit from such transfer or charge. The order has to be proclaimed in the manner described in sub-r. (2) of R. 54. A mere order of attachment is not enough. AIR (Vol 26) 1939 Bom 508: 41 Bom LR 1104: 185 Ind Cas 655.

——S. 64, O. 38, R. 5 — Attachment before judgment ordered without giving defendant opportunity to furnish security — Third party, if can ignore it and enforce mortgage against claims of decree-holder under attachment.

An order of attachment before judgment should comply with the provisions of O. 38, R. 5, and it should be conditional order accompanied by a notice to the defendant. But where this procedure has not been complied with and there is a failure to give the defendant an opportunity to furnish security, the 'ex parte' order for attachment does not become a nullity but is simply rendered irregular liable to be set aside only at the instance of the defendant. A third party cannot ignore the attachment and enforce his mortgage against the decree-holder's claim under the attachment. AIR (Vol 25) 1938 Lah 49: 40 PLR 280: ILR (1987) Lah 756: 175 Ind Cas 828 (DB).

——Attachment of lands before judgment — Decree passed — Mortgage of lands — Execution by decree-holder — Rent for certain period attached — Decree-holder appointed Receiver to collect rent — Suit by mortgagee claiming rent of attached land.

Plaintiff attached certain lands before judgment in suit. Subsequent to the decree the lands were mortgaged. Afterwards the decree-holder in execution of his decree attached the rents of those lands for a certain period, he himself being appointed Receiver to collect them. The mortgagee brought a suit claiming rents of the lands. The Receiver decree-holder contended that under S. 64; Civil P. C., the mortgage being void, he and not the mortgagee was entitled to the rents:

Held, that the claim of the decree-holder Receiver arose under the second and not the first attachment and the decree-holder was appointed Receiver under the second attachment. The transfer in favour of mortgagee was antecedent to the second attachment under which the Receiver claimed rents. The mortgage, therefore, was not void under S. 64. Consequently the contention of the Receiver could not prevail and the mortgagee was entitled to the rents as against the Receiver. AIR (Vol 24) 1937 Mad 843: 46 MLW 375: 1937 MWN 1001: (1937) 2 MLJ 728: ILR (1937) Mad 970: 167 Ind Cas 218 (DB).

——S. 64, O. 38 — Attachment before judgment — How long continues.

If an attachment before judgment is made under the provisions of O. 38, then the plaintiff becomes entitled to the benefit of Section 64, Civil P. C. Where property is under attachment by virtue of the provisions of Order 38 and a decree is subsequently passed in favour of the plaintiff, it will not be necessary upon an application for execution of such decree to apply for a re-attachment of the property. The property is already under attachment and the attachment continues to subsist till the decision of the suit. When the plaintiff obtains a decree he can apply for the sale of the attached property. If after the attachment, the judgment-debtor has made any alienation it will be void against his claims enforceable under the attachment. AIR (Vol 21) 1934 All 165: 1933 ALJ 1501: 147 Ind Cas 509.

——Creditor attaching before judgment — Whether a charge.

Section 64 does not create a charge in favour of the creditor who gets an order of attachment before judgment. AIR (Vol 20) 1933 All 593: 147 Ind Cas 482 (DB).

——Prior transfer is not affected by attachment.

According to O. 38, R. 10, attachment before judgment does not affect the rights existing prior to the attachment of persons not parties to the suit. Therefore property transferred to stranger few days before the actual attachment before judgment in a suit, would not be affected by the attachment. Such a transfer cannot be said to be contrary to such attachment. AIR (Vol 15) 1928 Bom 545: 115 Ind Cas 414: 30 Bom LR 1488. (DB).

——Conditional order of attachment before judgment — Purchaser is entitled to oppose the order being made absolute.

It is usual for a plaintiff to file an application along with the plaint for the attachment of the property of the defendants and if there are minors in the suit to propose some person as their guardian. If afterwards the guardian is

found unwilling to act, the Court appoints a proper guardian. But the conditional attachment made in the hope that the proposed guardian would act cannot be said to be invalid by reason of the proposed guardian being unwilling to act.

The Court should see before making the conditional order absolute that a guardian is appointed to properly represent the minors, as the guardian might represent to the Court that the plaintiff has not made out a good case for attachment before judgment or that he is willing to give security for any decree that may be passed in the suit, and therefore the attachment before judgment is not necessary. Therefore an order absolute for attachment before judgment could not be made in the absence of a proper guardian. But a conditional order that simply prevents the property from alienation by the defendants pending the disposal of the application cannot be said to be invalid merely because the guardian proposed comes and says he is unwilling to act.

If the order is made absolute, then the property would be subject to the attachment order so made. A purchaser of such property during the subsistence of the conditional order is entitled to intervene in the proceedings to show that the conditional order for attachment should not be made absolute. AIR (Vol 15) 1928 Mad 1: 106 Ind Cas 142 (DB).

——Ss. 64 and 65 — Attachment before judgment — Subsequent sale of property in execution of another decree — Application for sale by person who attached before judgment.

The property in suit was attached before judgment by the plaintiffs in two suits. Both the suits were decreed but the decree-holder in one suit sold the property in execution and purchased it.

Held, that the ownership of the property passed at the moment the sale was knocked down to him and the judgment-debtor retained no interest in it which could be attached or sold thereafter, at the instance of the decree-holder in the other suit. AIR (Vol 7) 1920 Mad 626: 38 MLJ 441: 11 LW 349: 55 Ind Cas 626 (DB).

——S. 64 — O. 21, R. 57 and O. 38, R. 1 — Abandonment of attachment.

A re-attachment in execution ex Majori Cautela of certain immoveable properties which had been attached before judgment, does not amount to an abandonment of the original attachment. No fresh attachment is necessary where attachment before judgment has been obtained and the mere dismissal of an execution petition does not cause the attachment before judgment to cease to exist. AIR (Vol 2) 1915 Mad 386: 1 LW 932: 26 Ind Cas 81 (DB).

4. Claim enforceable under attachment.

——Execution sale — Application for rateable distribution by other decree-holder and property attached — Sale by judgment-debtor — Execution sale set aside — Validity of sale by judgment-debtor.

A had brought certain property belonging to B to sale in execution of his decree on August 29, 1934, and three other decree-holders including C had applied for rateable distribution. Meanwhile B applied first under R. 90 and then under R. 89 of O. 21, for setting aside the sale. The application under R. 89 was eventually allowed and the application under R. 90 was dismissed and the sale set aside on October 31, 1934. B, meanwhile on September 20, 1934, sold the property which was the subject-matter of the sale to D and on September 29, 1934, C who had filed an execution application for the attachment of that property on August 29, 1934, had the attachment effected. D filed a claim petition based upon his sale-deed from B and after it was dismissed he filed a suit for declaration of his title against C and B in 1935:

Held, that when D filed his suit in 1935, C could no longer make any claim for rateable distribution of the assets received from the sale of B's property on August 29, 1934. C could not possibly, therefore, be said to be making any claim in this suit against D based upon the explanation to S. 64 or his action on August 29, 1934. The result of setting aside the sale was to put an end to that attachment of August 29, 1934, which had formed the basis of the sale. Whatever rights the other creditors might have under S. 73, there was only one creditor who attached the property. The attachment proceeded logically to a sale and when that creditor's sale was set aside and his claim was satisfied, that particular attachment had come to an end. Therefore, it was impossible in any circumstances for C to say that he had a claim enforceable under the earlier attachment which was effected in 1934 before the sale of August 29:

Held, also that although the sale was set aside on October 31, 1934, the effect of the setting aside of the sale was clearly to declare that from August 29, onwards the title lay with B. Therefore, B had a good title on September 20, when he sold the property to D. AIR (Vol 29) 1942 Mad 522: 55 MLW 274: (1942) 1 MLJ 556: 1942 MWN 412: 202 Ind Cas 451.

——Whether includes claim for rateable distribution.

"A claim enforceable under the attachment" is a claim which would be made by a person purchasing the property attached and sold in execution of a decree, including claims for rateable distribution.

A claim can only arise under an attachment when some sort of transaction has taken place. A person who proposes to purchase in a sale in execution of a decree, a property which had been attached, could not be said to have a claim under the attachment; not until he had purchased would such a claim arise.

A right to rateable distribution is conditional upon there being assets in the hands of the Court.

Where the property had never been sold by the Court but it had been sold by private treaty and consequently no proceeds came into the hands of the Court;

Held, that it could not be said that there were any assets held by the Court. AIR (Vol 24) 1937 Pat 609: 3 BR 705: 1936 PWN 898: 170 Ind Cas 353.

——S. 64, O. 21, R. 55 (as amended by Allahabad High Court) — Applicant for rateable distribution — Whether on the same footing as attaching decree-holder — Private transfer of part of property by judgment-debtors — Rights of transferee and applicant for rateable distribution.

Under S. 64 a person who applies for rateable distribution is placed on the same footing so far as the attachment goes, as the attaching decree-holder. If, however, the attachment were to cease, the position of the person who had applied merely for rateable distribution might become precarious and he might be unable to proceed further to realise the amount. But by the amendment of O. 21, R. 55, by the Allahabad High Court even if the attaching decree-holder is satisfied or withdraws his claim, that would not affect the rights of those who had already applied for

rateable distribution. Under that rule the amount decreed is deemed to include the amount of any decree passed against the same judgment-debtor notice of which had been sent to the sale officer.

D obtained a decree against A from the Subordinate Judge's Court and M and C separately from the Court of the Munsif. D executed his decree and attached certain properties and the execution of his decree was transferred to the Collector by the Subordinate Judge. M acted independently. He executed his decree, got the same property attached and got execution of his own decree transferred to the Collector. Both the decrees were, therefore, in execution before the Collector. C did not attach any property separately nor did he apply to the Court of the Subordinate Judge for a rateable distribution. He applied only to the Court of the Munsif in M's case for a rateable distribution. An intimation of his application was sent to the sale officer. Thus the sale officer had the claims of all the three decree-holders in his consideration. Before any auction sale could be held, the judgment-debtors privately transferred to the plaintiff part of the property on January 3, 1928, at a time when the attachments of D and M were subsisting and C's application for rateable distribution also was pending. The Collector sold the property in execution of D's decree and even after satisfying the amount due to him, there was a surplus left which was sent to the Civil Court. M made a statement that he had been paid out of Court and would not proceed with his execution. A dispute arose between the plaintiff (the private transferee) and C, the third decree-holder, as to who was entitled to the surplus amount which had been left over after the satisfaction of D's decree:

Held, that no private transfer of the property or of the surplus could affect the rights of M and that the plaintiff who was a private transferee at a time when the attachment of the property by M was subsisting could not claim a permanent right so as to override the claims of C who had previous to his private transfer applied for rateable distribution and thereby placed himself on the same footing as the attaching decree-holder. AIR (Vol 21) 1934 All 896: 4 AWR 236: 57 A 237: 1934 ALJ 731: 1934 ALJ 1251: 150 Ind Cas 770 (DB).

——Enforceable does not necessarily mean in process of enforcement. 33 CLJ 7 Diss.: 49 Mad 38: 97 Ind Cas 496: AIR (Vol 13) 1926 Mad 307 (DB).

——It is only when the property is sold in execution of the decree of a creditor who had attached it prior to the transfer that the transfer would be void not only against the claim of the attaching creditor, but against all claims of creditors who had applied to the Court for attachment or for rateable distribution before sale. 20 SLR 111: 93 Ind Cas 366: AIR (Vol 13) 1926 Sind 177.

——Attachment released and property attached afresh.

The words 'All claims enforceable under the attachment' in S. 64 do not mean 'All claims of the attaching creditor enforceable under that or any subsequent attachment under the same decree.' 77 Ind Cas 1: 4 PLT 409: AIR (Vol 10) 1923 Pat 564 (DB).

——Abandonment of attachment.

Execution — Attachment — Abandonment of — Attachment struck off — No steps taken except keeping alive decree for statutory period when execution and attachment were again applied for — Attachment may be presumed to be abandoned.

Per Seshagiri Aiyar, J. Contra — The practice in the Madras Presidency has been to regard the orders "striking off" as one made for statistical purposes; such orders do not ordinarily put an end to the attachment. They are never seriously considered as having the effect of dismissing an application properly made. The mere fact that there is a new prayer for attachment is not a ground for holding that the applicant intended to give up his rights under the original attachment. 62 Ind Cas 121: 44 Mad 232: 1921 MWN 53: AIR (Vol 8) 1921 Mad 30: 40 MLJ 65 (DB).

——Decree-holder having no claim.

The decree-holder's rights are not affected by the temporary discontinuance of the attachment. S. 64 affects the legality of a transfer as only against claims enforceable under an attachment. A decree-holder having no claim enforceable under the attachment cannot obtain any benefit from S. 64: 2 Lah LJ 99: AIR (Vol 6) 1919 Lah 54.

——Transfer voidable — Private sale of portion of attached property.

If a portion of the property attached is sold privately by the judgment-debtor after attachment and the decree-holder cannot realize his discretal amount out of the portion left unsold, he can under S. 64 proceed against the portions sold. 34 Ind Cas 91: AIR (Vol 4) 1917 All 423 (DB).

——Ss. 64 and 73 — Right to rateable distribution.

Where a judgment-debtor's property was attached in execution and another decree-holder applied for attachment of the same property but the judgment-debtor paid the amount of the first decree-holder into Court and sold the property to a third person:

Held, that the deposit in Court was "assets" and that the 2nd decree-holder was entitled to a rateable distribution and the transfer of property was void as against his share. 8 Bur. L.T. 14: 26 Ind Cas 264: AIR (Vol 2) 1915 Low Bur 92.

——S. 64 (S. 276 Old Code) — Attachment, effect of.

A sale of property under attachment is not void, but voidable at the option of the attaching creditor alone if he wishes to proceed against the property. (1905) 2 ALJ 265 (DB).

5. Claim for rateable distribution — Explanation.

——Applicability.

The explanation to S. 64 does not apply where the Court is not in possession of assets from which rateable distribution could be allowed under S. 73, as the Legislature meant to include only enforceable claims in the explanation. AIR (Vol 30) 1943 Bom 261: 45 Bom LR 449: ILR (1943) Bom 514: 208 Ind Cas 407 (DB).

——Ss. 64, Expl. and 73 — Court ordering execution application to be filed but mentioning that attachment should continue — No such order made on application for rateable distribution which was also filed.

The explanation to S. 64, clearly indicates that applications for rateable distribution go hand in hand with the application for execution. Hence where the Judge orders execution petition to be filed but mentions in the order that the attachment shall continue but no separate order for the attachment to subsist is made on the application for rateable distribution which is also ordered to be filed as infructuous, the decree-holder can take advantage of the order regarding subsistence of attachment on the execution application. AIR (Vol 28) 1941 Pesh 18: 1941 Pesh LJ 18: 193 Ind Cas 712.

——Non-attaching decree-holder, whether can rely on third party attachment.

The non-attaching decree-holders are not entitled to rely on the third party attachment even where the proceedings has reached the stage of an application for rateable distribution. AIR (Vol 24) 1937 Nag 1: ILR (1937) Nag 291: 167 Ind Cas 48 (DB).

——Ss. 64, Expl. and 73 — Claim for rateable distribution.

A claim for rateable distribution of assets in order to be enforceable must satisfy the conditions laid down in S. 73. In the Explanation to S. 64 the expression "claim for the rateable distribution of assets" must be taken to mean claims for the rateable distribution of assets which are enforceable and under the provisions of S. 73, no such claim is enforceable until assets are received by the Court. Without assets, what the Court has before it is merely an application for rateable distribution.

Property was attached in execution of a decree. Another decree-holder who had applied for execution against the same judgment-debtor, applied for rateable distribution. Before the execution sales, the judgment-debtor transferred the property and a part of the consideration was paid to the attaching creditor who got his case dismissed for want of prosecution as partly satisfied. The execution of the other decree-holder was also dismissed and he again took out execution and attached the property transferred by the judgment-debtor. The purchaser preferred a claim under O. 21. R. 58:

Held, that the transfer by the judgment-debtor not being contrary to attachment, was not void.

Held, also that as the decree-holder had not himself attached the property and as the attachment had come to an end, he had no enforceable claim under the said attachment. (1936) 163 Ind Cas 587: 39 CWN 1076 (DB).

——S. 64, Expl., S. 73, and sub-r. (3) added to S. 54 by Allahabad High Court — Claim for rateable distribution — Attachment released before sale by satisfaction of first decree-holder by mortgage of property — Benefit of S. 64 (Expl.) to the unsatisfied decree-holder.

On a construction of the Explanation to S. 64 of the Civil P.C., the person claiming rateable distribution of assets cannot get the benefit of it unless he has himself got an attachment on the assets from which he seeks to benefit. The mere fact that he has filed an objection asking to share in the distribution is not sufficient. But where the decree-holder had claimed rateable distribution, and in the meanwhile the attachment had been raised by the satisfaction of the decree of the other attaching decree-holder by mortgaging the attached property, then he can have the benefit of S. 54, sub-r. (3) which has been added by the Allahabad High Court. Under this sub-rule the effect of the order passed by the Court that the property be attached is that it shall be deemed that there had been an attachment of the property in suit from the very date of the order. So by virtue of this sub-rule, the decree-holder shall be entitled to the benefit of S. 64, Civil P.C. AIR (Vol 21) 1934 All 1069: 1934 ALJ 1091: 4 AWR 874: 152 Ind Cas 364 (DB).

——Explanation to S. 64, whether a fresh addition.

Per Sulaiman C. J. —The explanation to S. 64 is after all a mere explanation which removes a doubt which once prevailed as regards S. 64 and is not necessarily a fresh addition to the previous enactment. AIR (Vol 21) 1934 All 1057: 1935 ALJ 4: 4 AWR 1236: 154 Ind Cas 350 (DB).

——Ss. 64, 73 — Essential condition or claim of rateable distribution — Formal application for rateable distribution, if necessary.

A claim for rateable distribution can only arise when assets are held by the Court and more persons than one have applied, before the receipt of assets for rateable distribution.

Section 73 does not make it necessary for a decree-holder to make any formal application for a rateable share in the assets. All that is necessary is that he should have made an application to that Court for the execution of his decree for payment of money. AIR (Vol 21) 1934 All 1057: 1935 ALJ 4: 4 AWR 1236: 154 Ind Cas 350 (DB).

——S. 64 Expl. 1, S. 73, O. 21 Rr. 89 and 100 — Decree obtained by M — Prior to execution sale, attached property sold privately to A and 5 per cent. deposited — Another decree-holder K applying for execution prior to auction — Rateable distribution ordered — Attachment & sale of same property at instance of K — K himself purchasing property & obtaining physical possession — Sale to A held contrary to attachment of M which was for benefit of M and K — K was entitled to rateable distribution. AIR (Vol 20) 1933 Nag 349: 149 Ind Cas 628.

——Mere attachment before judgment without decree — S. 73 does not apply.

A person who has merely obtained an attachment before judgment cannot put up a claim for rateable distribution unless he has obtained a decree and made an application for execution. AIR (Vol 15) 1928 Bom 545: 115 Ind Cas 414: 30 Bom LR 1488 (DB).

——Assets not held by Court.

Where no assets are held by the Court the claim is not one falling under S. 73, it cannot therefore be a claim enforceable under attachment within the meaning of S. 64. AIR (Vol 15) 1928 Bom 545: 30 Bom LR 1488: 115 Ind Cas 414 (DB).

——The explanation to S. 64 is to be considered with regard to the state of the law at the time when it was enacted, & cannot be held to control the clear provisions of R. 89. AIR (Vol 14) 1927 Mad 445: 52 MLJ 157: 100 Ind Cas 82 (DB).

——Transfer subsequent to attachment — Second attachment and sale thereon subsequent to transfer — Transfer not void.

It is only when the property is sold in execution of the decree of a creditor who had attached it prior to the transfer that the transfer would be void not only against the claim of the attaching creditor, but against all claims of creditors who had applied to the Court for attachment or for rateable distribution before sale.

The underlying object of the explanation to S. 64 is to secure to the prior attaching creditor full payment of his decretal debt before the private transferee could claim any interest in the attached property or its sale proceeds. Where the alienee fails to discharge the claim of the prior attaching creditor and permits him to proceed to the sale of such property, he must necessarily be postponed till the claims of all the creditors who are by virtue of S. 73 entitled to share rateably with the prior attaching creditor are satisfied. Similar equities do not, however, arise where not only the prior attaching creditor has failed to get his decree transferred to the Court having the custody of the attached property, but cannot even claim to share rateably with the subsequent execution creditor. AIR (Vol 13) 1926 Sind 177: 20 SLR 111: 93 Ind Cas 366.

——Explanation to S. 64.

Subsequent claims for rateable distribution must be considered as claims enforceable under the original attachment under the explanations to S. 64. When an attachment has been levied on property in execution of a decree then any attempt by the judgment-debtor to deal thereafter with the proper-

ty, must be considered as contrary to the attachment and the transferee or mortgagee must be considered as taking the transfer or mortgage subject to all claims which will be made against the property attached which by the law are not confined to claims of creditors attaching before the transfer but will also include the claims of any other execution creditors who may apply for execution before the assets are realised. AIR (Vol 9) 1922 Bom 241: 69 Ind Cas 161: 24 Bom LR 364: 46 Bom 895 (DB).

——Sale under attachment set aside — Subsequent mortgage — Attachment and petition under S. 73 subsequently — Mortgage is valid against second attachment.

Two persons A and B had each a decree against the same judgment-debtor. A attached certain property and B applied for rateable distribution. The property was sold in execution under A's decree but the sale was set aside. Then the judgment-debtor mortgaged the property. Subsequently the property was attached and sold in execution of B's decree.

Held, that the decree-holder B who had applied for rateable distribution was not entitled to attack the mortgage and that as the auction purchaser's rights could not be referred to the prior attachment but only to the later one which was subsequent to the mortgage, the mortgage was binding on him. AIR (Vol 8) 1921 All 45: 60 Ind Cas 846: 43 All 399: 19 ALJ 221 (DB).

——Prior alienation not affected.

Claim for rateable distribution arising subsequent to private alienation of the property is not binding on alienee. AIR (Vol 8) 1921 Cal 801: 62 Ind Cas 167: 33 CLJ 7 (DB).

——The explanation to S. 64 gives no priority to claims under S. 73 apart from the attachment in connection with which they were made, and under which they are enforceable. AIR (Vol 8) 1921 Oudh 176: 66 Ind Cas 642: 8 OLJ 358 (DB).

——Ss. 64 and 73 — Right to rateable distribution — Non-attaching creditors — Private alienation by judgment-debtor — Attachment raised subsequently.

A private sale of property pending an attachment by a decree holder which has subsequently been raised is valid as against a non-attaching decree-holder who had applied for rateable distribution during the continuance of the attachment. AIR (Vol 6) 1919 Lah 129: 5 PR 1919: 49 Ind Cas 134.

——Ss. 64 and 73 — Right to rateable distribution — Non-attaching decree-holders — Private alienation — Right to avoid.

Non-attaching decree-holders, who have applied for rateable distribution of assets that may be realised by a sale to be held in pursuance of a subsisting attachment which has been raised by satisfaction of the decree or otherwise, are not entitled to question a private alienation made during the continuance of such attachment. An alienation by means of which a decree in execution of which the attachment was made, is satisfied, cannot be regarded as an alienation contrary to the attachment within S. 64 of the C. P. C. AIR (V 5) 1918 Mad 127: 41 M 265: 22 MLT 461: 33 MLJ 707: (1917) MWN 882: 7 LW 298: 43 Ind Cas 539 (FB).

——Ss. 64 and 73 — Right to rateable distribution — Transfer pending attachment — Previous attachment under different decree — C. P. C., 1882, Ss. 276 and 295.

A decree holder purchased immoveable property at a sale in execution of his decree, but on the day before the attachment, the judgment-debtor had transferred the property to a creditor for good consideration. Five years prior thereto, the decree-holder had attached the same property in execution of another decree against the same judgment-debtor but the execution had not been proceeded with. On a question arising as who had a valid title,

Held, that the creditor transferee had acquired a good title to the property. The earlier attachment, whether it was subsisting or not, did not affect the title of the transferee under S. 64 (S. 276, C. P. C., 1882), as it was not the attachment under which the execution sale was held. AIR (Vol 3) 1916 PC 238: 44 Cal 662: 1 Pat LW 425: 5 LW 711: 32 MLT 425: 21 CWN 585: 21 MLT 344: 15 ALJ 382: 25 CLJ 508: 19 Bom LR 424: (1917) MWN 473: 44 IA 172: 40 Ind Cas 242.

——S. 64, Expln. and O. 21, R. 48(2) — Interpretation of.

There is no inconsistency between S. 64 Expln. and O. 21, R. 48(2) C. P. C. (1912) 14 Bom LR 633: 16 Ind Cas 540 (DB).

6. "Contrary to such attachment".

——S. 64 — Prior mortgagee attaching property in execution of his money-decree subject to his mortgage — Subsequent mortgagee expressly providing for payment of certain amount to prior mortgagee — Such payment, whether "contrary to attachment" or "against claim enforceable under attachment".

The expressions "contrary to such attachment" and "as against all claims enforceable under the attachment" limit the operation of S. 64 to certain transfers or acquisitions of interest on payments to the judgment-debtor. Where the property subject to mortgage in favour of the decree-holder is attached in execution of a money-decree and subsequent mortgage expressly and separately mentions that a part of the consideration for the mortgage has been included in order that it might be utilized for paying off the prior mortgage debt, that is, for a purpose which was unaffected by the attachment, i. e., not connected with the judgment-debtors' equity of redemption which was under attachment, the payment of the amount which was to be utilized for the payment of the earlier mortgage is not affected by the attachment, or, to use the words of the section, was not "contrary to the attachment" and is not "against any claim enforceable under the attachment". The very object with which S. 64 has been enacted is to save rights which do not conflict with the claims enforceable under the attachment. AIR (Vol 29) 1942 Bom 227: 44 Bom LR 415: 202 Ind Cas 392 (DB).

——S. 64 — Decree-holder attaching in execution of decree — Other decree-holder applying for rateable distribution without attachment — Judgment-debtor alienating property and paying-off attaching decree-holder.

Where a decree-holder attaches property in execution of his decree and another decree-holder applies for rateable distribution without attaching the property in execution of his decree and subsequently the judgment-debtor alienates the property and pays off the attaching decree-holder, the alienation to satisfy the decree under which the attachment is made is not "contrary to such attachment" within the meaning of S. 64, Civil P. C., and the other decree-holder is not entitled to question the alienation. AIR (Vol 24) 1937 All 641: 1937 ALJ 785: 1937 AWR 600: 177 Ind Cas 799 (DB).

——Ss. 64, 73 — Alienation after attachment — Attaching creditor satisfied — Other decree-holders not applying for attachment.

One of the objects of S. 64, Civil P. C., is to prevent an alienation which might defeat the

claim of the attaching creditor. Where, therefore, an alienation has been made after the attachment and the judgment-debtor satisfies the debt of the attaching creditor out of the sale proceeds, then such an alienation cannot be said to be "contrary to such attachment". The attaching creditor is interested in realising the money. If he is paid the amount due to him, then there is nothing in law to prevent him from asking the Court to enter satisfaction of his claim and to raise the attachment. It becomes a matter of indifference to him whether the alienation made after the attachment was good or bad. But other creditors who have not applied for attachment but have applied for rateable distribution are not entitled to the benefit under S. 64. AIR (Vol 21) 1934 All 1057: 1935 ALJ 4: 4 AWR 1236: 154 Ind Cas 350 (DB).

——S. 64 — Letting out of land during attachment on nominal rent whether, "contrary to attachment".

Letting out of lands while under attachment even for a nominal rent by a landlord is "contrary to attachment" within the meaning of S. 64, Civil P. C. AIR (Vol 21) 1934 All 902: 18 RD 313: 152 Ind Cas 757 (DB).

——S. 64 — Prohibition — If affects bona fide transferees.

Temporary injunction restraining alienation of property pending decision of suit does not render sale void against bona fide purchaser.

A firm brought a suit for recovery of money against another firm, K F, through K and his son F and an ad interim injunction was issued against the defendants but the order was served on K alone restraining them from transferring the property pending decision of the suit. The suit was settled by compromise. But in the meantime F had transferred the property by mortgage with possession to D. The decree-holder proceeded to attach the house. The lower Court dismissed objections by D, holding the mortgage to be void under S. 64.

Held, that the order was erroneous both as a statement of fact and law. The injunction had been served on K and not on F who actually effected the mortgage which being in favour of bona fide mortgagee for consideration, was not void. AIR (Vol 17) 1930 Lah 858.

——S. 64 — Creditor satisfied.

——Where property under attachment before judgment is privately transferred for consideration for satisfying the claims of the attaching creditors and their claims are actually satisfied and their suits are dismissed, the transfer is not contrary to attachment which may be said to be technically subsisting on the date of the sale deed. AIR (Vol 15) 1928 Bom 545: 30 Bom LR 1488: 115 Ind Cas 414 (DB).

——S. 64 — Transfer to pay prior mortgage is valid.

Mortgage, during attachment, to pay prior mortgage is binding on purchaser. AIR (Vol 15) 1928 Mad 703: 28 MLW 213: 111 Ind Cas 266: 55 MLJ 369 (DB).

——S. 64 — Alienation satisfying decree.

An alienation by means of which a decree in execution of which the attachment was made, is satisfied, cannot be regarded as an alienation contrary to the attachment within S. 64 of C. P. C. AIR (Vol 5) 1918 Mad 127: 41 M 265: 22 MLT 461: 33 MLJ 707: (1917) MWN 882: 7 LW 298: 43 Ind Cas 539 (FB).

——S. 64 — Rival attachments — Private transfer to satisfy one decree if void.

A property was attached in execution of two decrees by two decree-holders, the second praying for rateable distribution. The first decree was satisfied by a private sale deed of the same property to the decree-holder. It was certified to the court.

Held, the private alienation was void as the property was attached by the second decree-holder. (1911) 13 Bom LR 1189: 12 Ind Cas 923 (DB).

——S. 64, (S. 276 Old Code) — Easement — Release of, after attachment.

If an easement enjoyed by the dominant tenement is expressly released after the latter is attached under a decree, it is an alienation of a portion of that property within the meaning of Section 276, C. P. C., and the transaction will be void. (1907) 12 CWN 969: 35 C 889 (894, 895).

——S. 64, (S. 276 Old Code) — 'Alienation' — Bequest of the whole of his property to a stranger by a Mahomedan — Attachment of the property by a creditor of the heirs — Consent of heirs to the bequest after attachment — Validity of.

Where a Mahomedan bequeathes the whole of his property to a stranger and after his death the property is attached by the creditor of his heirs, the consent of the heirs to the bequest given even after attachment is valid and does not amount to an alienation under S. 276. (1902) 4 Bom LR 132: 26 Bom 497 (499) (DB).

——S. 64, (S. 276 Old Code) — When not applicable — Prior mortgages — Discharge by mortgagor from money raised on a fresh mortgage— Execution sale — Priority of mortgage to sale — Intention — Charge, extinguishment of.

A payment of the mortgage by a person claiming under the judgment-debtor or by the latter on behalf of that other with the intention of keeping alive the old mortgage does not enure for the benefit of the execution-creditor just as a further advance or a subsequent mortgage in renewal of the prior mortgage will not affect him prejudicially under S. 276, C. P. C.

When an owner of an estate pays charges on the estate for which he is not personally liable, the question whether such payment operates as an extinguishment of such charges or otherwise, depends upon the intention of the parties. An intention to keep alive the prior charges will be presumed when it is for the benefit of the person paying. Payment by a judgment-debtor of his own charges pending attachment for the benefit of a person who had advanced the money and under an agreement with him operates to keep alive such charges for the benefit of the person who had so advanced.

Where a judgment-creditor while the attachment on the equity of redemption was pending mortgaged his estate to pay off prior charges created before the attachment and out of the mortgage amount paid off such charges and got a reconveyance from the holders of the prior charges and the redelivery of the title-deeds together with the documents creating the charges and delivered all such to the mortgagee in pursuance of an agreement with the latter who was to have the first charge on the property represented to be unincumbered:

Held, that the judgment-creditor could not claim to have the benefit of this payment and a purchaser with notice of those facts in the execution sale could only take a title subject to the mortgage. (1902) 4 Bom LR 238: 12 MLJ 73: 6 CWN 209: 29 C 154, (165, 166): 29 IA 9 (PC).

——S. 64, (S. 276 of Old Code) — Alienation of property after attachment.

Where a party prosecuting a decree is compelled to take out another execution, his title should be presumed to date from second attachment. A mortgage prior to that date is not void under S. 276. (1900) 23 A 114 (116) (DB).

7. Effect of attachment.

——**S. 64 — Attachment — Effect of.**

Where a property is attached, no alienation after the date of attachment, whether voluntary or involuntary, will affect the auction-purchaser who later on purchases the property. AIR (Vol 33) 1946 Pat 306 (DB).

——**S. 64 — Attachment becoming null and void.**

Even if an attachment under S. 64, Civil P. C., becomes null and void under S. 7 (i) (a), U. P. Encumbered Estates Act, the rights that were acquired before the attachment became null and void remain intact. AIR (Vol 31) 1944 All 176: ILR (1944) All 230: 1944 AWR 112: 1944 ALJ 161: 218 Ind Cas 498 (DB).

——**S. 64 — Whether prevails against claim of mortgagee to sale proceeds under S. 73, Transfer of Property Act (IV of 1882).**

Attachment by itself does not confer any right on the attaching decree-holder. Besides the attachment cannot prevail against the claim of the mortgagee to the surplus sale proceeds (S. 73, T. P. Act). The mortgagee therefore, is under no necessity to implead in his mortgage suit the attaching decree-holders before they actually withdraw the sale proceeds. AIR (Vol 29) 1942 Pat 185: 23 PLT 412: 8 BR 291: 7 CLT 49: 197 Ind Cas 739.

——S. 64 — A mere attachment of land does not create any interest in the land in the person attaching it so as to give him a right to sue for mesne profits especially against a person in lawful possession of the same. AIR (Vol 28) 1941 Pesh 87: 1941 Pesh LJ 87: 197 Ind Cas 273.

——S. 64 — There is no authority to show that an attachment is ineffective in relation to that part of the property which does not vest in the judgment debtor at the time of attachment and that a transfer of the attached property cannot be impugned on any ground even if immediately after the attachment and before the sale the judgment-debtor becomes owner of that part of the property also and transfers it by sale in the teeth of the attachment. (1940) 42 PLR 356.

——**S. 64, O. 21, R. 46, cl. (3) — Attachment of rent due to judgment-debtor for simple money-decree — Payment of rent into Court to credit of simple mortgagee in suit to enforce mortgage.**

A obtained a money-decree against B and attached rent payable to B by his tenant C. A simple mortgagee of the land then filed a suit to enforce his mortgage and to avoid the appointment of a Receiver in this suit, C deposited to the credit of the mortgagee the rent that had been attached:

Held, that the payment into Court to the credit of the mortgagee was payment contrary to the attachment and was void as against A and the claim of A had preference over that of the mortgagee as the latter was only a simple mortgagee and as such, had no right to the rents and profits until a Receiver was appointed. AIR (Vol 23) 1936 Mad 251: 1936 MWN 147: 43 MLW 713: 71 MLJ 243: 161 Ind Cas 473.

——**S. 64, O. 32, R. 5 — Alienation during attachment — Order of attachment, if creates charge in plaintiff's favour.**

The only effect of the attachment before judgment is to prevent the judgment-debtor from making transfer of the attached property during the continuance of the attachment so that the benefit of attachment may be available to him when he seeks to enforce his decree which might subsequently be passed The order of attachment does not create a charge in his favour, and, therefore, as soon as the attachment ceases the plaintiff loses all rights to enforce any claim under it. AIR (Vol 21) 1934 All 165: 1933 ALJ 1501: 147 Ind Cas 509.

——**S. 64, O. 21, R. 53 (6) — Attachment of decree — Pendency of application for leave to appeal to Privy Council by judgment-debtor of attached decree — Compromise between parties to attached decree.**

Where a simple money-decree-holder took out execution of his decree and attached a decree for money which the judgment-debtor had obtained against a stranger, but when execution was taken, an application for leave to appeal to the Privy Council by the stranger was pending and subsequently, in accordance with the terms of compromise between the stranger and his decree-holder, the latter agreed to give up a portion of his decretal amount and the petition to appeal to the Privy Council was dismissed by the High Court:

Held, (i) that the compromise was not invalid under S. 64;

(ii) that it was in the nature of an adjustment of the attached decree and came within the purview of O. 21, R. 53(6);

(iii) that the adjustment so made without notice or knowledge of the attachment could not in any way affect the rights of the attaching creditor and could not be recognised by the execution Court at all so long as the attachment remained in force. AIR (Vol 20) 1933 All 82 : 1932 ALJ 792 : 141 Ind. Cas. 625 (DB).

——**S. 64 — Companies Act, S. 229 — Attaching creditor is not secured creditor — Attachment creates no charge in favour of attaching creditor — No charge.**

It merely prevents and avoids alienation, and confers no right on the attaching creditor. 122 Ind Cas 836 : 31 Bom LR 1209 : AIR (Vol 17) 1930 Bom 16 (DB).

——S. 64 — Judgment-creditor has no charge on mortgage amount by reason of his attachment — More than one creditor attaching same mortgage amount — Court cannot give to one of them charge at expense of other creditors. AIR (Vol 17) 1930 Mad 4.

——**S. 64 — No security.**

Attachment does not create any title in favour of the attaching-creditor. It merely prevents private alienations. The position of the attaching creditor does not confer any title upon him in the property in question and he is only entitled to be classed with other creditors all of whom are entitled to rateable distribution of the assets in the hands of the receiver. Such creditor has no higher right than that of any other unsecured creditor and he is not entitled to have his decree satisfied in full out of the sale proceeds of the property attached by him. AIR (Vol 16) 1929 Cal 524 (DB).

——**S. 64 — No title or charge.**

Attachment in itself gives no cause of action for a suit by reversioners for a declaration regarding a decree based on a mortgage passed against their predecessor-in-title, inasmuch as no title passes in virtue of the attachment, nor is any charge created upon the property: 1904 Pun Re. No. 32, not foll. AIR (Vol 16) 1929 Lah 90: 113 Ind Cas 907: 10 LLJ 491: 30 PLR 6: 10 Lah 543 (DB).

——**S. 64 — Cannot be made retrospective.**

If attachment is validly withdrawn though under misapprehension subsequent attachment does not

relate back to date of 1st attachment and cannot have such effect against person taking transfer during interval. AIR (Vol 16) 1929 Rang 229: 7 Rang 201 : 118 Ind Cas 615.

——S. 64 — Debtor's property attached by one creditor — Another creditor cannot do an act so as to put debtor's property beyond the reach of attaching creditor. AIR (Vol 14) 1927 Mad 1147: 39 MLT 196: 26 MLW 209: 105 Ind Cas 246 (DB).

——S. 64 — Where property is usufructuarily mortgaged during the pendency of an attachment and it is subsequently sold, the purchaser must sue for possession within 12 years from the date when he took symbolical possession. Nor could he ever sue for redemption. AIR (Vol 13) 1926 Mad 966: 51 MLJ 143: 24 MLW 263: 97 Ind Cas 718 (DB).

——S. 64 — Attachment creates no charge on property nor title in creditor but merely prevents a private alienation of the property. Property attached may deteriorate in value or become entirely worthless before the date of the sale and it cannot possibly be said that what is sold is the property in the condition in which it was at the time of the attachment. AIR (Vol 10) 1923 Lah 261: 69 Ind Cas 720: 3 Lah 414 (DB).

——S. 64 — Sale determines rights under attachment.

The effect of an attachment is to prevent alienation and not to confer title by way of charge or otherwise on the attaching decree-holder. 37 Mad 418, Dissented from. Further it is only aimed at private alienations. A Court sale of attached property altogether releases it from attachment. If the judgment-debtor re-acquires the attached property from the auction-purchaser or his assignees, he acquires a fresh interest which may be made the subject of a fresh attachment, but is not affected by the earlier attachment. The attaching creditor's right to redeem any mortgage there may be on the attached property comes to an end together with the attachment itself on the sale to the auction-purchaser in execution of the decree in a suit on the mortgage, although the attaching creditor was not a party to the mortgage suit. Even if there is no such decree, the attachment and the attaching decree-holder's right of redemption will come to an end when he brings the judgment-debtor's interest to sale and it is acquired by the auction-purchaser.

Per Seshagiri Aiyar, J.— An auction-purchaser takes ordinarily on the rights of the judgment-debtor and he cannot claim to stand in the shoes of the judgment creditor for purposes of enforcing the right of redemption under S. 91, cl. (f) of the Transfer of Property Act. 39 All 536, Dissented from. AIR (Vol 8) 1921 Mad 30: 62 Ind Cas 121: 44 Mad 232: 1921 MWN 53: 40 MLJ 65 (DB).

——S. 64 — Effect of attachment — Award, pending attachment — Effect of — Decree — Subsequent purchase by attaching creditor.

During the pendency of an attachment of a property of the judgment-debtor it was awarded to another person by arbitration.

Held, the award was not a private transfer under S. 64 of the C. P. C. as it only recognised a pre-existing title, and the attachment and the consequent execution sale only take effect subject to the award. AIR (Vol 6) 1919 Mad 798: 35 MLJ 441: 24 MLT 477: 8 LW 582: 48 Ind Cas 123 (DB).

——S. 64 and O. 21 R. 54 — Transfer pending — Attachment — Mortgage subsequent to — Rights of purchasers.

If after a complete and valid attachment is made by an order passed under O. 21, R. 54 C. P. C., a mortgage is effected of the properties in dispute by the judgment-debtor, the mortgage cannot prevail over the rights acquired by purchasers at the sale of such property effected in pursuance of the attachment. AIR (Vol 6) 1919 Oudh 4: 23 OC 18: 7 OLJ 1: 20 UP LR (JC) 46: 55 Ind Cas 481 (DB).

——S. 64 and O. 21, R. 57 — Attachment of decree — Dismissal of execution application for default — Effect on attachment — Rights of transferee.

Where a decree-holder attaches a decree in execution, the proceedings under the decree which was attached remain in force notwithstanding an improper dismissal of the original execution proceeding. So long as the attachment remained in force, any dealing by the original decree-holder or any transfer or delivery of property comprised in the decree attached, is void as against the claims enforceable under the attachment. AIR (Vol 5) 1918 Pat 454: (1918) Pat HC C 353: 48 Ind Cas 786 (DB).

——S. 64 -- An attachment of property does not confer the title therein, but merely prohibits its transfer. AIR Vol 2) 1915 Lah 281: 39 PR 1915: 103 PWR 1915: 8 PLR 1916: 29 Ind Cas 572 (DB).

——S. 64 — Effect of attachment — If creates right in attaching creditor.

A mere attachment of property creates no right or title in the attaching creditor. Where prior to a decree for maintenance, the property had been attached but was sold after the decree for maintenance. Held that the decree was binding on the purchaser and created a charge on the estate. AIR (Vol 2) 1915 Mad 464: 16 MLT 551: 25 Ind Cas 759 (DB).

——S. 64 — Attachment prevents alienations, it does not confer a title or does it give the attaching creditor any charge or lien on the property. (1910) 32 All 479: 7 ALJ 409: 6 Ind Cas 113 (DB).

——S. 64 — Effect of attachment — Revenue Sale Law (1859), S. 44.

Attachment prevents alienation but does not confer any title to the property on the person attaching. (1910) 14 CWN 677: 11 CLJ 528: 6 Ind Cas 40 (DB).

——Ss. 64, 73 (Ss. 276, 295, old code) — Attachment, effect of how far a lien or charge.

An attachment under the Civil Procedure Code creates no charge or lien on the property. It only prevents alienation. (1902) 6 CWN 577: 29 C 428 (431) (FB).

8. Insolvency after attachment — Effect.

——S. 64 — Attachment — Insolvency, effect of.

An attachment of property does not create a charge and on the insolvency of the defendant, the attachment falls to the ground. The consent of the defendant to the attachment does not give the creditor any higher rights. Where the Official Assignee wants possession of the attached property, the claim is to be decided by the Court having custody and not by the Insolvency Court. AIR (Vol 31) 1944 Mad 333: 1944 MWN 72: (1944) 1 MLJ 116: 57 LW 128.

——S. 64 — Attachment before judgment — Sale pending attachment — Subsequent adjudication of judgment-debtor — Official Assignee.

The adjudication of the debtor automatically puts an end to the attachment and vests the property in the Official Assignee free of the attachment, but it has no such efficacy as regards an alienation made by the insolvent before his adjudication. Until the alienation is set aside by appropriate proceedings taken under Ss. 55 or 56, Presidency Towns Insolvency Act, or S. 53, T. P. Act, it

stands good unless again the property was vested in the insolvent at the commencement of the insolvency within S. 52 (2) (a). So long as the alienation has not been set aside by any proceedings, the Official Assignee has no present title to the property alienated. AIR (Vol 30) 1943 Mad 179: 1942 MWN 740: 54 MLW 213: (1943) 1 MLJ 139: ILR (1943) Mad 659: 207 Ind Cas 418 (DB).

——**S. 64 — Effect of attachment.**

Adjudication of judgment-debtor as insolvent by foreign Court — It does not affect the rights of a creditor who has attached before the adjudication. He remains entitled to the benefits of his attachment. But attachment after the adjudication is of no avail. In such a case the creditor is not entitled to anything by reason of the attachment. Section 64 read with S. 74 does not affect this conclusion. AIR (Vol 27) 1940 Mad 47: 50 MLW 701: (1939) 2 MLJ 859: 1940 MWN 195: 190 Ind Cas 172 (DB).

——**S. 64 — Claim of attaching creditor, whether enforceable under attachment after vesting of property in Receiver — Whether objection under S. 64 is within scope of Ss. 4 and 53, Provincial Insolvency Act.**

Quaere.— It is doubtful whether the claim of an attaching creditor can be said to be enforceable under the attachment after the property had vested in the Receiver, and equally doubtful whether an objection based upon S. 64 is properly within the scope of S. 4 or S. 53, Provincial Insolvency Act. AIR (Vol 26) 1939 Cal 503: 69 CLJ 329: 43 CWN 575: 183 Ind Cas 635 (DB).

——S. 64 — Alienation pending attachment — Subsequent insolvency and discharge of judgment-debtor:

Held, that the attaching creditor was entitled to execute his decree against the attached property. AIR (Vol 23) 1936 Mad 100: 42 MLW 834: 1935 MWN 1328: 69 MLJ 799: 159 Ind Cas 1027.

——**S. 64 — Sale by Official Receiver in insolvency — Attachment for income-tax before adjudication but sale thereunder after sale by Receiver — Purchaser's rights in sale for arrears of income-tax.**

A person became insolvent in 1925, and his property was sold by the Receiver in 1927 and purchased by the plaintiff. In 1924, i.e., before the insolvency, the property sold had been attached in connection with proceedings under the Income-tax Act for non-payment of income-tax and it was brought to sale under the Revenue Recovery Act and purchased by the defendant in 1928. The question being whether the plaintiff or the defendant had a better title:

Held, that it is only if a sale is for land revenue that the purchaser gets a preferential title free from all encumbarances; such priority does not attach itself to a sale for enforcement of other dues even if the sale is held under the provisions of the Revenue Recovery Act, and the plaintiff had, therefore, a better title than that of the defendant. AIR (Vol 22) 1935 Mad 882: 1935 MWN 940: 42 MLW 663: 158 Ind Cas 776.

——**S. 64 — Defendant paying money to plaintiff's Pleader pending result of suit — Subsequent application to adjudicate defendant as insolvent — Ad interim Receiver, if entitled to withdraw money for benefit of general body of creditors.**

The plaintiff instituted a suit for partnership and accounts against the defendant who was since adjudicated insolvent on the ground that there had already been accounts taken and a certain sum was found due from the defendant. The defence was the denial of the averment about the accounts taken. The parties went into arbitration and an award was given. The defendant deposited a certain sum with a certain gentleman and offered to deposit another amount with the plaintiff's Pleader. This amount was also paid and the Court ordered that the money be kept in deposit with the Pleader until further orders. The suit was ultimately decreed. Subsequently at the instance of another creditor a petition was filed to adjudicate the defendant as insolvent and an 'ad interim' Receiver was appointed. The Receiver applied for withdrawal of the sum deposited with the Pleader:

Held, that the plaintiff being successful in the suit was entitled to have the money paid out to him and that it made no difference in principle as to whether the money was actually deposited in the Court or whether the money was put into the hands of the plaintiffs' Pleader under the order of the Court earmarking that money to be paid to the plaintiffs in part satisfaction of the money to which the plaintiffs might be found entitled as a result of the pending action and that the Receiver was not entitled to withdraw the amount. AIR (Vol. 20) 1933 Cal 625: 37 CWN 475: 58 CLJ 222: 145 Ind Cas 826 (DB).

——S. 64 — The assignee of a decree already subject of attachment has only a permissive right to execute the decree.

And the assignment though valid as between the parties to it is subject to the right of creditors who may have already attached the decree. The intervention of the insolvency of assignor after assignment makes no difference. The Official Receiver will of course be at liberty to take any steps with regard to the vesting of or distribution of the proceeds of the decree if and when realized. AIR (Vol 14) 1927 Mad 1025: 1927 MWN 680: 105 Ind Cas 606 (DB).

——**S. 64 — Effect of attachment — Insolvency of judgment-debtor — Vesting of property in official assignee.**

An attachment of immoveable property in execution of a money decree followed by an order for sale does not confer on the judgment creditor any charge on the land. An attachment prevents and avoids any private alienation, but does not invalidate an alienation by operation of law such as is effected by a vesting order in the Official Assignee of the insolvent. AIR (Vol 1) 1914 PC 129: 42 Cal 72: 18 CWN 1058: 1 LW 567: 27 MLJ 150: 16 MLT 353: (1914) MWN 747: 16 Bom LR 814: 20 CLJ 555: 13 ALJ 154: 41 IA 251: 24 Ind Cas 304.

[Reversing (1912) 15 Ind Cas 288 (Cal)]

——**Ss. 64 and 73 — Transfer voidable — Insolvency.**

A attached in execution some property of B, who assigned his interest in the property to C on 6th January 1896. In 1898 D obtained a decree against B who was adjudged an insolvent in 1903. In 1904, D attached the same property. In 1907, A's debt was paid and his attachment was removed. In 1910, C got an order for the removal of D's attachment.

Held that the assignment by B to C was not void as against D, that there were no assets realised for rateable distribution and D's claim was not enforceable either under S. 64 or S. 73. (1913) 37 Bom 138: 14 Bom LR 904: 17 Ind Cas 625 (DB).

9. Prior contract for sale and antecedent liability.

——**S. 64 — Agreement to sell before attachment — Decree for specific performance and consequent sale prevails against attachment.**

The principle laid down in O. 38, R. 10 is not limited to attachments before judgment. It would apply to all attachments, whether before judgment or in course of execution. Where the purchase in pursuance of a decree for specific performance

is subsequent to the attachment but the agreement in pursuance of which the decree has been passed was prior to the attachment, the purchase prevails against the attachment. AIR (V 30) 1943 Bom 145 : 45 Bom LR 208 : 206 Ind Cas 267.

——S. 64, O. 38, R. 10 — S. 64 applies to effective attachment — Attachment before judgment is not effective against subsisting rights — Prior agreement of sale subsisting — Onus.

Section 64 and O. 38, R. 10, have to be read together. Section 64 applies to an effective attachment and an attachment ordered under O. 38, R. 10 before judgment is not effective as against rights subsisting at the date of the attachment. Hence where the plaintiff claims under an attachment before judgment, the onus is on him to prove that a prior agreement of sale entered into by the defendants with a third person subsisting at the date of the attachment is collusive and fraudulent & is not effective to displace the rights under the attachment. AIR (V 30) 1943 Bom 27 : 44 Bom LR 874 : 204 Ind Cas 340.

——S. 64, O. 38, R. 10, O. 21, R. 54 — Attachment before judgment — Judgment-debtor agreeing before attachment to sell property to third person — Completion of sale after attachment — Purchase-money or balance thereof not paid — If can be attached in hands of purchaser — Whole price paid — Remedy of decree-holder.

Section 64 and O. 21, R. 54, read with O. 38, R. 10 of the Code make it clear that the holder of a money-decree, who has attached immovable property of his judgment-debtor before judgment, cannot bring that property to sale in satisfaction of his decree when the judgment-debtor has, before the attachment, agreed to sell the property to a third party and the sale has been completed by a conveyance after the attachment.

If the purchase-money or the balance thereof has not been paid, he can attach it in the hands of the purchaser. He can also in that case have the benefit of the vendor's lien under S. 55 (4) (b), T. P. Act, and can, if necessary, sue to enforce it if the whole of the price has been paid to the vendor, the attaching creditor's only right is to attach the money in the hands of the vendor, if he can. But he has no right to the part of the purchase-money left with the vendee for payment to the mortgagee. AIR (V 28) 1941 Bom 198 : 43 Bom LR 206 : ILR (1941) Bom 290 : 195 Ind Cas 547 (DB).

——S. 64, O. 38, R. 10 — Contract of sale before attachment of property before judgment — Subsequent conveyance, if prevails over attachment.

Section 64 and O. 38, R. 10, must be read together. Section 64 applies to an effective attachment and under O. 38, R. 10, attachment before judgment is not effective as against rights subsisting at the date of the attachment. Hence a conveyance of a property, executed after its attachment before judgment by a creditor in pursuance of a contract dated before the attachment, should prevail over the attachment. AIR (V 26) 1939 Bom 492 : 41 Bom LR 943 : 185 Ind Cas 225.

——S. 64 — Alienation by judgment-debtor after attachment but under previous agreement to sell — Right of attaching decree-holder to vendor's lien for unpaid purchase-money.

Section 64 does not invalidate a sale in pursuance of an agreement to sale made prior to the attachment inasmuch as an agreement to sell creates an obligation to convey the property and a later attachment cannot override the conveyance made in performance of that obligation; but the attachment holds good in respect of such right as the vendor has in property at the time of the attachment and if there is an unpaid balance of the purchase-money, the attachment fastens to the judgment-debtor's right to recover the money, that is to say, to the charge which the unpaid vendor is given by S. 55 (4) (b) of the Transfer of Property Act, upon the property. The property, however, passed by conveyance from the judgment-debtor cannot be sold in excution of the decree against the judgment-debtor. AIR (V 22) 1935 Mad 872 : 1935 MWN 942 : 42 MLW 544 : 69 MLJ 678 : 59 M 1 : 158 Ind Cas 940.

——S. 64 — Attachment of property between dates of execution of mortgage and registration — Mortgage, if affected — Sale in pursuance of attachment — If prevails over mortgage lien.

Where a property was attached in execution of a money-decree between the dates of the execution of a mortgage of the property and admission thereof before the Registrar, and the completion of the registration on a subsequent date:

Held, that the attachment did not affect the mortgage and a purchase in auction of the property in pursuance of the attachment did not prevail over the mortgage lien. AIR (V 20) 1933 Cal 212 : 59 Cal 1176 : 36 CWN 733 : 142 Ind Cas 452 (DB).

——S. 64 — As the agreement to sell entered into before attachment does not create any interest or charge on the property, it cannot prevail against attachment. AIR (V 16) 1929 Cal 494 : 33 CWN 805 (DB).

——S. 64 — Where the purchaser of a property had paid the purchase-money and taken delivery of possession before attachment issued against vendor, but the formal sale deed was executed and registered during attachment.

Held that the attachment did not affect purchaser's right. AIR (V 12) 1925 Rang 382 : 4 Bur LJ 166 : 92 Ind Cas 777 (DB).

——S. 64 — Prior agreement to sell perfected by sale — Prevails over attachment.

An agreement to purchase an immovable property creates an interest in the same sufficient for putting in a claim to raise an attachment thereon. The title of such a vendee when he perfects his title to the land by obtaining a decree for specific performance and getting a transfer of the property to himself under the decree prevails against that of the attaching decree-holder. AIR (V 11) 1924 Mad 610 : 46 MLJ 361 : 80 Ind Cas 388 : 19 MLW 455 : 34 MLT 110 : 1924 MWN 329.

——S. 64 — Agreement to sell prior to attachment is valid.

Where after a judgment-debtor enters into an agreement for sale of property, notice of a previous application for execution of the decree by attachment and sale of the property reaches the judgment-debtor and the property is subsequently attached and sold in execution of the decree, the promisee under the contract for sale is not precluded by the execution proceedings, on ground of 'res judicata' from asserting his rights against the auction-purchaser. AIR (V 8) 1921 Mad 30 : 40 MLJ 65 : 62 Ind Cas 121 : 44 Mad 232 : 1921 MWN 53 (DB).

——S. 64 — Scope of — Antecedent transactions.

Section 64 is meant for the protection of a creditor against transactions subsequent to attachment, but obligations touching the property attached incurred by the debtor prior to the attachment are not affected by the section. AIR (V 3) 1916 Cal 927 : 23 CLJ 115 : 21 CWN 158 : 34 Ind Cas 953 (DB).

——**S. 64 — Antecedent liability — Effect of attachment.**

Where a mortgagee whose rights had been attached, assigned his rights to a third person and directed him to pay the consideration for the assignment to the attaching creditors and the assignee paid them off but not before the money in his hands were attached by the plaintiff.

Held, that the assignee was entitled to protect himself by paying prior creditors and such payment did not offend the provisions of S. 64 and the plaintiff was not entitled to impeach the same. AIR (V 2) 1915 Mad 599 : 1 LW 977 : 26 Ind Cas 223 (DB).

——**S. 64 — Transfer — Surrender of holding attached during attachment — Surrender invalid, if holding transferable.**

A surrender of a holding attached before judgment during the continuance of attachment to the landlord who in the meantime settled it with another person, does not affect the position of the decree-holder purchaser or create in the landlord and his new tenants any preferential right if the holding is transferable. (1910) 8 Ind Cas 76 (Cal) (DB).

——**S. 64 — Decree — Attachment of — Transfer.**

A mortgagee of a decree can sue for the recovery of mortgage amount in spite of attachment of that decree on the date of mortgage. As such mortgage is not made during the continuance of the attachment, it is not invalid under S. 273, C. P. C. (1882). The mortgage is valid though the Munsiff had received a notice of attachment on the day of mortgage. (1910) 7 MLT 143 : 20 MLJ 330 : 5 Ind Cas 92 (DB).

——**S. 64 — Attachment and private alienation at same time.**

Case under Old Code — Where an attachment and private alienation are made on the same day, the alienation will prevail over the attachment, in the absence of proof that the alienation was made during the continuance of the attachment, i.e., after receipt of the notice by the Court whose decree is attached. The legal fiction that every judicial act should be presumed to have been done at the earliest point of time, even assuming it applies to all judicial acts without qualification, is not applicable to the receipt of notice of attachment by a Court, the same not being a judicial act. (1910) 20 MLJ 330 : 5 Ind Cas 92 : 7 MLT 143 (DB).

——**S. 64 (S. 276, Old Code) — When not applicable — Private alienation — Attachment — Mortgage — Power of sale.**

A sale by the mortgagee under the power conferred on him by the mortgage is not affected by an attachment of the property at the date of the sale, because S. 276 is inapplicable to sales under a power conferred prior to the attachment. (1901) 3 Bom LR 892 (892).

10. Private transfer or delivery of property or interest.

(a) General.
(b) Compromise decree or award.
(c) Transfer under O. 21, R. 83.
(d) Attaching creditor satisfied.

(a) General.

——**S. 64 — Private transfer after attachment — Rights of the attaching creditor — Legality of private transfer.**

All that S. 64 lays down is that any private transfer of the property attached or of any interest therein shall be void as against all claims enforceable under the attachment. It does not make the sale-deed inadmissible; nor does it make any acknowledgment in that document inadmissible in evidence, invalid or void as against the attaching creditor. All that the attaching creditor can say is that he is not bound by the transfer of property. The attaching creditor has no interest in the property as he is not a transferee and therefore, the principle that a mortgagee is not bound by an acknowledgment by the mortgagor after the date of the mortgage cannot apply to an attaching creditor.

Where, therefore, in a sale-deed dated December 5, 1928, the vendor made an acknowledgment relating to debt on mortgage executed on December 19, 1916, but the part of the mortgaged property was attached in a simple decree by one C on August 22, 1928, and was subsequently purchased by him on June 20, 1929, it was held that C was bound by the acknowledgment. AIR (V 32) 1945 All 224 : 1945 ALJ 58 : 1945 OWN (HC) 28 : 1945 AWR (HC) 22 : ILR (1945) All 120.

——**S. 64, Expl. I, S. 73, O. 21, Rr. 89, 100 — Prior to execution sale attached property sold privately and 5 per cent. deposited — Another decree-holder applying for execution prior to auction — Rateable distribution ordered — Attachment of the same property again — Sale and purchase by himself.**

In execution of a decree K attached the judgment-debtor's field on May 17, 1925 and brought it to sale in execution on December 8, 1925. The execution purchaser deposited Rs. 260-8-0 being a quarter of the purchase-money Rs. 1,050. One U obtained a decree against the same judgment-debtor and applied for execution of his decree on November 14, 1925. Both the execution proceedings were pending in one and the same Court which, on U's application for execution, ordered rateable distribution. Before the auction-sale was held at the instance of K, the judgment-debtor sold the field on November 25, 1925, to one A and on January 6, 1926, deposited in Court Rs. 52-8-0 being the amount equivalent to 5 per cent. of the purchase-money as compensation payable to the auction-purchaser and instead of depositing the decretal amount due to K, he paid the amount privately to her Pleader apparently on January 6, 1926. Thereafter U obtained an order of attachment of the same field on January 13, 1926, and brought it to sale on April 15, 1926 and became himself the purchaser. He obtained physical possession of the field in due course. A, the private purchaser, intervened under O. 21, R. 100, but without success. He therefore instituted a suit against U for recovering the field. U became entitled to rateable distribution by his application made on November 14, 1925, his rights were enforceable under the attachment already made by K on May 17, 1925:

Held, that the private sale in favour of A which was executed on November 25, 1925, was obviously contrary to K's attachment which was not only for the benefit of himself but also of U. The field under attachment was sold on December 8, 1925, for Rs. 1,000 which sum was deposited in full by December 18, 1925. The Court having been in possession of the assets U was entitled to rateable distribution under S. 73, since the sale was held in pursuance of K's attachment which was also for the benefit of U. The amount due under the decree of K was not paid to her until January 6, 1926. Up to that date the attachment in any case continued in force and consequently, the private sale made on November 25, 1925 could not prevail against U's claim. AIR (V 20) 1933 Nag 349 : 149 Ind Cas 628.

——**S. 64 — Assignment of property before execution but after decree.**

Though a plaintiff may have obtained a decree, there is nothing to prevent the judgment-debtor disposing of any of his property before it has been attached in execution of the decree. AIR (V 19) 1932 Sind 164 : 26 SLR 158 : 139 Ind Cas 848 (DB).

——S. 64 — It cannot be held that an assignment of a debt or fund, equitable or legal, does not involve a transfer of an interest in that debt or fund. AIR (V 16) 1929 Rang 229 : 7 Rang 201 : 118 Ind Cas 615.

——S. 64 — Section refers to beneficial interests.

What is aimed at in S. 64 is the transfer of a beneficial interest, delivery of property or any payment.

Where the purchaser of a property had paid the purchase-money and taken delivery of possession before attachment issued against vendor, but the formal sale deed was executed and registered during attachment.

Held, that the attachment did not affect purchaser's right. AIR (V 12) 1925 Rang 382 : 92 Ind Cas 777 : 4 Bur LJ 166 (DB).

——S. 64 — Mortgage during attachment is not binding on auction-purchaser.

A transfer during the pendency of the attachment would be void as against all claims enforceable under the attachment. It cannot be disputed that it is open to the attaching decree-holder to ignore the subseqent mortgage and to proceed to sell the whole property and not only the equity of redemption, and that if he did so, the auction-purchaser would get the whole property free from the incumbrance, the mortgage not creating any lien on the property sold.

The fact that the mortgage deed in dispute was executed in order to pay off the money due to another attaching creditor will not help the mortgagee as against the auction-purchaser. AIR (V 9) 1922 All 443 : 68 Ind Cas 790 : 44 All 714 : 20 ALJ 722 (DB).

——S. 64 — Attachment — Private transfer is voidable.

A private transfer of property under attachment is not absolutely void but is void only as against claims enforceable under attachment. (1921) 63 Ind Cas 108 (Lah) (DB).

——S. 64 — Bona fide transfer.

No question of bona fides of transfer arises under S. 64. AIR (V 6) 1919 Mad 594 : 42 Mad 565 : 36 MLJ 284 : 26 MLT 45 : 50 Ind Cas 261 (DB).

——S. 64 — Transfer — Voidable — Alienation while under attachment.

A mortgage executed while the property is under an attachment in execution of a decree, is inoperative against the auction-purchaser though the decree-holder was not in any way prejudicially affected. (1913) 20 Ind Cas 241 (Cal) (DB).

——S. 64, O. 21, S. 53 (Ss. 273, 276, Old Code) — Alienation pending attachment — "During the continuance of the attachment" — When alienation good.

Where an attachment and private alienation are both made on the same day, the alienation will prevail over the attachment, in the absence of proof that the alienation was made during the continuance of the attachment, i.e., after receipt of the notice by the Court whose decree is attached. The legal fiction that every judicial act should be presumed to have been done at the earliest point of time, even assuming it applies to all judicial acts without qualification, is not applicable to the receipt of a notice of attachment by a Court, the same not being a judicial act. (1910) 20 MLJ 330 : 33 Mad 429 (432) (DB).

(b) Compromise decree or award.

——S. 64 — Award decree without intervention of Court — Genuine dispute settled by arbitrators.

Section 64 affords protection to an attaching creditor only against a "private transfer", but not against an enforced transfer in obedience to a decree of a Court. The charge created by a decree passed on an award is not a private transfer which can be treated as ineffective under S. 64 as against the claim enforceable against the charged property under a prior attachment. A decree would not be a private transfer even if it was passed on an award and the matters in difference were referred to arbitration without intervention of the Court. If, however, the reference to arbitration was collusive and sham, then the award would be only a camouflage to disguise the private character of the transaction, and, in that case although the awards be filed and decrees passed on them, they would be treated as "private transfers" for the purpose of S. 64. The burden of proving that the awards are not genuine, but were made collusively only as a device to invest a private arrangement with the appearance of a public adjudication lies heavily on the plaintiff. But where there was a genuine dispute between the parties and that dispute was settled by the arbitrators and their awards were made decrees of the Court, they cannot be regarded as private transfers. AIR (V 30) 1943 Bom 283 : 45 Bom LR 526 : 211 Ind Cas 230 (DB).

——S. 64 — Attachment in execution by decree-holder — Judgment-debtor entering into settlement with subsequent decree-holder and creating charge in his favour on attached property — Settlement drawn in form of award — First decree-holder purchasing property in execution sale, and having notice of charge.

The meaning of a "private transfer" in S. 64, Civil P. C., is a transfer which is brought about solely by the act of parties and not as a result of any judicial decision. A device to invest a private arrangement between the parties with the appearance of a public adjudication is in itself a collusive, though not necessarily a fraudulent, transaction. In every case, the Court must look at the substance of the transaction. If in reality there has been a transfer by the private act of the parties, it does not cease to be a private transfer by being given the appearance of a public adjudication.

Where the decree-holder had attached property in execution and the judgment-debtor entered into a settlement creating a charge on the attached property in favour of a subsequent decree-holder, and the transaction was drawn in the form of an award:

Held, that it was essentially a private transaction and was consequently void under S. 64, Civil P. C.

Held, also that the former decree-holder was not estopped from questioning the validity of the charge when he purchased the property in execution, with notice of the charge. AIR (V 26) 1939 Bom 212 : 41 Bom LR 473 : 183 Ind Cas 313 (DB).

——S. 64 — Property attached in execution subject to mortgagee rights — Subsequent compromise whereby mortgagors agree to transfer portion of mortgaged property to mortgagee in consideration of reducing mortgage charge.

Where an attachment in execution of a decree is made subject to the mortgagee rights of the mortgagee holding a mortgage on the property, a subsequent compromise whereby the mortgagors agree to transfer a portion of the mortgaged property to the mortgagee in consideration of his re-

ducing the mortgage charge and releasing the rest of the property from the mortgage, is not illegal by reason of S. 64, Civil P. C., more specially so when the mortgagee had already become entitled to possession even prior to the attachment. AIR (V 25) 1938 Lah 737 : 182 Ind Cas 353.

——S. 64 — Charge.

A charge created under a compromise decree is no better than a private transfer and is void under S. 64, Civil P. C. (1937) 1937 MWN 45.

——S. 64 — Private agreement — Decree dependent on agreement — Particular properties transferred to one of them.

Where the form which a decree took was entirely dependent on the agreement of the parties and it was by agreement between them that certain properties were transferred to one of them:

Held, that the transfer was definitely a private transfer though embodied in a decree of the Court. AIR (V 21) 1934 Rang 313 : 154 Ind Cas 249 (DB).

——S. 64 — A transfer made pursuant to a decree passed in terms of an award made in a reference to arbitration without the intervention of the Court is a transfer under an order of the Court and not a private transfer within the meaning of S. 64. AIR (V 19) 1932 PC 235 : 9 OWN 829 : 36 CWN 1129 : 36 LW 456 : 63 MLJ 664 : 1932 ALJ 909 : 16 RD 522 : 56 CLJ 324 : 13 L 702 : 35 Bom LR 1 : 34 PLR 63 : 59 IA 405 : 139 Ind Cas 85 : 1932 MWN 1063.

——S. 64 — Bona fide award is not private transfer.

Attachment of judgment-debtor's property — 'Bona fide' arbitration award and decree thereon transferring property to third person — Award is not a private transfer under S. 64. AIR (V 9) 1922 Mad 221 : 41 MLJ 557 : 68 Ind Cas 673 : 45 Mad 103 : 14 MLW 524 : 1921 MWN 808 (DB).

——S. 64 — Fund in Court — Transfer — Attachment.

In a reference by the Collector to the Civil Court for the apportionment of the compensation money awarded under the Land Acquisition Act, the dispute was amongst three persons, one of whom was A. Before the reference was made by the Collector, the petitioner had obtained an attachment upon the fund in Court in so far as it represented A's interest. In the Civil Court A put in a petition of compromise by which he has abandoned his claim to the compensation money. The petitioner applied to be made a party but the Judge held that he had no 'locus standi' and dismissed his application. The petitioner moved the High Court.

Held, that the effect of the compromise was to transfer the interest of A to the other claimants and that such transfer after the attachment and the subsequent delivery of the funds pursuant thereto were contrary to the provisions of S. 64 of the C. P. C. (1910) 12 CLJ 545 : 7 Ind Cas 481 (DB).

(c) Transfer under O. 21, R. 83.

——S. 64 — Private transfer under O. 21, R. 83 cannot be brought within the ambit of S. 64 and held to have a claim enforceable under attachment. AIR (V 28) 1941 Mad 208 : 52 MLW 862 : (1940) 2 MLJ 1038 : 1941 MWN 66 : 195 Ind Cas 212 (DB).

——S. 64 and O. 21, R. 83 — Private alienation of property under attachment after permission of executing Court — Trial Court's order in upholding sale on purchaser's payment of balance after satisfying other decree-holders is legal and equitable.

Where immovable property under attachment was sold by the judgment-debtor after obtaining permission of the executing Court under R. 83 of O. 21, and the executing Court had given permission to judgment-debtor to satisfy the decree-holder out of the sale proceeds and out of sale proceeds of the property re-attached, the judgment-debtor kept the balance with him after satisfying some decree-holders and the purchaser filed a suit to set aside the attachment and the sale was upheld by the trial Court on certain conditions and the lower Appellate Court held the sale void on second appeal:

Held, that the trial Court's order to uphold the sale on the payment by the purchaser of the balance left with himself was legal and equitable. That while granting permission under R. 83 the executing Court ought to have ordered the judgment-debtor to deposit entire sale proceeds. AIR (V 22) 1935 Lah 481 (DB).

——S. 64 — Attachment — Mortgage effected by Court under decree for specific performance.

By an agreement on June 4, 1922, A agreed to execute a mortgage in favour of B for Rs. 700, of which amount Rs. 500 had already been paid. No mortgage was executed and B obtained a decree for specific performance of his agreement on February 26, 1925. On December 10, 1926, C also obtained a money-decree against B and on December 23, 1926, attached in execution of his decree the property in regard to which B had obtained his unexecuted decree. On March 17, 1927, B applied to execute the decree and the Court executed a mortgage on the property on June 27, 1927. In a suit by B for declaration that C could sell the property only subject to B's mortgage:

Held, that the execution of B's decree did not contravene the provisions of S. 64, and that the mortgage in his favour not being a private transfer, was not void. AIR (V 19) 1932 Bom 301 : 34 Bom LR 117 : 139 Ind Cas 610.

(d) Attaching creditor satisfied.

——S. 64 — Creditor satisfied — Transfer not void.

Where a property under attachment before judgment is privately transferred for consideration for satisfying the claims of the attaching creditors and their claims are actually satisfied and their suits are dismissed, the transfer is not contrary to attachment which may be said to be technically subsisting on the date of the sale-deed. AIR (V 15) 1928 Bom 545 : 30 Bom LR 1488 : 115 Ind Cas 414 (DB).

——S. 64 — Alienation satisfying decree.

An alienation by means of which a decree in execution of which the attachment was made, is satisfied cannot be regarded as an alienation contrary to the attachment. AIR (V 5) 1918 Mad 127 : 41 M 265 : 22 MLT 461 : 33 MLJ 707 : (1917) MWN 882 : 7 LW 298 : 43 Ind Cas 539 (FB).

11. Removal, discontinuance, suspension or revivor of attachment.

——S. 64 — Applicability — Private sale after order releasing property from attachment and before that order is set aside on appeal — Validity.

Where an order for releasing property from attachment is set aside, the effect is to make the property still subject to the attachment and to restore the state of things which had been disturbed by the order of release. It is immaterial whether the order releasing the property from attachment is set aside as the result of a suit under O. 21, R. 63, C. P. Code, or as the result of an appeal or an order in revision. If it is set aside the effect is to make the property still subject to the attachment and to restore the state of things which had been disturbed by the order of

release. Accordingly, a private sale of the property by the judgment-debtor after the order releasing the property from attachment and before the appellate order setting aside that order, is void as against the purchaser in the execution sale, in view of the provisions of S. 64, C. P. Code, as the property must be regarded as being under attachment during that period. (1949) ILR (1949) 1 Cal 177 (DB).

——S. 64, O. XXI, Rr. 58, 60, 63 — Property attached in execution — Claim under O. XXI, R. 58 allowed — Attachment, whether ends — Claimant, whether free to transfer property.

Where immovable property is attached in execution of a decree, the order for release from attachment in a case under O. XXI, R. 58, Civil P. C., does not put an end to the attachment so as to leave the claimant free to deal with the property as he likes, and if a suit is brought by the decree-holder to establish a right to attach the property and a decree is passed in his favour, the effect of the decree is to set aside the order of release and to maintain uninterrupted the attachment originally made. The result is that any private transfer of property by the claimant, though made after an order under R. 60, O. XXI, releasing the property from attachment, will be void under S. 64, if the right to attach is subsequently established by suit under R. 63. AIR (V 26) 1939 Oudh 178 : 1939 OWN 408 : 14 Luck 543 : 181 Ind Cas 362.

——S. 64 — Purchase void by reason of being contrary to attachment — Attachment ceasing — Purchase, whether revives or still remains void.

The claim referred to in S. 64 is the claim of the decree-holder enforceable under the attachment. If a purchase is void by reason of its being made contrary to an attachment, it does not revive by reason of the attachment ceasing. An alienation which is null and void because made during an attachment which was subsisting cannot be validated by the removal of the attachment. (1936) 163 Ind Cas 812 : 39 CWN 733.

——S. 64, O. VI, R. 4 — Closing of execution case — Termination of attachment — Mortgage before fresh attachment — Validity.

Where a decree-holder applies to have attachment under the decree of property which has been previously attached under the decree, it lies upon the decree-holder, if the question is raised, to show that the second application was unnecessary by reason of the first attachment being still subsisting. Failing such evidence, a Court may presume that the prior attachment had ceased before the application for a second attachment was made.

Where certain properties were attached and put up for sale and as there were no bidders, the case was closed and the decree-holder applied for attachment again but during the interval the judgment-debtor had mortgaged the properties:

Held, that the mortgage was valid as it was executed at a time after the first attachment had ceased and before the next attachment had come into existence. AIR (V 20) 1933 Rang 169 : 149 Ind Cas 954.

——S. 64 — Release of attachment between execution and registration does not invalidate sale.

A sale-deed of certain immovable property worth more than Rs. 100 was executed on the 4th of December, 1912. The property was then under attachment. It was released from that attachment on the 10th of December. The sale-deed was registered on the 13th of February, 1913.

Held, that the transfer was made on the date of registration because if the deed had not been registered there would have been no transfer at all. That for certain purposes, or even for all purposes, it took effect as from the date of execution has nothing to do with the date on which it was made. AIR (V 14) 1927 Nag 289 : 103 Ind Cas 65.

——S. 64 — Valid termination of attachment — Subsequent transfer is not affected by a later attachment.

If an attachment comes to an end validly, then upon a second attachment no Court can refuse to recognise an interest validly created in the meanwhile, but if an attachment is wrongly released and the right to attach is established subsequently according to law either by appeal or otherwise, the attachment will relate back to the time when it was made. AIR (V 11) 1924 Cal 744 : 83 Ind Cas 233 : 51 Cal 548 : 39 CLJ 418 (DB).

——S. 64 — Claim allowed — Attaching creditor's suit thereon — Suit decreed — Attachment revives.

The release from attachment on the claim to the attached property being allowed is only provisional in character and is subject to the result of the suit which is allowed to be brought by the Code to contest the order allowing the claim and if the suit succeeds the attachment is revived from the beginning. Any payment made by a debtor of the debt attached under that order of release becomes void against the attaching decree-holder. AIR (V 9) 1922 Mad 176 : 41 MLJ 393 : 69 Ind Cas 642 : 45 Mad 84: 14 MLW 371 : 1921 MWN 642 (DB).

——S. 64 — Reviver of attachment — Interim transfer affected.

Claim suit decreed and attachment raised — Decree reversed in appeal — Attachment is revived and renders transfer during interval invalid — T. P. Act, S. 52. AIR AIR (V 9) 1922 Nag 138 : 65 Ind Cas 220 : 4 NLJ 213.

——S. 64 — Restoration of attachment — Sale during interval.

Where property is attached before judgment and under a mistake the order of attachment is set aside, but the attachment is subsequently restored, the restoration of the attachment, has the effect of reverting the parties to the position they occupied, when the property was originally attached. A private sale of the property in the interval is void. AIR (V 7) 1920 All 356 : 42 All 39 : 17 ALJ 901 : 52 Ind Cas 343 (DB).

——S. 64 — Suspension of attachment.

The decree-holder's rights are not affected by the temporary discontinuance of the attachment. AIR (V 6) 1919 Lah 54 : 2 Lah LJ 99.

——S. 64 — (Case under Old Code) — Attachment after decree was set aside — Reversal and restoration of original decree.

An attachment in execution of a decree not subsisting at the time is null and void whether the attachment was made by the original court or the court to which the decree was transferred for execution and the fact that the reversed decree was subsequently restored on appeal cannot bring the void attachment to life. (1905) 29 M 175 (176) (DB).

12. Sale under later attachment.

——S. 64 — Sale under later attachment prevails though earlier attachment exists.

Section 64 does not relate to sales in execution of a decree. Hence a sale made in pursuance of a later attachment will prevail even though there is an earlier attachment in existence at the date of the sale. AIR (V 31) 1944 Nag 324: 1944 NLJ 385 : ILR (1944) Nag 739.

——S. 64 — **Subsequent attachment in execution of decree in another suit — Previous attachment subsisting and previous decree unsatisfied — Auction purchaser in execution of subsequent decree, whether obtains good title.**

Per Leach, C. J., Pandrang Row and Patanjali Sastri, JJ.; Abdur Rahman and Krishnaswami Ayyangar, JJ.: contra. — Section 64, Civil P. C., provides that where a property has been attached, any subsequent alienation is void against all claims enforceable under that particular attachment, but it does not go beyond this. An attachment effected after a private alienation is not assisted by an attachment before the alienation. If the execution proceedings, in which the second attachment has been made, have been instituted before assets have been brought into Court, the creditor will be entitled to rateable distribution if the property is sold in the earlier execution proceedings, but if the sale takes place as the result of the attachment effected after the private alienation, a person who buys the property at the court-auction will not obtain a good title.

Per Abdur Rahman and Krishnaswami Ayyangar, JJ. — Section 64, Civil P. C., places both the attaching creditor and other decree-holders who have applied for execution in the same position so far as the alienation of the attached property is concerned and if the alienation is made during the continuance of the attachment, it would be voidable, not only against the attaching creditor, but also against the other decree-holders. A private transfer, therefore, made after and during the pendency of an attachment in one suit, is void against the title of an auction-purchaser in execution of a decree in another suit under an attachment made after the transfer but while the decree in former suit remained unsatisfied and the attachment therein was subsisting. AIR (V 27) 1940 Mad 385 : 1940 MWN 207 : 51 MLW 270 : (1940) 1 MLJ 482 : ILR (1940) Mad 526 : 188 Ind Cas 81 (FB).

——S. 64 — **Attachment before judgment by A — Decree by C against same judgment-debtor — Sale — Purchase by C — A bringing property to sale — Deposit of money by C to avoid sale — Suit for repayment of amount deposited.**

A attached a property before judgment and obtained a decree against B. C subsequently obtained a decree against B and purchased the property in execution. A then brought the property to sale and C's objection to attachment being dismissed, he had to deposit the amount due to A under protest to avoid the sale. After attachment was released, C sued A and B for recovery of the amount he deposited:

Held, that by A's attachment no charge was created in his favour, that C had become owner by purchase at the auction and that under S. 72, Contract Act, C was entitled to recover the amount from A, as the payment made by him was not voluntary but made under compulsion to avoid the sale. AIR (V 20) 1933 All 953 : 147 Ind Cas 482 (DB).

——S. 64 — **Attachment subsequent to alienation.**

Alienation of property during attachment — Attachment ceasing under O. 21, R. 57 — Property sold under second attachment — Alienation is not void as against purchaser under second attachment. (1926) 97 Ind Cas 547 (All).

——S. 64 — **Execution sale — Pending, attachment — Execution sale under — Subsequent attachment — Validity.**

If property is sold in execution of a decree, it cannot be sold again at the instance of another decree-holder who may have attached it before the attachment effected by the decree-holder under whose decree it is actually sold. When a judicial sale takes place, all previous attachment effected on the property fall to the ground. AIR (V 7) 1920 Pat 75 : 2 UPLR (Pat) 106 : 55 Ind Cas 558.

13. **Scope and object.**

See also N. 1.

——S. 64 and O. 21, R. 54 (3) (All) — **Repugnancy.**

The provisions of sub-rule (3) of R. 54 of O. 21 (All), is not only inconsistent with the provisions of sub-rule (2) of the same rule but is also repugnant to S. 64 in that it provides for an attachment being effective before it has actually been made, whereas S. 64 provides for certain results to accrue only where the attachment has actually been made. AIR (V 33) 1946 All 438 : ILR (1946) All 788 : 223 Ind Cas 599 : 1946 ALW 161 : 1946 OWN (HC) 153 : 1946 ALJ 187 : 1946 AWR (HC) 393 (DB).

——S. 64 — All that S. 64 of the Code provides is that any private transfer by the judgment-debtor of the property attached shall be void as against all claims enforceable under the attachment. It will not be accurate to read S. 64 as putting an end to the power of sale, because, as between the transferor and the transferee alienation will undoubtedly be operative. If the attaching creditor is paid off or for any reason the attachment ceases to subsist, the alienee's title will be unassailable. The only effect of S. 64 is that such transfer shall not prejudice the rights of the attaching creditor. AIR (V 29) 1942 Mad 330 : 55 MLW 35 : (1942) 1 MLJ 318 : 1942 MWN 338 : 206 Ind Cas 477 (DB).

——S. 64 — **Rateable distribution.**

Neither of the Ss. 63 and 64 indicates that the Court should ascertain who are the various claimants to a particular sum of money and then divide that sum among the persons who are entitled to it. AIR (V 28) 1941 Mad 125 : (1940) MWN 1151 : (1940) 2 MLJ 844 : 52 MLW 807 : 192 Ind Cas 864.

——S. 64 — **Scope.**

When a Hindu father sells the family property for the discharge of his debts, he is not merely exercising the power of sale possessed by the son himself. The father's power cannot be limited by reason of the statutory disability imposed by S. 64 upon the son as a result of the attachment of the son's interest. AIR (V 26) 1939 Mad 702 : ILR (1939) Mad 853 : 49 LW 460 : (1939) MWN 329 : (1939 2 MLJ 822 : 185 Ind Cas 562 (DB).

——S. 64 — Sale-deed executed before but registered after attachment — Sale is not affected by S. 64. AIR (V 24) 1937 Nag 143 : ILR (1939) Nag 266 : 174 Ind Cas 321.

——S. 64, O. 21, R. 90 — **Person acquiring interest in property after attachment but before sale — Whether can file application to set aside sale.**

Where a person acquires some interest in a property after it is attached in execution but before the sale, he is a competent person to file an application to set aside the sale under O. 21, R. 90. Section 64 does not bar such an application. AIR (V 20) 1933 Cal 788 : 37 CWN 912 : 146 Ind Cas 339.

——S. 64 — **Sale by judgment-debtor after order of attachment but before completion under O. 21, R. 54 is not within S. 64.**

Attachment is not complete until prohibition and proclamation under O. 21, R. 54 is effected. It can hardly be said that immovable property is attached on the mere order of attachment until that order is followed up in the manner laid down in O. 21, R. 54. Mere information by attaching

creditor to a purchaser from judgment-debtor by letter before the date of the sale and after order of attachment was passed but before the actual prohibition and proclamation does not suffice to complete and convert the order for attachment into a legal attachment. In the absence of a legal attachment S. 64 has no application. AIR (V 16) 1929 Bom 395 : 53 Bom 851 : 31 Bom LR 1111.

——S. 64 makes no distinction between attachment before or after judgment. AIR (V 16) 1929 Cal 494 : 33 CWN 805 (DB).

——S. 64 — Transfer — Who can object.

Under the provisions of S. 64 it is only the persons who have claims enforceable under the attachment, who can take objection that the transfer was void. AIR (V 16) 1929 Pat 1 : 7 Pat 726 : 9 PLT 822 : 113 Ind Cas 673 (DB).

——S. 64 — Prohibition is absolute.

A sale by consent or with the connivance of the decree-holder is not exempt from the operation of S. 64. AIR (V 14) 1927 Mad 648 : 38 MLT 310 : 101 Ind Cas 591.

——S. 64 — Benefit might be waived.

Decree-holder can agree to forego benefit of section — Transferee of decree with knowledge of such agreement is also bound by it. AIR (V 10) 1923 Mad 230 : 44 MLJ 80 : 72 Ind Cas 839 : 16 MLW 988 : 1923 MWN 51 : 31 MLT 423 (DB).

——S. 64 — Prohibition is co-extensive with attachment.

It cannot be urged that decree-holder's first attachment enures beyond the dismissal of his first application for execution. If the transfer is, therefore, not made during the continuance of the attachment under which decree-holder's claim was enforced by the sale, S. 64 has no application to the case. AIR (V 9) 1922 Nag 81 : 66 Ind Cas 850 (DB).

——S. 64 — Prior transfer not affected.

Person already holding mortgage is not bound by attachment or subsequent enoumbrance created 'pendente lite' — T. P. Act. S. 52 — Mortgage. AIR (V 8) 1921 Cal 801 : 33 CLJ 7 : 62 Ind Cas 167 (DB).

——S. 64 — Who can question — Claimants for rateable distribution.

Non-attaching decree-holders, who have applied for rateable distribution of assets are not entitled to question a private alienation made during the continuance of attachment. AIR (V 5) 1918 Mad 127 : 41 M 265 : 22 MLT 461 : 33 MLJ 707 : (1917) MWN 882 : 7 LW 298 : 43 Ind Cas 539 (FB).

——S. 64 — Right to avoid transfer — Transfer voidable — Right of decree-holder.

Section 64 aims at preventing fraud on decree-holders and to secure in tact the rights of attaching creditors as well as creditors who have obtained decrees and are entitled to satisfaction out of the assets of the judgment-debtor (without further attachment). It is therefore immaterial whether the plaintiff decree-holder who questions a transfer under S. 64 obtained a decree before or after the time when the transfer of the property attached took place. A transfer by the judgment-debtor of his property which is under attachment is inoperative as against a judgment-creditor who obtains his decree after the transfer in question and seeks to attach the property in execution of that decree. AIR (V 4) 1917 Cal 561 : 33 Ind Cas 492 (DB).

——S. 64, O. 21, R. 83 (Ss. 276, 305, Old Code) — Sale of property preceding an attachment — All claims enforceable under the attachment — Sanction of the Court to the sale prima facie.

A sale deed executed by one person in favour of another operates to convey to that other the interest of the executant in the property which the deed purports to pass. But to prevent fraud on decree-holders it is provided by S. 276, C. P. C., that when an attachment has been made by actual seizure or by written order duly intimated and made known in the manner aforesaid any private alienation of the property attached, whether by sale, gift, mortgage or otherwise . . . during the continuance of the attachment shall be void as against all claims enforceable under the attachment. S. 305, C.P.C., is an enabling section and qualifies the prohibition contained in S. 276; on compliance with the conditions of that section, a private alienation, notwithstanding S. 276, becomes absolute even against all claims enforceable under the attachment. (1901) 3 Bom LR 16 : 30 B 337 (339) (DB).

14. Transfer how far void.

——S. 64 — Attaching decree-holder paid in full — Attachment set aside — Claim of creditor who had applied for rateable distribution cannot be said to be enforceable under attachment.

The effect of Ss. 64 and 73 is that any alieantion made by the judgment-debtor after the attachment is void as against a creditor who has applied for rateable distribution in time. Section 64 does not say that the alienations shall be void absolutely. What it says is that they shall be void as against all claims enforceable under the attachment. When the attachment is set aside by reason of the decree-holder having been paid in full, all claims which were enforceable under it cease to be enforceable and, therefore, neither the attaching decree-holder nor the creditor who had applied for rateable distribution can be said to have any claim enforceable under the attachment and therefore, S. 64 can have no application. An alienation by the judgment-debtor after the attachment has ceased is, therefore, not void under S. 64 as against the creditor who had applied for rateable distribution but was not paid. AIR (V 30) 1943 Mad 165 : 55 MLW 733 : (1942) 2 MLJ 607 : 1942 MWN 682 : ILR (1943) Mad 175 : 207 Ind Cas 223 (DB).

——S. 64 — Obiter per Patanjali Sastri, J. — Section 64 does not render an alienation pending attachment void against all persons and for all purposes, but only against a "claim enforceable under the attachment" i.e., against the decree-holder's right to bring the property to sale under his attachment unaffected by any alienation by the judgment-debtor subsequent to such attachment. AIR (V 28) 1941 Mad 161 : ILR (1941) Mad 438 : 53 MLW 27 : 1941-1 MLJ 45 : 1941 MWN 149 : 196 Ind Cas 204 (FB).

——S. 64 — All that S. 64 provides is that claims enforceable under the attachment will remain unaffected by the private transfer and the attaching creditor can proceed to enforce his claim under the attachment irrespective of the transfer. It is not open to the attaching creditor to say that a private transfer does not bring about all the consequences which it does ordinarily bring about and at the same time certain covenants in the sale-deed are binding and can be taken advantage of by the attaching creditor AIR (V 27) 1940 All 500 : 1940 ALJ 744 : 1940 AWR 470 : ILR (1940) All 681: 191 Ind Cas 745 (DB).

——S. 64 — Private transfer.

Private sale pending attachment — Purchaser discharging prior mortgage — Charge is created on property against purchaser in execution.

Section 64 does not render void transactions which do not prejudice the attaching creditor. (1936) 1936 MWN 843.

——S. 64 — **Mortgaged properties under attachment at time of mortgage — Sale in pursuance of attachment.**

Where the mortgaged properties were under attachment when the mortgage-deeds were executed and they have been purchased at the auction sales in pursuance of the attachment, the deeds must be held to be void as against all claims enforceable under the attachment so far as they are contrary to the attachment. AIR (Vol 22) 1935 All 391 : 1935 AWR 169 : 1935 ALJ 749 : 154 Ind Cas 437 (DB).

——S. 64 — What S. 64 renders void is not every transfer but only a transfer 'contrary to the attachment' and further, the section only renders the sale void "as against all claims enforceable under the attachment".

Omission to mention in the proclamation of sale the revenue assessed upon the land is material irregularity. AIR (Vol 20) 1933 Mad 96 : 36 LW 781 : 63 MLJ 945 : 1933 MWN 54 : 140 Ind Cas 600 (DB).

——S. 64 — **Alienation after attachment — Further attachment after alienation — Alienation, whether void against later attachment — Right to rateable distribution.**

Under S. 64, an alienation after an attachment is void only against claims enforceable under that attachment; it is not void against claims enforceable under attachments effected subsequently though during the pendency of the first attachment. The fact that the decree-holder under the later attachment might be entitled to rateable distribution in respect of the proceeds obtained on a sale under the first does not make any difference. AIR (Vol 20) 1933 Nag 230 : 144 Ind Cas 681.

——S. 64 — **Mortgage of attached property — Subsequent payment and removal of attachment.**

Where a property under attachment in execution was mortgaged and after the amount due under the writ of execution was paid and the attachment came to an end, the decree-holder reattached the property for some further interest due:

Held, that there were no further claims enforceable under the attachment in respect of which the mortgage could be said to be void, and ex post facto the mortgage transaction was rehabilitated in law. AIR (Vol 19) 1932 Rang 103 : 10 Rang 199 : 138 Ind Cas 201 (DB).

——Ss. 64, 73, O. XXI, R. 46 — **Attachment of debt — Attachment and adjustment by another creditor before first attachment took effect, validity of — S. 64, scope of — Potential decree-holders — Right to rateable distribution.**

The effect of an attachment is to prevent any subsequent transfer and not to avoid a previous transfer and S. 64 avoids only transfers contrary to the attachment and not all transfers during attachment.

A attached a certain debt. N also attached the same debt but he adjusted his claim by arranging that the debt should be made over to him a day before A's attachment took effect:

Held, that A had no right to interfere with the transaction.

It is not the business of the executing Court to determine whether the debt attached is really due.

Obiter:- Potential decree-holders have no right to rateable distribution. AIR (Vol 18) 1931 Mad 570 : 1931 MWN 259 : 135 Ind Cas 543.

——S. 64 — **Discharge of — Prior encumbrance does not validate sale.**

Where the plaintiff took a sale of the suit property after it had been attached by the defendant and then discharged the encumbrance on the property which was subsequently sold and purchased by the defendant.

Held, that inasmuch as the plaintiff's sale was after the attachment it is void as against the defendant's interests under S. 64, C. P. Code, but that the plaintiff was entitled to have a charge upon the property for the amount of incumbrance discharged by him. 24 MLW 444 : 1926 MWN 737 : 97 Ind Cas 932 : AIR (Vol 13) 1926 Mad 1082 : 51 MLJ 358 (DB).

——S. 64 — **Alienations are void and not voidable.**

S. 64, C. P. Code, says in effect that private alienation of property after attachment shall be void as against all claims enforceable under the attachment. Such alienations therefore are not voidable merely. 85 Ind Cas 349 : AIR (Vol 12) 1925 Mad 338 : 47 MLJ 913.

——S. 64 — A private transfer of property under attachment is not absolutely void but is void only as against claims enforceable under attachment. (1921) 63 Ind Cas 108 (Lah) (DB).

——S. 64 and O. 21, Rr. 54 and 89 — **Transfer voidable — Locus standi for application under O. 21, R. 89.**

The effect of S. 64 is not to invalidate for all purposes the alienation of the property by the judgment-debtor, after it has been attached. The transferee of property from the judgment-debtor after attachment can make an application under R. 89 to cancel the sale. 26 CLJ 127 : 36 Ind Cas 510: AIR (Vol 4) 1917 Cal 281 (DB).

——S. 64 and O. 21, R. 54 (2) — **Transfer voidable — Purchaser's rights.**

Purchase made during pendency of an attachment is void and the purchaser has not even a lien on the property to the extent of the purchase money. 34 Ind Cas 34: AIR (Vol 3) 1916 Pat 353 (DB).

15. Waiver of benefit.

——S. 64 — **Private transfer.**

Property attached — Private sale of property by judgment-debtor — Purchaser depositing decretal amount with consent of decree-holder — Decree-holder must be deemed to have waived the benefit of S. 64. AIR (Vol 21) 1934 Pat 685 : 13 Pat 446 : 1 BR 521 : 155 Ind Cas 918 (DB).

——S. 64 — **Objection to attachment — Occupancy holding — Non-transferable — Execution sale of — Estoppel.**

A judgment-debtor consented to the attachment of an occupancy holding of his; pending the hearing of an application to set aside an ex parte decree and subsequently on the decree being confirmed he objected to the sale on the ground of non-transferability of the holding without the landlord's consent.

Held, the attachment by consent did not estop the judgment-debtor from contending that the property attached shall be maintained intact, for the benefit of any possible purchaser and the consent meant only that he accepted the limitation on alienation. 5 Pat LW 185 : 47 Ind Cas 29 : AIR (Vol 5) 1918 Pat 604 (DB).

——S. 64 and O. 21, R. 54 — **Transfer pending attachment — Decree-holder permitting alienation to be notified in proclamation — Estoppel.**

Attachment is not complete so as to render alienations effected during the attachment void against all claims enforeable thereunder, unless the attachment is duly intimated as under O. 21, R. 54. As between the decree-holder and auction-purchaser, want of such notice may not be an

irregularity but as between the decree-holder or auction-purchaser on one side and an alienee on the other, different equities arise if the judgment-debtor is not, by order, prohibited from transferring the property. Where a decree-holder allows an alienation during attachment to be notified at the sale he cannot afterwards question its validity. 3 OLJ 422 : 36 Ind Cas 732 : AIR (Vol 3) 1916 Oudh 169 (DB).

——S. 64 — Waiver of prior attachment.

Where by way of caution, a decree-holder who had previously attached the property of his judgment-debtor asks for re-attachment, he does not thereby abandon or waive the original attachment especially, when he refers to the prior attachment as subsisting and asks for re-attachment only if the court should deem it necessary. (1902) 13 MLJ 221 (221) (DB).

——S. 65.

See also O. 21, Rr. 94 and 82.

1. "Shall be deemed to have vested".
1A. When title is affected.
2. Right to possession when accrues.
3. Right to mesne profits.
4. Right to and liability for rent.
5. Sale in execution of mortgage decree.
6. What passes at execution sale.

See also O. 21, R. 94.

1. "Shall be deemed to have vested."

——Ss. 65 and 68 — Sale of insolvent's property by Collector — Vesting of title in purchaser — Date of sale or its confirmation — Provincial Insolvency Act, S. 60.

In the case of a sale of an insolvent's property by the Collector, the property vests in the purchaser from the date of the sale and not from the date of its confirmation by virtue of S. 65, C. P. Code. It cannot be urged that this section applies only in the case of sales arising in the execution of a decree and can have no application to sales which arise in any other manner. When the powers conferred by the Code are used in the matter of sales arising otherwise than in execution of a decree all the incidents of the Code apply. Further when the Insolvency Act directs that in certain circumstances sales are to be held by the Collector in the manner in which the Collector carries out such sales in the execution of decrees it follows that the vesting of the property in the purchaser should be deemed to antedate to the time of the sales as much as it does in the case of a Collector executing a decree. AIR (Vol 36) 1949 Nag 127 : ILR (1948) Nag 610 : 1948 NLJ 312.

——S. 65 — Purchaser — Right of — When accrues — Date of sale or date of confirmation.

The property purchased at an execution sale vests in the purchaser under S. 65, C. P. Code, from the time of the sale and not from the time of its confirmation or becoming absolute. AIR (Vol 35) 1948 Pat 71: 13 Cut LT 36.

——S. 65 — In interval between sale and confirmation auction-purchaser acquires substantial interest — Consequences flowing from acquisition of such interest, stated.

It is no doubt true that it is only when an order confirming the sale is passed that the sale becomes absolute, but as laid down in S. 65, when a sale has become absolute, the property is deemed to have vested in the purchaser from the time when the property was sold and not the time when the sale became absolute. In the interval between sale and confirmation, the auction-purchaser acquires substantial interest in the property.

If there be any accretions to the property between the date of the sale and the date of confirmation, those accretions become the property of the purchaser; and conversely, obligations which arose during the same period would also be transferred to him and not fall on the judgment-debtor.

On the same principle the auction-purchaser is entitled to the mesne profits which have accrued due in the interval.

Nor can the rights of the auction-purchaser be defeated by a transfer made by the judgment-debtor during this period. AIR (Vol 29) 1942 Lah 102: 44 PLR 126: ILR (1942) Lah 349: 200 Ind Cas 302 (FB).

——Ss. 65, 115 — Property purchased by auction-purchaser vests in him from date of confirmation of sale and vesting is not postponed to date of decision of proceeding taken by judgment-debtor.

A Court commits a material irregularity within the meaning of S. 115 in ignoring the fundamental principle of S. 65, that whenever a court auction is confirmed, the confirmation relates back to the date on which the auction was held and the property therefore vests in the owner with effect from that date. The vesting of the property is not postponed till the final decision of the proceedings in connection with the confirmation, started by the judgment-debtor. AIR (Vol 25) 1938 Pesh 49: 177 Ind Cas 555.

——S. 65 — Effect of deletion of proviso.

In view of the deletion of the proviso to S. 65, it is not now necessary for the confirmation of an execution sale that the decree should be subsisting at the time of confirmation. AIR (Vol 20) 1933 Mad 598: 38 LW 138: 65 MLJ 253: 56 Mad 808: 1933 MWN 1081: 143 Ind Cas 854.

——S. 65 — Transfer of Property Act (IV of 1882), S. 8 — Purchaser in Court-sale — When becomes entitled to property.

Under S. 65, Civil P. C., and S. 8, Transfer of Property Act, a purchaser in a Court-sale is entitled to the property from the date of the sale and not from the date of confirmation thereof. AIR (Vol 20) 1933 Mad 482: 145 Ind Cas 174.

——S. 65 — Agreement to convey property.

Property vests in buyer from time the property is sold — Suit based on agreement to convey property to another after such vesting does not come under S. 66. AIR (Vol 17) 1930 Bom 81: 31 Bom LR 1271 (DB).

——S. 65 — For appropriate reliefs S. 47 applies in void sales.

Where notice required by O. 21, R. 22 is not given but the sale or excess sale takes place such a sale is void. Being void the sale need not be set aside and as such sale need not be set aside the period of limitation (comparatively shorter) prescribed by Art. 166 would not apply, so that in cases where sales are held to be void, appropriate relief could be obtained by parties to the suit by proceedings under S. 47, the period of limitation being not the period prescribed for the setting aside of sales but general period of three years prescribed by Art. 181. AIR (Vol 17) 1930 Mad 12: 123 Ind Cas 24: 1929 MWN 811.

——S. 65 — Sale under old law.

An auction sale, at which a benamidar purchased for the plaintiff, took place on 8th August, 1908 when the Code of 1882 was in force. Under S. 316 of that Code the property purchased in execution of the decree vested in the purchaser on the confirmation of the sale; but the sale was not confirmed until 6th January, 1909 when the Code of 1882 had ceased to operate and had been superseded by the Code of 1908. In a subsequent suit against transferees from the benamidar it was argued that, under S. 65 of the new Code, on the confirmation of the sale the title to the property is to

vest back with retrospective effect from the date of the sale and by the confirmation of the sale under S. 65 of the new Code the plaintiff's title to the property accrued on 8th August, 1908 and, therefore, S. 66 of the Code had no application but S. 317 of the old Code would apply.

Held, that as on 1st January this sale had not become absolute, the plaintiff's right had not accrued and as the plaintiff's right did not accrue on 1st January he was clearly bound by S. 66 of the new Code and if he was bound by S. 66 the plaintiff cannot maintain the suit. AIR (Vol 15) 1928 Cal 338: 32 CWN 112: 107 Ind Cas 67 (DB).

——S. 65 — Sale conveys good title in equity from the date of sale.

Plaintiff mortgagee purchasing mortgaged property — Revenue paid by him — Subsequent setting aside of the sale — Property again put for sale and purchased by a third party — Plaintiff suing mortgagor under S. 69, Contract Act, for recovery of money paid by him — Plaintiff cannot recover the money as defendant was not bound by law to pay after the purchase of the property by the plaintiff as title in equity passes to the purchaser and the judgment debtor has a bare right to have the sale set aside till confirmed. AIR (Vol 15) 1928 Pat 552: 9 PLT 795: 111 Ind Cas 243 (DB).

——S. 65 — Revenue sale.

Rights of purchaser at revenue and voluntary sale are different. AIR (Vol 13) 1926 Cal 97: 52 Cal 862: 90 Ind Cas 901 (DB).

——S. 65 — Vesting of property.

Property sold vests in the purchaser from the date of the sale. AIR (Vol 13) 1926 Nag 17: 88 Ind Cas 693 (DB).

——S. 65 — Sale to highest bidder not affected.

Decree-holder allowed to bid but on conditions — His failure to fulfil the conditions does not affect the sale in favour of highest bidder. AIR (Vol 13) 1926 Pat 335: 1926 PH CC 138: 95 Ind Cas 441.

——S. 65 — Effect.

After sale judgment-debtor has no interest in property. AIR (Vol 8) 1921 Pat 409: 61 Ind Cas 922: 2 PLT 240: 1921 PHCC 205 (DB).

——S. 65 — Title of purchaser, when accrues — Liability to Govt. revenue.

Where a mortgagee purchases the mortgaged property in execution of a decree on the mortgage, the property becomes his in fact and in law from the date of the sale and if between the date of the sale & the date of the confirmation thereof, there had been accretions to the property, the accretions would belong to him and any obligations which arose in the said period would also be transferred to him. If therefore, the property is sold for arrears of revenue accruing between the two dates the execution purchaser will lose it completely and cannot even enforce his mortgage right against the purchaser at the revenue sale. (1913) 40 Cal 89: 39 IA 228: 16 CWN 985: 23 MLJ 311: 12 MLT 352: (1912) MWN 244: 14 Bom LR 1046: 16 CLJ 606: 16 Ind Cas 210 (PC).

——S. 65 (Ss. 316, 244 old Code) — Sale.

If a party to a suit is not put out of Court by S. 244 he is not affected by the grant of a sale certificate to the auction purchaser under S. 316 of the Code. (1908) 9 CLJ 464 (466) (DB).

——S. 65 — Purchase pending appeal — Modification of decree on appeal — Auction purchaser's rights how affected — Stranger purchasers and decree-holder purchaser, difference between — Charge — Practice — Plaint.

In case of third parties purchasing at execution sale, the subsequent reversal or modification of the decree or order under which the sale took place does not affect their rights, but it is otherwise in the case of decree-holders themselves purchasing, and their purchase is subject to the final result of the litigation. This rule applies even when the property is knocked down for a sum equal to, or less than, that eventually found due. (1903) 27 M 98 (100, 101) (DB).

Also see (1905) 32 C 296: 32 IA 23 (PC).

——S. 65 (S. 316 old Code) — Certificate of sale not conclusive — Proclamation of sale — Property sold.

A certificate of sale granted under S. 316 of the C. P. C., is not conclusive as to the property sold. So far as regards the parties to the suit and those claiming through or under them, the certificate is determinative as the date from which the property sold actually vests in the purchaser. The property sold is what is described in the proclamation of sale. (1903) 27 B 334 (339): 5 Bom LR 217 (DB).

1A. 'When title is affected'.

——S. 65 — Auction sale — Vesting of title — Point of time — Sale certificate — Necessity.

Under S. 65, C. P. Code, title vests in the purchaser after the confirmation of the sale from the date of the sale. It is not necessary that the sale certificate should be actually obtained; it is not a document of title but is only evidence of title. AIR (Vol 37) 1950 All 644 (DB).

——S. 65 — Time of title vesting — Effect of a resale.

An execution sale set aside on application under O. 21, R. 90, C. P. C., but restored in appeal, must be deemed to have vested the title in the purchaser from the date of the sale as if the first sale had never been set aside. The purchaser at a sale, in between the date of first sale being set aside and its restoration, does not acquire any thing even though he may be a third person, the title already having vested in the first purchaser. AIR (Vol 36) 1949 Pat 304: 27 Pat 1132.

——S. 65 and O. 21, R. 94 — Auction-purchase in execution — Title when passes.

According to S. 65, C. P. Code, it is the confirmation of the sale that passes the title and the auction-purchaser becomes the owner of the property from the date of the sale. Under O. 21, R. 94 the vesting of title is not made dependent on the issue of the sale certificate. AIR (Vol 34) 1947 All 171: (1946) AWR (HC) 528: 1947 ALW 25: 1947 OWN (HC) 11: 1947 ALJ 159: 227 Ind Cas 147.

——S. 65 — Title to property sold — When vests in purchaser — Sale by judgment-debtor after Court sale and before confirmation — Effect of.

Under S. 65, C. P. Code, title vests in the auction-purchaser not from the date when the sale is confirmed but from the date when the sale is actually held, provided the sale is subsequently confirmed. An assignment of the property sold by the judgment-debtor to another between the date of sale in execution and the date of its confirmation would not affect the right or title of the auction-purchaser. AIR (Vol 33) 1946 Pat 306: 25 Pat 13: 12 BR 729: 226 Ind Cas 350 (DB).

——S. 65 — Title, when passes.

Not merely a sale but the sale becoming absolute that vests the property in the purchaser. When there is no order of confirmation, the title to the purchaser does not pass. (1937) 1937 OWN 1153: 1937 RD 570: 1938 AWR 2.

——S. 65 — Sale certificate.

Under S. 65 on confirmation of the sale the property vests in the auction-purchaser from date of the sale. Issue of sale certificate is not necessary for title to vest. (1926) 95 Ind Cas 965 (All).

——S. 65 — Two sales of property — Property sold in execution of two decrees — Purchaser at the unconfirmed sale gets no title to property.

Certain property was attached in execution of a decree and was sold on 28th February, 1917. The same property was attached and sold by another Court in execution of another decree on 3rd March, 1917 and was purchased by the plaintiff. The first sale was never confirmed. The judgment-debtor applied to set it aside under O. 21, R. 89, and ultimately it was decided by compromise that if the judgment-debtor deposited a certain amount by a certain time the sale should be set aside. The deposit was accordingly made by the judgment-debtor on 11th September, 1920, and the sale was set aside and the proceedings in the first executing Court thus terminated. The sale of the second Court was duly confirmed. The judgment-debtor had obtained from defendants the necessary money to set aside the sale by the first Court. In consideration thereof he sold the property to them on 21st September, 1920 with certain other properties, and put the purchaser in possession thereof. The plaintiff then brought a suit to recover possession.

Held, that when the first executing Court sold the property the purchaser merely obtained a right to get the sale confirmed, and it would not be until he obtained the sale certificate, that the vesting of the property would date back to the date of the sale. When the second executing Court sold the same property, the purchaser also obtained an inchoate right which would fail to materialize if the previous sale was confirmed. When the previous sale was set aside then the right of the purchaser from the second executing Court which had been in the meanwhile in suspense, revived, and if the sale was confirmed, then his title would date back to the date of the sale. There was nothing to prevent the judgment-debtor objecting to the second sale before the certificate was issued. Therefore the plaintiff was entitled to succeed. AIR (Vol 12) 1925 Bom 483: 27 Bom LR 963: 88 Ind Cas 962 (DB).

——S. 65 and O. 21, R. 94 — Sale certificate — Not obtained after confirmation — Effect.

Failure to obtain the sale certificate from Court does not vitiate title of the auction purchaser. AIR (Vol 1) 1914 Oudh 306: 25 Ind Cas 8.

——S. 65 and O. 21, R. 94 — Title of purchaser — Issue of sale certificate.

An auction purchaser's title cannot be defeated by any transfer made by the judgment-debtor between the date of the sale and the date of its confirmation. (1911) 15 CWN 312: 8 Ind Cas 657 (DB).

——S. 65 and O. 21, R. 94 — Sale certificate — Effect of.

The mere fact that a sale certificate under S. 316, had been issued in no way affects title. (1909) 9 CLJ 464: 4 Ind Cas 168 (DB).

——S. 65 and O. 21, R. 94 — Confirmation of sale — Title of purchaser.

Title of purchaser at an execution sale becomes complete on the date of confirmation but relates back to the date of sale. (1909) 2 Ind Cas 81 (All).

——S. 65 (S. 316 old Code) — Execution of decree — Sale in execution — Decree reversed before confirmation of sale.

Held, that the title of an auction-purchaser at a sale held in execution of a decree does not become absolute if the decree under which the sale took place is reversed at any time before a certificate of sale is granted to the purchaser. (1907) AWN 198: 4 ALJ 486: 29 A. 591 (593).

2. Right to possession when accrues.

——S. 65 — Right to possession, when accrues.

An auction purchaser has a right of possession not from the date of sale, but from the date of confirmation of the sale because he can only get into possession after a sale certificate had been issued as provided by O. XXI, R. 94, C. P. C., and not a moment earlier. AIR (Vol 30) 1943 Pat 320: 22 Pat 280: 10 BR 354: 211 Ind Cas 212 (DB).

——S. 65 — Right of auction-purchaser to possession, when accrues.

The title to the property after the sale is made absolute vests in the auction-purchaser from the date of the sale according to S. 65, and it is wrong to say that the right to possession only accrues from the date of the sale certificate. AIR (Vol 27) 1940 Lah 230: 43 PLR 313: ILR (1941) Lah 91: 190 Ind Cas 635 (DB).

——S. 65 — Gift before confirmation.

A gift by auction-purchaser made before the confirmation of sale is operative to pass-title, to donee if the donor, who has undisputed title in the property though it is not actually in his possession, authorizes the donee to take possession: AIR (Vol 14) 1927 Oudh 261: 2 Luck 496: 1 LC 50: 102 Ind Cas 72 (DB).

——S. 65 (S. 316, old Code) — Execution of decree — Sale in execution — Time from which the auction-purchaser's title accrues.

When immovable property is sold in execution of a decree, the title of the auction-purchaser to mesne profits or possession does not accrue until the sale certificate has been obtained. (1902) AWN 145: 24 A 475 (477) (DB).

3. Right to mesne profits.

——S. 65—The auction-purchaser is entitled to the mesne profits which have accrued due between date of sale and date of confirmation. AIR (Vol 29) 1942 Lah 102: 44 PLR 126: ILR (1942) Lah 349: 200 Ind Cas 302 (FB).

——S. 65 — Application by auction-purchaser resisted by person claiming under judgment-debtor — Notice of auction-purchaser's right to possession.

Where the auction-purchaser has applied for possession and is resisted by person claiming under the judgment-debtor, the latter can be said to have had notice of the claim of the auction-purchaser to possession. It is not necessary that a separate notice should be given that if he did not give up possession, he would be liable for mesne profits. The auction-purchaser is thus entitled to mesne profits from the date of the sale. AIR (Vol 27) 1940 Lah 230: ILR (1941) Lah 91: 43 PLR 313: 190 Ind Cas 635 (DB).

——S. 65 — Suit by auction-purchaser for profits from date of sale — His name not recorded in revenue papers till later date.

Once the previous owner has been divested of his interest in the property, he has no right whatsoever to any profits. A suit, therefore, by the auction-purchaser for profits from the date of the purchase, though his name is not recorded in the revenue papers until some later date, is maintainable. AIR (Vol 24) 1937 All 661: 1937 ALJ 769: 1937 RD 387: 1937 AWR 650: 171 Ind Cas 686.

——S. 65 — Rights and liabilities, commencement of.

Property sold vests in the purchaser from the date of sale — Auction purchaser is entitled to profits and responsible for loss from the date of the sale to him. Under the old Code the position was precisely the reverse. AIR (Vol 13) 1926 Nag 17: 88 Ind Cas 693 (DB).

——S. 65 — Accrual of title — Right to mesne profits.

The right of an auction purchaser of a share in a village to mesne profits dates from the date of

sale and not from the date of mutation of names in the Revenue Register. AIR (Vol 5) 1918 Oudh 9: 50 LJ 31: 45 Ind Cas 248.

——S. 65 — Difference between old and new Code — Right to mesne profits.

Under S. 316, an auction-purchaser's right to the property commences from the date of the sale certificate and not from date of sale as provided by S. 65 of the Code of 1908. Therefore, an auction-purchaser, when the old Code was in force, is not entitled to mesne profits till the sale had been confirmed. (1911) 33 All 63: 7 Ind Cas 65 (DB).

——S. 65 — Mesne profits.

When immovable property is sold in execution of a decree, the title of the auction purchaser to mesne profits does not accrue until the sale certificate has been obtained. (1902) 1902 AWN 145: 24 All 475.

4. Right to and liability for rent.

——S. 65 — Mukarrari tenure sold in execution of decree — Rent accruing due between dates of sale and its confirmation — Liability of auction-purchaser.

Per Manohar Lall, J.—An auction-purchaser has a right of possession, not from the date of sale, but from the date of the confirmation of the sale because he can only get into possession after a sale certificate had been issued as provided by O. XXI, R. 94, Civil P. C., and not a moment earlier. Hence when a mukarrari tenure is sold in execution of a decree and the sale is in due course confirmed, the auction-purchaser is not, in the absence of a contract, personally liable for the rent accruing due between the date of the sale and the date of its confirmation. It is only the tenure which is liable to be sold in execution of the decree for rent for the aforesaid period.

Per Shearer, J.—When a mukarrari tenure is sold in execution of a decree, and the sale is, in due course, confirmed, the auction-purchaser is ordinarily liable to pay the rent, which accrues due, after the date of the sale, and the judgment-debtor is liable to account for the profits up to the date of his dispossession. This relationship, which ordinarily subsists as between the auction-purchaser on the one hand and the judgment-debtor on the other, between the date of the sale and the date of the confirmation of the sale is, however, liable to be altered as the result of an agreement between them. AIR (Vol 30) 1943 Pat 320: 22 Pat 280: 10 BR 354: 211 Ind Cas 212 (DB).

——S. 65 — Liability for rent for intervening period.

Auction-purchaser is not liable to pay rent for period between date of sale and its confirmation under Bihar Tenancy Act, and the provisions of the general enactment of Civil P. C. (S. 65) are not applicable. AIR (Vol 27) 1940 Pat 673: 7 BR 344: 19 Pat 824: 192 Ind Cas 213 (DB).

——S. 65 — Object of.

Section 65 determines priority as between purchasers at successive sales. It is not meant to confer on a defaulting tenant the privilege of rent-free occupation for so long as he or the decree-holder can delay confirmation of the sale. AIR (Vol 27) 1940 Pat 673: 19 Pat 824: 7 BR 344: 192 Ind Cas 213 (DB).

——S. 65 — Execution sale — Lessee of judgment-debtor paying rent to him before confirmation of sale — Suit by auction-purchaser after confirmation of sale against lessee and judgment-debtor.

A leased out his property to B. In execution of a decree against A, his property was sold and purchased by the decree-holder C. Before the sale was made absolute, B paid the rent to A who was his landlord until the sale was confirmed. After the confirmation of the sale, C brought a suit for rent paid by B to A against both A and B and a decree was passed against both:

Held, that B quite properly paid to A this rent and was entitled to do so, until the sale had been confirmed. That, of course, was not to deprive the purchaser of the rent from the date of his purchase when his sale had been confirmed but it did protect the lessee until such time as the sale was confirmed in regard to any payment he had made to his former lessor. That being so, no decree ought to have been passed against B and it should have been passed against A alone. AIR (Vol 25) 1938 Mad 317: 1937 MWN 1009: 178 Ind Cas 647.

——S. 65 — Accrual of rent after decree and before execution sale — Sale held subject to liability for such rent — Auction-purchaser, liability of — Position when he is himself decree-holder.

An auction-purchaser who purchased a holding with notice that it is saddled with liability for arrears of rent for a period anterior to the date of the sale, is liable for the rent of that period. It makes no difference if the auction-purchaser himself is the decree-holder. AIR (Vol 25) 1938 Pat 545: 19 PLT 723: 5 BR 68: 17 Pat 694: 178 Ind Cas 10 (FB).

——S. 65 — Execution sale — Vesting of title in purchaser — Previous owner's dealings after sale — Validity — Conversion of rent from kind into cash.

Under S. 65, title in a property sold at an auction-sale vests in the purchaser from the time of the sale of the property, and consequently, any subsequent dealing with the property by the previous owner is an act of trespass. Where after sale, the previous owner converts the rent of the property from kind into cash, his act of conversion is that of a trespasser and is accordingly liable to be questioned in a Civil Court. AIR (Vol 20) 1933 Oudh 38: 9 OWN 948: 16 RD 567: 140 Ind Cas 560 (DB).

——S. 65 — Purchase of property already leased.

Purchase of land at an auction-sale — Land already leased at the time of sale — Purchaser is entitled to rent due from the lessee. AIR (Vol 15) 1928 Rang 67: 5 Rang 803: 109 Ind Cas 151.

——S. 65 — Auction purchaser — Rent decree — Liability of for rent after sale.

The auction-purchaser in execution of a rent decree and not the judgment-debtor is liable for rents accruing between the date of the sale and its confirmation, as under S. 65 of C. P. C. the title of the former dates from the date of the sale. AIR (Vol 1) 1914 Cal 785: 18 CWN 136: 23 Ind Cas 101 (DB).

5. Sale in execution of mortgage decree.

——S. 65 and O. 21, Rr. 90 and 92 — Execution sale set aside but restored in appeal — Title when vests — Sale held after setting aside of first sale and before restoration on appeal — What passes under — Later sale under mortgage decree — Rights of purchaser.

Where an execution sale is set aside on application under O. 21, R. 90, C. P. Code, but is subsequently restored on appeal, the sale must be deemed to have vested the title in the purchaser from the date on which the sale was held, and the position is as if the first sale had never been set aside. If between the date of the sale being set aside and its restoration on appeal, another sale is held and a third person purchases the property, the purchaser at the latter sale does not acquire anything by his purchase the title having been vested in the first purchaser already.

If, however, a sale of the same property takes place after the first sale is set aside, in pursuance

of proceedings in execution started before the first sale under a mortgage decree, different considerations would arise. The first sale, held during the pendency of the proceedings in execution of the mortgage decree cannot affect the title acquired by the purchaser at the sale under the mortgage decree. Till this sale is confirmed, the first purchaser would have a right to redeem the property, but once it became final and was confirmed, there would remain no right of redemption. AIR (Vol 36) 1949 Pat 304: 27 Pat 1132 (DB).

——S. 65 — Rights of purchasing decree-holder— Purchase between the preliminary and final mortgage decree.

In a case of a sale of some of the mortgaged properties by a third person in execution of his money-decree against a mortgagor, between the passing of the decree nisi and absolute in a mortgage suit it is not a question of absolute right but rather a question of justice or injustice to be determined in view of the fact that on the one hand the mortgagee is entitled to have his dues satisfied out of the mortgaged properties and on the other that the purchaser may have bought without notice of the mortgage and paid not merely for the equity of redemption but for an absolute interest in the property. The mortgagee is not the master of the situation.

On the other hand it cannot be said that the Court has got an absolute discretion in the matter. What has got to be considered is the question as to the respective equities which arise in favour of the parties. So far as the mortgagee is concerned, his rights extend only to the realisation of his dues, and if he can satisfy the Court that by the sale of the properties in the order which the Court proposes to lay down for the sale he would be prejudiced in the enforcement of his rights, the Court will have to accede to the request which the mortgagee will make.

On the other hand, if the Court finds that the purchase by the stranger was made bona fide and although at a Court sale but without notice of the mortgagee and on payment not merely of the value of the equity of redemption but the value of the absolute interest in properties then the Court will have to make such provisions as regards the order of sale as would work no injustice to the purchaser. If the purchase by the stranger was a collusive one or if he paid only for the equity of redemption, no such equity will arise in his favour. (Case law considered.) AIR (Vol 14) 1927 Cal 522: 45 CLJ 255: 31 CWN 521: 101 Ind Cas 124 (DB).

——S. 65 — Sale, passes only rights of judgment-debtor.

Mortgagor having only charge on property mortgaged, mortgaging as owner — Purchaser in execution of mortgage-decree against him was disallowed to recover possession — Purchaser can claim a right to the charge in favour of the mortgagor, because that was all the right, title and interest of the judgment-debtor. AIR (Vol 14) 1927 Cal 359: 45 CLJ 151: 100 Ind Cas 413 (DB).

——S. 65 — Purchaser's rights against invalid mortgage.

The auction-purchaser in a Court sale of the judgment-debtor's land possessed by a mortgagee under an invalid mortgage obtains good title to it and the mortgagee can get equitable relief only by way of repayment of his amount borrowed by the judgment-debtor. AIR (Vol 14) 1927 Rang 332: 6 Bur LJ 230: 106 Ind Cas 861.

——S. 65 and O. 21, R. 94 — Different purchasers — Competing title.

In deciding between the competing titles of two different purchasers in execution of two different mortgage decrees the Court should be guided not by the dates of the several mortgages but of the several purchases. Once the property is sold at the instance of one mortgagee, there is no further saleable interest left in the judgment-debtor to be sold again. (1909) 32 Mad 485: 19 MLJ 728: 4 Ind Cas 1077 (DB).

——S. 65 (S. 316) — Vesting of title — Mortgage decree and money-decree.

Although the title to the property sold vests in the purchaser from the date of the confirmation, he does not acquire the right, title and interest of the judgment-debtor as they stand on that date. If he has purchased in execution of a money decree he takes the property as it stood on the date of attachment and is not affected by any subsequent dealings therewith on the part of the judgment-debtor. If he has purchased in execution of a decree on a mortgage, he takes the property as it stood on the date of the creation of the mortgage, and persons who have subsequently become interested in deferring payment of the equity of redemption cannot claim a superior title. (1907) 7 CLJ 1 (29) (DB).

6. What passes at execution sale.

——S. 65 — What passes.

What passes to a purchaser at Court sale is the right, title and interest of the judgment-debtor, whatever that interest may be, and he buys the property with all risks and defects in the judgment-debtor's title, except where it is proved that the judgment-debtor had no saleable interest at all. AIR (Vol 17) 1930 Lah 937.

——S. 65 — Sale when void.

Court has no jurisdiction to sell property of person against whom decree is not made — Sale, if takes place, is ultra vires. AIR (Vol 17) 1930 Mad 12: 1929 MWN 811: 123 Ind Cas 24.

——S. 65 — Whether implied covenant for title passes at a Court sale.

Jackson, J.—Supposing the right and interest of judgment-debtor, which is sold by action of the Court should happen to include an interest which the transfer was capable of passing, then that interest could be purchased at the Court sale along with the property to which it was attached, and if such interest were a covenant running with the land, as for instance, the covenant for title provided in S. 55(2), that interest could be transferred at a Court sale.

Reilly, J.—(Quaere) Whether in India the benefit of an implied covenant for title arising only out of the provisions of S. 55(2), T. P. Act, could pass by sale. AIR (Vol 15) 1928 Mad 894: 51 Mad 688: 1928 MWN 419: 28 MLW 346: 55 MLJ 151: 110 Ind Cas 830 (DB).

——S. 65 — Sale in execution — Court is not responsible for breach of warranty.

All that passes at the Court auction is the right, title and interest of the judgment-debtor, i.e., the purchaser is placed exactly into the shoes of the judgment-debtor as regards the land sold, and he has no remedy against the Court for breach of warranty. AIR (Vol 15) 1928 Rang 67: 5 Rang 803: 109 Ind Cas 151.

——S. 65 — Property held by widow.

Property held by Hindu widow, sold in execution of simple money-decree against her — Auction-purchaser obtains only widow's interest. AIR (Vol 13) 1926 All 715: 48 All 637: 24 ALJ 873: 96 Ind Cas 595 (DB).

——S. 65 — Property with charge for maintenance.

Plaintiff obtaining a decree for maintenance with a charge made on certain properties in a suit in forma pauperis — Government selling properties for costs — Sale is of equity of redemption

subject to plaintiff's charge. AIR (Vol 13) 1926 Cal 859: 94 Ind Cas 391 (DB).

——S. 65 — Structures on land.

Structures erected by defaulting proprietor do not pass to purchaser. Prima facie and in the absence of anything else, it is the land or the share in the land which passes at the sale and not the structures or buildings on the land. AIR (Vol 13) 1926 Cal 97: 52 Cal 862: 90 Ind Cas 901 (DB).

——S. 65 — Sale subject to mortgage.

Where a person purchases certain property in execution of a money-decree expressly subject to a mortgage on it and admits the existence of the mortgage it is not subsequently open to him to challenge the mortgage in a suit, on the mortgage, by the mortgagee. AIR (Vol 13) 1926 Nag 446: 95 Ind Cas 563.

——S. 65 — Crops go with land.

The sale of a tenure would apparently pass all that was growing upon the land unless the growing crops were excepted by the notification of sale or else a custom was proved that the outgoing ryot should have the crops subject to a payment for use and occupation of the land while they remained on the land. AIR (Vol 10) 1923 Pat 355: 4 PLT 318: 1 Pat LR 269: 73 Ind Cas 451.

——S. 65 (S. 316 of old Code) — Title whether guaranteed.

A Court acting under S. 316 does not guarantee title. All that it does is to convey the right, title and interest in the property of the parties concerned, it guarantees that the judgment-debtor shall not recover the property sold and that from the date entered in the certificate the purchaser becomes entitled to whatever interest the judgment-debtor was possessed of on the date of sale. (1907) 7 ALJ 893 (DB).

——S. 65 (S. 316 old Code) — Attachment of decree after sale, but before confirmation — Right of attaching creditor to have sale confirmed.

A sale in pursuance of a decree is not a satisfaction of the decree. An attaching creditor of a decree after the purchase by the judgment-debtor-decree-holder of immoveable property in pursuance of a sale held in execution of the attached decree but before the confirmation of the same, steps into the shoes of the judgment-debtor purchaser and is entitled to confirmation of the decree. (1907) 11 CWN 158 (159, 160) (DB).

——S. 65 — Auction-purchaser's rights to benefit accruing to property after purchase — Sale subject to Government revenue due — Remission of revenue after purchase enuring to the benefit of a decree-holder.

Certain Zemindari property, against which there was a demand outstanding for revenue, was sold in execution of a decree for money, the demand for revenue being notified, and was purchased by the decree-holder. After the purchase, the revenue payable in respect of the property was remitted by Government.

Held that such remission enured for the benefit of the decree-holder. The amount remitted could not be claimed by the judgment-debtor as a set off against the balance of the decretal debt, which had not been satisfied by the sale of the Zemindari property. (1904) 1904 AWN 32 (33) (DB).

——S. 66

1. Applicability — Object — Scope.
2. Bar of suit.
3. Benami.
4. Co-Mortgagees.
5. Estoppel and waiver.
6. Fraud.
7. Guardian.
8. Joint Hidu family.
9. Joint purchasers.
10. Plea of.
11. Possession.
12. Principal and agent.
13. Representatives.
14. Specific performance.
15. Suit for Declaration.
16. Third Parties.
17. Trust.

1. Applicability — Object — Scope.

(a) Cases under other Acts.
(b) Construction of Section.
(c) Not Retrospective.
(d) Revenue Sales.

——S. 66 — Applicability — Certified purchaser before 1908 — Suit against person claiming under him alleging that the purchase was made benami for plaintiff — Maintainability.

A suit cannot be maintained against a certified purchaser or any one claiming through him on the ground that the purchase was made on behalf of the plaintiff whether the purchase was made before 1908 or afterwards 47 Cal 1108 not foll. AIR (Vol 36) 1949 Mad 656: 1949 MWN 260: (1949) 1 MLJ 398.

——S. 66 — Scope — Partition suit.

Quaere.— Whether S. 66 applies to suit for partition. AIR (Vol 32) 1945 Cal 458: 79 CLJ 248: 222 Ind Cas 319 (DB).

——S. 66 — Scope.

Section 66 is confined to suits for possession AIR (Vol 32) 1945 Cal 458: 79 CLJ 248: 222 Ind Cas 319 (DB).

——S. 66 — Applicability.

Section 66 only applies to purchases made and sale certificates issued under the rules contained in Sch. I, Civil P. C., which make provision for sales in execution of decrees and issue of sale certificates for purchases made at those sales. A person who is not claiming title under a purchase certified by the Court under any of the rules framed under the Code would not be protected under S. 66. AIR (Vol 29) 1942 Mad 154: 54 LW 539: 1941 MWN 962: (1941) 2 MLJ 717: 201 Ind Cas 11.

——S. 66 — Title of persons otherwise beneficially interested in purchase at auction.

Section 66 is designed to create some check on the practice of making what are called 'benami' purchases at execution sales for the benefit of judgment-debtors, and in no way affects the title of persons otherwise beneficially interested in the purchase. The section does not apply to the case of those persons who, by operation of law, and not by virtue of any private agreement or understanding, are entitled to treat as joint property an acquisition made by the use of joint funds by one or other of them in his own name. AIR (Vol 29) 1942 Pat 230: 20 Pat 855: 8 BR 716: 200 Ind Cas 546 (DB).

——S. 66 — Object of — Distinction between purchase by person in name of stranger and one by father in name of son.

The object of S. 66 is to put a stop to 'benami' purchases at execution sales.

There is no difference between purchases by A in the name of B where A and B are strangers and where A and B are closely related as in the case of father and son. Section 66, Civil P. C., therefore, applies also to purchases by father in the name of the son.

Section 66 (1) does not deal with a case where A has purchased at court auction property in his own name though he purchased on behalf of somebody else. The section deals with a case where "any person" has made the purchase "on behalf of the plaintiff". AIR (Vol 26) 1939 Nag 274: 1939 NLJ 421: 185 Ind Cas 210 (DB).

——**S. 66 — Assignee of benamidar.**

The objection under S. 66 applies to a suit against the assignees of the 'benamidar'. AIR (Vol 25) 1938 Cal 602: 42 CWN 1059: 181 Ind Cas 102 (DB).

——**S. 66 — Applicability — Plaintiff not getting any relief without proving that certified purchase was on behalf of plaintiff — Plaintiff already in possession and seeking confirmation of possession.**

The words "no suit shall be maintained" in S. 66 are similar to the opening words of S. 80 under which it has been held that the section is applicable to all forms of action and all kinds of reliefs. The test is can the plaintiff get any relief or any material relief since he will not be satisfied only with the aforesaid declarations which are not opposed, without proving that the purchase certified by the Court was made on behalf of the plaintiff. If he cannot, that furnishes the "ground" of the applicability of S. 66, sub-s. (1) so that the suit cannot be maintained. It is immaterial whether the plaintiff is in possession and seeks a confirmation of possession or whether he is out of possession and seeks to recover possession in either case S. 66 applies.

The fact that defendant was 'benamidar' before the auction sale is also no answer to the objection under S. 66 for it does not matter how the certified purchaser got his funds. AIR (Vol 25) 1938 Cal 602: 42 CWN 1059: 181 Ind Cas 102 (DB).

——**S. 66 — Scope — Suit based on footing that defendant had no longer title to keep money advanced to him.**

Where the plaintiff did not challenge the title of the defendant to property purchased by him at court-sale, though he said that the arrangement was that the property was to be purchased for all the 'ijaradars' who contributed the purchase-money, but he did not in this suit endeavour to assert his title to his share of the land and the suit was based on the footing that defendant had no longer any title to keep the money that had been advanced to him by the plaintiff:

Held, that the suit was not one within S. 66, Civil P. C. AIR (Vol 23) 1936 Pat 429: 2 BR 469: 17 PLT 591:. 162 Ind Cas 553.

——**S. 66 — Scope of — Transfer from auction-purchaser.**

Section 66 applies not only to cases in which the property is claimed against an auction-purchaser himself but also where it is claimed against his representative in interest.

Where the auction-purchaser is no party and is indifferent as to which of the two contending parties is held to be entitled to the property purchased by him, he being admittedly a mere stake-holder, S. 66 does not apply. This does not apply to a case where the defendant is a transferee under a valid title deed from the auction-purchaser. AIR (Vol 22) 1935 All 143: 4 AWR 974: 157 Ind Cas 615.

——**S. 66 — Auction-purchaser — Necessary party.**

Application to set aside sale — Auction-purchaser is a necessary party — Benami character of sale is no excuse. AIR (Vol 15) 1928 Bom 189: 52 Bom 290: 30 Bom LR 465: 110 Ind Cas 710 (DB).

——**S. 66 — Sale by receiver.**

A sale by a Receiver is not a sale by the Court but a sale under the Court and in such cases the Court does not grant a sale certificate nor does it confirm the sale. S. 66, C. P. Code, does not apply to such sales. AIR (Vol 13) 1926 All 124: 48 All 209: 24 ALJ 26: 6 LRA Civ 610: 90 Ind Cas 116 (DB).

——**S. 66 — Does not preclude evidence of benami.**

S. 66 of the C. P. Code, makes a suit founded on the ground mentioned therein not maintainable. It does not go further: it has not the effect of excluding evidence as to the auction-purchaser being a 'benami' for another wherever such evidence is relevant. Where the suit is founded on title by prescription, in determining that title, the fact of the purchaser being 'benami' for another may be taken into consideration. AIR (Vol 12) 1925 Oudh 20: 11 OLJ 466: 84 Ind Cas 98 (DB).

——**S. 66 — Applicability.**

S. 66 only applies to a person who attempts to enforce his secret title against a sale certificate holder. AIR (Vol 10) 1923 Cal 302: 27 CWN 208: 37 CLJ 403: 75 Ind Cas 196 (DB).

——**S. 66 — Object of.**

The object of S. 66 of C. P. C. is to put an end to purchases at court auction by one person in name of another. AIR (Vol 7) 1920 PC 30: 43 Mad 643: 47 IA 108: 39 MLJ 11: 28 MLT 13: 13 LW 1: (1920) MWN 389: 24 CWN 699: 18 ALJ 584: 56 Ind Cas 395.

——S. 66 of the C. P. C. should not be restricted to benami purchases made by or on behalf of judgment-debtors. 11 Mad 234 Not foll. AIR (Vol 7) 1920 Cal 852: 24 CWN 1024: 59 Ind Cas 719 (DB).

——**S. 66 — Applicability of — Benami purchase of a fraction of property.**

The section applies whether the ostensible purchaser at an auction sale purchases the whole or part of the property sold. AIR (Vol 7) 1920 Nag 147: 57 Ind Cas 684.

——**S. 66 — Scope of — Claim arising prior to sale.**

S. 66 can only apply where the plaintiffs claim is based on an auction purchase but not where it is independent of and prior to the sale. AIR (Vol 3) 1916 Pat 315: 36 Ind Cas 681 (DB).

——**S. 66 — Applicability of — Fictitious execution sale.**

S. 317 of the C. P. C. 1882 contemplates a real sale in execution of a real decree in a real suit and does not bar a suit by a party to the proceedings for possession of property purchased in a fictitious sale held in execution of a fictitious decree. AIR (Vol 2) 1915 Cal 492: 18 CLJ 616: 18 CWN 1331: 27 Ind Cas 230: 22 Ind Cas 86 (DB).

——**S. 66 (S. 317 of old code) — Object of — Benami purchase — Plea that purchase was made on behalf of family — Whether section applies?**

The object of S. 317 of the Code of Civil Procedure is to check benami purchase. That section has no application to a case where the purchase was made in the name of one of the members of a Hindu family and it is alleged that he made the purchase on behalf of the family. (1909) 6 ALJ 174: 31 A 282: 2 Ind Cas 210 (211) (FB).

(a) Cases under other Acts.

——**S. 66 — Suit under Bengal Tenancy Act (VIII of 1885), S. 106 — Auction-purchase before Civil Procedure Code, 1908 — Applicability of S. 66 of**

present Code — Scope of suit — Questions to be decided — Nature of order.

A suit under S. 106, Ben. Ten. Act, was brought after the Civil P. C. of 1908 came into force. It was alleged that the auction-purchase which was made before the Code came into force was made, not for the benefit of the certified purchaser, but for some other person:

Held, that S. 317 of the old Code of 1882 and not S. 66 of the present Code applied:

Held further that it was not necessary to decide whether the person in possession was the 'benamidar' for the real owner, because, in a suit under S. 106, Ben. Ten. Act, the question that falls to be determined is the question of actual possession at the date of the entry in the Record of Rights and not the right to possession:

Held, also that in such a suit the amount payable as rent was a question which fell to be decided. But an order that the sum ascertained as payable was to take effect from a certain date was not warranted. AIR (Vol 31) 1944 Cal 145: 47 CWN 544: 209 Ind Cas 569.

——S. 66 — Arrears of rent — Sale by Revenue Court under Madras Estates Land Act (I of 1908) — Madras Estates Land Act (I of 1908) (as amended by Act VIII of 1934), S. 192.

Where the Act itself provides the procedure for the sale of immovable property in execution of decrees for rent, that procedure has to be followed and not the procedure prescribed in the Civil P. C. The Madras Estates Land Act itself provides such procedure. Therefore, the procedure prescribed by the Civil P. C. has no application. The provisions of the Civil P. C., so far as they relate to the sale of immovable property and the issue of sale certificate to a purchaser at such a sale, must be deemed to be inconsistent with the provisions of the Madras Estates Land Act within the meaning of S. 192 of the Act as amended by Act VIII of 1934.

Hence S. 66 cannot apply to sale in execution of a decree for arrears of rent by a Revenue Court under the provisions of the Madras Estates Land Act. AIR (Vol 29) 1942 Mad 154: 54 LW 539: 1941 MWN 962: (1941) 2 MLJ 717: 201 Ind Cas 11.

——S. 66 — Bar.

Suit by plaintiff for partition of properties jointly purchased by him and defendant at auction sale in execution of rent-decree under Chota Nagpur Tenancy Act is not barred by S. 66, Civil P. C. AIR (Vol 24) 1937 Pat 324: 18 PLT 397: 3 BR 615: 169 Ind Cas 736 (DB).

——S. 66 — Applicability of — Public Demands Recovery Act (I of 1895), S. 19(2).

The provisions of S. 66 barring a suit against a certified 'benami' purchaser at an execution sale, apply to the case of a purchaser at a sale in enforcement and execution of certificate under S. 19 (2) of the Public Demands Recovery Act. (1912) 16 CWN 973: 16 CLJ 412: 15 Ind Cas 291 (DB).

(b) Construction of the Section.

——S. 66 — Scope — Certified purchaser in possession — Suit by real owner for possession alleging benami purchase and alleging dispossession by defendant shortly before suit — Maintainability.

S. 66, C. P. Code, in as much as it runs counter to a well-established principle of equity must be strictly construed. S. 66 is more a weapon of defence than a weapon of offence. It is a section which the certified purchaser can avail himself of in defence against a suit for possession by the real owner. He cannot avail himself of this section in order to file a suit against the real owner who is in possession. He may even file a suit for a declaration that he is not the real owner but that some one else is.

A suit by the real owner against the certified purchaser on the ground that the plaintiff was in possession but was recently dispossessed by the defendant who was his benamidar at the Court sale is barred by S. 66, C. P. Code. AIR (Vol 37) 1950 Bom 277: 52 Bom LR 286.

——S. 66 — Interpretation — Benami purchase — Fraud — Bar of suit — Scope.

Sub-section (1) of S. 66, Civil P. C., bars the equitable jurisdiction of Court. Hence it must be strictly construed and should not be extended beyond its express words. Similarly, the exception to the substantive rule which is contained in sub-s. (2) should not be narrowly construed but as much scope should be given to it as its language can bear. If a fraud is contemplated and that fraud is sought to be accomplished through the insertion of the name of a person in the sale certificate who did not pay for the property purchased and so did not, in reality, purchase it, the bar imposed by sub-s. (1) cannot be applied. AIR (Vol 32) 1945 Cal 355: 49 CWN 371 (DB).

——S. 66 — Construction.

Since a statutory provision bars the equitable jurisdiction of the Courts, S. 66, Civil P. C., must be construed strictly. AIR (Vol 25) 1938 Cal 874: 67 CLJ 320: 182 Ind Cas 201 (DB).

——S. 66 — Construction of — Agreement of sale from vendee of benamidar.

Section 66 has to be construed strictly and applies to a suit in which the cause of action is given by the 'benami' purchase and not to a suit which is based on a contract which is separate from the transfer. AIR (Vol 18) 1931 Bom 578: 33 Bom LR 1296: 136 Ind Cas 509.

——S. 66 — Section discourages benami sales but does not render them illegal.

S. 66 must be construed very strictly and not extended beyond its express terms. S. 66 prohibits suits against a certified purchaser to assert a benami title against him but does not make benami purchases illegal. The object of the stringent provisions of the section is to discourage benami sales but not to render such purchases illegal. AIR (Vol 17) 1930 Bom 81: 31 Bom LR 1271 (DB).

——S. 66 — S. 317 (1882) — Auction-purchaser transferring to another in 1900 — Suit to question auction sale as benami filed in 1916 — Suit is barred by S. 66 of the Code of 1908 even against transferees from certified purchaser — S. 317 of Code of 1882 does not apply. The essential difference in the drafting of S. 66 shows that the Legislature did not approve of the narrow construction of S. 317 given to it by decisions of which (21 All 196) is an example. The section is intended to make it clear that the Legislature, disapproving of benami transactions, meant to prevent actions against certified purchasers and their transferees. AIR (Vol 8) 1921 All 165: 19 ALJ 227: 43 All 416: 62 Ind Cas 725 (DB).

——S. 66 — Suit against benamidar — Old Code and new.

A suit against a benamidar purchaser at a court auction sale is not maintainable by the real owner under S. 66, C. P. C. (1908) but such suit was not barred under S. 317 C. P. C. (1882). A cause of action against the benamidar which arose under the old Code 1882 is not affected by the new. 23 CWN 604: 50 Ind Cas 335: AIR (Vol 6) 1919 Cal 210 (DB).

——S. 66 — Representatives — Suit against private transferee of certified purchaser for confirmation of possession maintainability of.

S. 66 of the New. C. P. C. is more comprehensive than S. 317 of the C. P. C. of 1882.

S. 317 of the C. P. C. (1882) cannot be a bar to maintainability of a suit for confirmation of possession of immoveable property against a private transferee of the certified purchaser as 'benamidar' of the plaintiff. AIR (Vol 4) 1917 Cal 464: 32 Ind Cas 963 (DB).

(c) Not Retrospective.

——S. 66 — Retrospective effect — Civil Procedure Code (Act XVI of 1882), S. 317.

Section 66 has no retrospective effect. Where an execution sale in pursuance of a mortgage was confirmed in 1906, when the Code of 1882 was in force, and a suit for declaration that the mortgage was invalid is filed in 1933, the provisions of S. 317, Civil P. C. of 1882, govern the case. AIR (Vol 24) 1937 Lah 471: 39 PLR 152: 171 Ind Cas 856.

——S. 66 — No retrospective effect.

The stringent rule in favour of the certified purchaser enunciated in the Code of 1908 has no retrospective operation and cannot be utilised by an execution purchaser whose title was perfected when S. 317 of the Code of 1882 was in force. AIR (Vol 10) 1923 Cal 228: 36 CLJ 396: 27 CWN 305: 70 Ind Cas 555 (DB).

——S. 66 — Not retrospective — Difference between — Old code and new — Title of purchaser under old code — Not affected by new Code.

S. 66 does not apply to an execution purchaser whose title was perfected when S. 317, C. P. C. (1882) was in force. Hence a real purchaser at an auction sale held in 1903 can sue for a declaration of his title by purchase at a time when the Code of 1908 is in force against an assignee of a certified purchaser, though not against the certified purchaser himself. Both S. 317 of the Code of 1882 and S. 66 of the Code of 1908 place a limitation upon the title of purchaser; only S. 66 widens the fetter placed upon the title of the purchaser by S. 317. S. 66 improves the position of the certified purchaser, and, confers upon him a power of alienation he would not otherwise enjoy, and under this section the certified purchaser is enabled to confer a good title on the transferee because the real owner is debarred from impeaching the title not only of the certified purchaser but also of the person deriving title from him. The wider restriction embodied in S. 66 of the Code of 1908 does not apply, where the title accrued under the old Code. AIR (Vol 7) 1920 Cal 435: 24 CWN 1011: 31 CLJ 463: 58 Ind Cas 327 (SB).

——S. 66 — Representatives — Section not retrospective.

Under the old Code, S. 66 was only applicable to the certified purchaser but as it is now amended it applies also to persons standing in the shoes of the purchaser. The new Code does not affect rights vested in parties before its enactment. AIR (Vol 3) 1916 Cal 394: 29 Ind Cas 716 (DB).

(d) Revenue sales.

——S. 66 — A person who is not claiming title under a purchase certified by the Court under any of the rules framed under the Code but under a revenue sale would not be protected under S. 66. AIR (Vol 28) 1941 Nag 84: ILR (1941) Nag 90: 1940 NLJ 663: 195 Ind Cas 91 (DB).

——S. 66 (S. 317 of old Code) — Retrospective operation.

S. 317, C. P. C. does not apply to auction sales held before it was enacted. (1902) 4 Bom LR 817 (817) (DB).

2. Bar of suit.

——S. 66 — Bar of suit — Claim to property not based on possession subsequent to auction-purchase.

Where in a suit the only case pleaded by the plaintiff was that he derived his right to half of the village from the auction-purchase having been made in part on behalf of his predecessor by the defendant and no case independent of this purchase and basing title upon subsequent possession was traceable:

Held, that the suit was barred under S. 66. AIR (Vol 27) 1940 P C 202 : 1940 OWN 1061 : 7 BR 146 : 1940 ALJ 772 : 1940 MWN 1125 : 52 LW 755 : 45 CWN 266 : 43 Bom LR 138 : ILR (1940) Kar (P C) 406 Sup : 1940 AWR 150 : 190 Ind Cas 677.

——S. 66 — Bar of suit — Suit for relief which can only be given on declaration of title against persons claiming title under purchase certified by the Court.

Where the certified purchaser does not contest, no question of bar under S. 66 arises.

But where the suit is for relief which can only be given on declaration of title as against persons claiming title under a purchase certified by the Court such persons being parties and contesting the claim, the suit is barred under S. 66. AIR (Vol 25) 1938 Cal 874 : 67 CLJ 320 : 182 Ind Cas 201 (DB).

——S. 66 — Benami — Plaintiff claiming that auction-purchase was made on his behalf though ostensibly in another's name — Matters to be considered.

Where the plaintiff not only wishes to have the sale certificate rectified, but desires to claim that the auction-purchase itself had been made on his behalf or on behalf of his predecessor, though ostensibly in the name of the defendant or his predecessor, the case would obviously fall under sub-s. (1) and not under sub-s. (2) of S. 66, Civil P. C., and the claim will be barred. It is immaterial whether the property in suit is the entire property which was purchased in one lot at the auction or whether it is a part of a lot so purchased and whether the plaintiff claims the whole of it or only a share in it. The substantial thing to consider is that the defendant who is resisting the claim, claims title to the property under a purchase certified by Court, and if the property in dispute is part of the property so purchased, the latter is protected. Distinction should be drawn between the cases where the whole of the property purchased is claimed, and where the plaintiff says that he purchased only a share in the property mentioned in the sale certificate. In either case the defendant claims title under a purchase certified by the Court and the claim comes within the mischief of S. 66. AIR (Vol 24) 1937 All 176: 1937 ALJ 52: ILR (1937) All 113: 1936 AWR 1254: 167 Ind Cas 683.

——S. 66 — Benami — Suit by a real owner to enforce mortgage — Plea by defendant that he is a benamidar of plaintiff.

Section 66 only bars a suit against a person claiming title on the basis of an auction sale based on the ground that the purchase was made on behalf of the plaintiffs. It does not bar a defendant against whom a suit has been instituted to enforce a mortgage from pleading that he had purchased the mortgaged properties benami for the plaintiffs and so the mortgage has been extinguished and the suit is not maintainable. AIR (Vol 20) 1933 Lah 636: 14 L 712: 34 PLR 487: 146 Ind Cas 932 (DB).

——S. 66, O. XLI, R. 33 — Benami — Redemption of prior mortgage by real owner — Suit for possession by real owner against certified purchaser — Right to recover possession as mortgagee — Subrogation — Appellate Court — Power to pass decree in favour of respondent.

A property subject to a mortgage was purchased in court auction by A in the name of B. A died

and his son instituted a suit for redemption against the mortgagee and redeemed the property. Disputes arose between his successors and B's successors and the former instituted a suit for declaration of title and possession against the latter. The latter contended that the suit was barred under S. 66, Civil P.C., and the lower Appellate Court, upholding their contention, passed a simple money decree in favour of the plaintiffs for the amount paid for the redemption. The defendants appealed:

Held, (1) that there was no principle of law under which a personal decree could be passed against the defendants;

(2) that the plaintiffs who had redeemed the property claiming a bona fide title were entitled to the benefit of the security;

(3) that the Appellate Court had power under O. XLI, R. 33, to pass a decree for possession as mortgagees in favour of the plaintiffs even though they had not appealed. AIR (Vol 19) 1932 All 32: 1931 ALJ 601: 133 Ind Cas 536 (DB).

——S. 66 — Suit when barred — Real owner's suit against the benamidar is barred.

Head of the family making purchase on its behalf but allowing a third person to be entered in the sale-certificate — Plaintiff a member of the family suing to recover possession of property — Plaintiff's suit is barred. 50 All 512: 26 ALJ 245: 108 Ind Cas 130: AIR (Vol 15) 1928 All 619 (DB).

——S. 66 — No contest by purchaser — Section does not apply.

The section is not a bar when the certified purchaser does not contest plaintiff's claim. 5 LRA Civ. 671: 82 Ind Cas 344: AIR (Vol 12) 1925 All 47.

——S. 66 — Certified purchaser.

Where the defendant's name is entered as a certified purchaser, the plaintiff cannot sue on the ground that the defendant was a benamidar. (1929) 118 Ind Cas 713 (1) (All).

——S. 66 — Representatives — Successor-in-title of purchaser — Suit for declaration.

S. 66, C.P.C. applies to the successor-in-title of the certified purchaser. 31 Bom 61: 35 Bom 342 Ref. A suit is barred under S. 66, C.P.C. although one for a declaration only. If the plaintiff was in adverse possession against the certified purchaser for over 12 years his claim for a declaratory decree was not liable to be rejected on the ground that he was a trespasser. 16 NLR 87: 55 Ind Cas 499: AIR (Vol 7) 1920 Nag 51.

——S. 66 — Representatives — Mortgagee from Court purchaser — Immunity from suit.

A mortgagee claiming under a Court sale purchaser enjoys the same immunity from suit as his mortgagor. Therefore a suit against the mortgagee from such purchaser is barred by S. 66. (1911) 35 Bom 342: 12 Bom LR 1044: 8 Ind Cas 752 (DB).

——S. 66 (S. 317 of Old Code) — No bar — Bombay Land Rev. Code, S. 18.

S. 317, C.P.C., and S. 182 of the Bombay Land Rev. Code, 1879, are to be construed strictly and do not bar a suit where the plaintiff, although originally a benamidar, came honestly into possession. (1903) 5 Bom LR 329 (331) (DB).

——S. 66 (S. 317 of Old Code) — Suit against a certified purchaser — Applicability only as against certified purchaser.

S. 317, C.P.C., bars a suit to establish the benami character of an auction-purchase only against the certified purchaser. The benefit of the bar cannot be claimed by one who claims through or under him. (1902) 5 CWN 341 (343) (DB).

——S. 66 (S. 317 of Old Code) — Bar — Suit based on the ground that certified purchaser is not the real purchaser — Suits forbidden by the section.

One H-A in execution of a decree for money against M-A attached and brought to sale the one-third share of M.A. in a certain house property and it was purchased by A, the son of the judgment-debtor. Subsequently the same property was again attached and sold at the instance of N.A., and this time was purchased by K.B., K.B. was obstructed in obtaining possession of the property, and thereupon brought a suit for possession to which he made M.A. and others, alleged to be co-partners in the properties, defendants, but not the auction-purchaser A.A. A.A. was, however, added as a defendant under S. 32, C.P.C.

Held, that on these facts S. 317, C.P.C. was applicable and that the suit must be dismissed. The kind of suit that S. 317 C.P.C., forbids is one which cannot possibly succeed unless the purchaser at an execution sale is made party, and which, on his being made a party, can succeed only on proof that he is benamidar for another. (1904) 1904 AWN 226: 27 A. 194 (197): 1 All LJ 646.

——S. 66 (S. 317 of Old Code) — Bar — Suit by beneficial purchaser against certified purchaser — Suit not taken out of the section by reason of the beneficial purchaser being in possession and claiming only a declaration of his title — Execution of decree.

The plaintiff came into Court alleging that certain property having been put up to sale in execution of a decree against him, two of the defendants had, at his request, purchased the said property in their own names and obtained a sale certificate. He further alleged that the purchase money had been paid by him and that he had all along remained in possession of the property, and he asked for a declaration that he was the real purchaser and in proprietary possession of the property in suit.

Held, that such a suit could not be exempted from the prohibitions contained in S. 317 of the Code of Civil Procedure either upon the ground that the plaintiff being in possession claimed only a declaration or upon the ground that there had been a retransfer to the plaintiff and a new title created in him by the action of the certified purchaser. (1901) 1901 AWN 44: 23 A. 175 (180) (DB).

——S. 66 (S. 317 of Old Code) — Suit against certified buyer for recovery of part of property purchased.

K and T were joint mortgagees. They being dead, D.K.'s adopted son, and E, son of T, sued on the mortgage and got a decree for sale. In another suit it was settled P was entitled along with D to a part of K's property. D and E brought the properties to sale and bought them, P sued D for his share in them. D had before the date of the suit admitted that P was entitled to a share in them.

Held, (1) that the suit would not lie, as being contrary to S. 317, C.P.C. (2) That the acknowledgment would not justify the plaintiff in maintaining the suit unless it was accompanied by some act which would operate as a valid transfer of the property. (1900) 23 A. 34 (35) (DB).

3. Benami.

——S. 66 of the C.P. Code will stand in the way of a decree-holder suing for possession of property from a person who purchases the property in his own name disregarding the instructions of the decree-holder to bid at the sale for him after obtaining the Court's permission, because the purchase in such case will be benami for the decree-holder. Case-law discussed. 82 Ind Cas 541: AIR (Vol 12) 1925 Nag 41.

——S. 66 — Effect on title.

The provisions of the section were designed to create some check on the practice of making what are called benami purchases at execution sales for the benefit of judgment-debtors and in no way affect the title of persons otherwise beneficially interested in the purchases: 10 OLJ 481: 78 Ind Cas 393: AIR (Vol 11) 1924 Oudh 218 (DB).

——S. 66 — Scope of — Benami purchase.

For a suit to be barred by S. 66 of the C.P.C., plaintiff must be one who claims to be a beneficial owner or his representative and the defendant must be the certified purchaser or some one claiming through him. The section has to be construed strictly and not extended beyond its express terms. 2 Lah LJ 353: AIR (Vol 7) 1920 Lah 491 (DB).

4. Co-mortgagees.

——S. 66 — Co-mortgagees — Purchase by one of them in his own name.

Where out of two joint mortgagees, one alone sued, making the other pro forma defendant, and obtained a decree in execution of which he purchased the property in his own name and the question arose whether the other joint mortgagee can claim a share of the property purchased.

Held, that the suit was not maintainable. AIR (Vol 10) 1923 All 405.

——S. 66 — Co-mortgagees — Purchaser by one — Equity of redemption.

Of three co-mortgagees R. M. and G., G. purchased the equity of redemption. R., brought a suit for sale of 2/3 of the property making M. a party pro forma and the Court decreed the suit but made no order to safeguard his interest, and M. brought a suit to recover half of the property purchased by R. in execution of his decree.

Held, that the suit was maintainable and not barred under S. 66 C.P.C. 25 Ind Cas 735: AIR (Vol 1) 1914 All 259.

5. Estoppel.

——S. 66 — Benamidar — Certified purchaser—Possession with real purchase.

S. 66 of the C.P.C., is not restricted to benami purchases made by or on behalf of judgment-debtors. The failure of the alleged benamidar of the certified purchaser to assert his rights against the real purchaser during the latter's possession after the auction purchase cannot be regarded as a waiver or transfer of the right. 24 CWN 1024: 59 Ind Cas 719: AIR (Vol 7) 1920 Cal 852 (DB).

——S. 66 — Estoppel — Benami purchaser attesting sale by true owner.

If an auction purchaser allowed a stranger to be in possession for a long time and even attested a sale deed executed by him to re-assure the purchaser.

Held, that he was estopped from claiming the benefit of S. 317 of C.P.C. 1882, and if after such sale, the auction purchaser gets a sale certificate from the Court it is fraud.

Per Sadasiva Iyer. J.: S. 317 of the Code, 1882, applies to suits against representatives and assigns for purchaser.

Obiter: Though the section should be strictly construed, the words of the section should be given effect to it if they apply aptly to the plaint. (1913) 36 Mad 564: 23 MLJ 301: 12 MLT 211: (1912) MWN 882: 16 Ind Cas 30 (DB).

6. Fraud.

——S. 66 — Benami — Plaintiff's claim that purchase was on his behalf, when can succeed — Question of fraud.

The consequence of S. 66, Civil P.C., is that unless the auction sale could be impugned on the ground of fraud or of some other grave irregularity which made it a nullity, the plaintiff's suit that the purchase was on his behalf cannot be maintainable. Fraud must be strictly pleaded and particulars of any fraud relied upon must be stated in the pleadings. It is very important that one who seeks to set aside a purchase completed under sanction of the Court should state the grounds on which he claimed to impeach it and should not be allowed after trial of the case to rely on other grounds which had not been the subject of trial or adjudication in the Court which took the evidence. AIR (Vol 26) 1939 Rang 122: 181 Ind Cas 94 (DB).

——S. 66 — Scope of — Prevention of fraud.

Section 66 is intended to discharge benami purchase at execution sales held by the Court by penalising the person who purchases 'benami' in the name of another. The penalty applies equally to any one claiming through him. It does not apply where the name of 'benamidar' has been inserted in the sale certificate fraudulently or without consent of the real purchaser. It is designed to prevent fraud on third parties resulting from the collusive acts of the real and the certified purchaser. AIR (Vol 21) 1934 Cal 567: 61 Cal 440: 38 CWN 494: 150 Ind Cas 1051 (DB).

——S. 66 — Cannot plead his own fraud in defence.

Defendant sold part of her husband's estate, purchased a house in plaintiff's name out of the proceeds & successfully deluded the reversioner into believing that the proceeds had been devoted to the payment of debts binding on the estate. Defendant was in possession of the house. In a suit by plaintiff for possession.

Held, that it was not open to defendant to show that it was she that provided the funds for the purchase, by means of a fraud on the reversioner, to which she and plaintiff were parties on the principle that that party fails who first has to allege the fraud in which he participated. AIR (Vol 10) 1923 Cal 90, Not Foll. AIR (Vol 12) 1925 Mad 1016: 91 Ind Cas 776: 22 MLW 313.

7. Guardian.

——S. 66 — Guardian — Purchase by — Fraud by manager of an infant.

A manager guilty of fraud cannot take advantage of the section as against the ward. 30 Ind Cas 212: AIR (Vol 2) 1915 Cal 563 (DB).

8 Joint Hindu Family.

——S. 66 — A suit which the plaintiff alleges that he and the defendant were divided among themselves and also from their father for a long term of years, that property was purchased in court-auction in the name of the defendant who was his brother by their father and that therefore the plaintiff is entitled to one half of the properties falls within the purview of S. 66 of C. P. Code. (1929) 118 Ind Cas 713 (1) (All).

——S. 66 — Benami purchase — What is.

Where property is purchased by a joint Hindu family in the name of a female member thereof who has right to maintenance out of joint family property, she cannot be said to have such an interest in the purchase as would take her case out of S. 66. 63 Ind Cas 676 : 43 All 711 : 19 ALJ 787 : AIR (Vol 8) 1921 All 185 (DB).

——S. 66 — Manager of joint family — Purchase in the name of son-in-law — Claim of others.

Where properties sold in execution of a decree were purchased with the funds of the manager of a joint Hindu family in the name of his son-in-law, S. 317 of the C.P.C. 1882 bars the claim of the members of the joint Hindu family to the properties as being really Joint family acquisitions. 40 All 159 : 21 CWN 1065 : 20 OC 211 : 2

Pat LW 160 : 33 MLJ 180 : 15 ALJ 684 : 19 Bom LR 737 : 22 MLT 121 : 26 CLJ 267 : 6 LW 509 : (1917) MWN 477: 4 CLJ 762: 44 IA 201: 40 Ind Cas 988: AIR (Vol 4) 1917 PC 12.

[See also (1913) 35 All 80: 40 IA 40: 16 OC 129: 18 Ind Cas 30].

——S. 66 —Manager of Joint Hindu family — Rights of members.

When a suit is between one member of a joint Hindu family and another the above section is not applicable but it is applicable when the suit is between the separated members of a joint Hindu family, though at the time of this separation certain property of the family was not in fact divided. 3 OLJ 508 : 37 Ind Cas 111 : AIR (Vol 4) 1917 Oudh 143

——S. 66 —Manager of joint Hindu family.

S. 66 has no application to cases where the manager of a Hindu family or a tenant in common purchases with funds belonging to the joint family or to all the tenants in common. (1912) MWN 1071 : 17 Ind Cas 434 (DB).

——S. 66 — Applicability of — Manager of joint Hindu family — Purchasing on behalf of the whole family.

The section does not apply where one member of a joint family purchases on behalf of the whole family. The object of the section is to check benami transactions. (1909) 31 All 282: 6 ALJ 174: 2 Ind Cas 210 (DB).

9. Joint purchasers.

(a) Joint decree-holders.

——S. 66 — Joint purchase — Sale certificate in name of one alone — Others, held could file suit for their shares and possession.

Where three persons entered into a contract to the effect that they would jointly put up the money (though in different shares) necessary to purchase a certain village that was about to be put up to auction and the village was purchased by the agent of one of them acting on behalf of all the three, but the sale certificate was issued in the name of the principal alone and the other two filed suits for their share and for possession:

Held, that S. 66, Civil P. C. was no bar to the suit. AIR (Vol 27) 1940 Nag 1: 1939 NLJ 539: 187 Ind Cas 60 (DB).

——S. 66 — Joint purchase — Claim by person alleging that execution purchase was either on his behalf or by himself jointly with certified purchaser as a result of agreement.

Section 66 operates as a bar to a claim by a person who alleges that the actual execution auction-purchase was either on behalf of himself exclusively or of himself jointly with the certified purchaser, whether the purchase is alleged to be in execution of an express agreement or otherwise, for it is clear that no benami purchase can ever be otherwise than as the result of an agreement of some sort between the principal and the benamidar; nor does the fact that the principal claims only to have provided a part of the purchase-money and to be entitled to only a share in the property purchased make any difference in principle. AIR (Vol 26) 1939 Pat 207: 5 BR 215: 20 PLT 117: 18 Pat 181: 179 Ind Cas 295 (DB).

——S. 66 — Benami purchase — Suit for a declaration of title against the purchaser without notice.

In an execution sale, the property was purchased benami in the name of the defendant under private agreement that the plaintiff and some other persons were to share the property in certain proportions. The plaintiff filed a suit for a declaration of his title to his share against the vendee of a part of his share without notice:

Held, that S. 66, Civil P. C., barred the suit. The operation of this section cannot be ousted by the existence of any private agreement or undertaking. AIR (Vol 21) 1934 Cal 322: 61 Cal 371: 150 Ind Cas 77 (DB).

——S. 66 — Joint purchase — Purchase by joint decree-holder of — Right of other persons to recover share of the properties purchased — Relinquishment of the right.

In the absence of anything definite to show the contrary, the purchase made by a joint decree-holder, though in his own name, would enure for the benefit of all the persons interested in the joint fund which has been utilised in the acquisition of the property. The other persons 'would be beneficially interested in the purchase', and would be "entitled to recover a share of the properties purchased at auction". But the right to recover the share would be conditional on the payment of a proportionate share of the costs incurred in the litigation. It is not necessary for the relinquishment of the right to recover a share in the property that the transaction should be evidenced by a written instrument and that such instrument should be registered, such right being short of ownership. AIR (Vol 20) 1933 All 854: 1934 ALJ 107: 3 AWR 422: 148 Ind Cas 502.

——S. 66 — Is not benami.

A and B jointly purchasing property at auction-sale with joint fund — Sale certificate issued in the name of A — B can sue claiming to be owner of half the property, as such a purchase is not benami. AIR (Vol 13) 1926 Bom 525: 50 Bom 600: 28 Bom LR 997: 97 Ind Cas 688 (DB).

(a) Joint decree-holders.

——S. 66 — One of decree-holders or persons interested in decree executing decree and purchasing whole of property — Other decree-holder and person interested in decree is entitled to a share in the property purchased on payment of the proportionate costs of execution in asmuch as the decree-holder executing must be deemed to have executed the decree on behalf of all the decree-holders. No real distinction can be drawn between the case of joint decree-holders and that of persons interested in a decree such as the heirs of the decree-holders. AIR (Vol 29) 1942 Pat 230: 20 Pat 855: 8 BR 716: 200 Ind Cas 546 (DB).

——S. 66 — Joint decree-holders — Co-decree-holder purchasing the execution sale — Rights of others.

Section 317 of the C. P. C. of 1882 (S. 66 of the new code) was designed to create some check on the practice of benami purchases, execution sales for benefit of judgment-debtors. The section in no way affects the title of persons otherwise beneficially interested in the purchase. 12 BLR 317 ref. Where out of several joint decree-holders one applied for the execution of the decree subject to the rights of others and the properties put up for sale in pursuance thereof were purchased by him, the purchase enures to the benefit of all the decree-holders. The purchaser could not retain the property as his exclusive property and perpetrate a fraud against his co-decree-holders under cover of Section 317 of the C. P. C. of 1882. AIR (Vol 2) 1915 PC 81: 37 All 545: 42 IA 177: 19 CWN 1175: 18 MLT 203: 29 MLJ 329: 2 LW 837: 13 ALJ 999: 17 Bom LR 998: 22 CLJ 508: (1918) MWN 713: 30 Ind Cas 265

[Affirming (1910) 32 All 541: 7 ALJ 566: 6 IC 364].

——**S. 66 — Joint decree-holders — Suit by the other — Maintainability.**

Two persons held a joint money-decree against the judgment-debtor whose property was put up for sale in execution. One of the decree-holders purchased it with permission of the Court in 1902 and was put in possession in 1903. In 1913 the other decree-holder brought a suit claiming a share in the property, on the strength of an oral agreement whereby the purchase was to be for the benefit of both.

Held, that the suit was barred under S. 66, C. P. C. AIR (Vol 2) 1915 All 316: 29 Ind Cas 447: (This is no longer law See AIR (Vol 2) 1915 PC 81: 37 All 545: 30 Ind Cas 265).

——**S. 66 — Joint decree-holders — Purchase by one.**

A suit by plaintiff claiming a part of the property purchased under a decree passed in favour of himself and the defendant jointly, is not barred by Section 317 C. P. C. (1882) as the purchase by defendant alone is not a benami one and the section is intended to put an end to benami transactions only. (1910) 7 ALJ 1091: 6 Ind Cas 374.

——**S. 66, (S. 317 of Old Code) — Joint decree — Purchaser at sale in execution by one decree-holder — Suit for declaration that property purchased was joint.**

In execution of a joint decree on a mortgage one of the decree-holders obtained leave to bid at the auction-sale and purchased the mortgaged property for the exact amount of the decree, namely, the mortgage-debt, interest and costs. Satisfaction of the decree was entered up and the purchaser took possession of the property.

Held, that Section 317 did not preclude the other joint decree-holder from suing for a declaration that the property so purchased was the joint property of himself and the actual purchaser. (1907) 1907 AWN 166: 29 A 557 (561).

10. Plea of.

——**S. 66 — Plea of bar of suit — May be raised at any stage.**

The plea of legal prohibition of any particular suit, as for example prohibition under Section 66 of C. P. C. may be put forward and given effect to at any stage of the suit, even in appeal for the first time. AIR (Vol 4) 1917 Oudh 143: 3 OLJ 508: 37 Ind Cas 111.

——**S. 66 — Representatives — Benami purchaser — Actual purchaser — Defence.**

The special plea of a certified purchaser at a Court-sale, against the actual purchaser, under Section 260 of C. P. C. of 1859, and Section 317 of C. P. C. of 1882, is no longer available after the Code of 1908, as no one has a vested right in a particular form of procedure. Under Section 66, C. P. C. the plea is open to the certified purchaser and to his heirs and assigns. AIR (Vol 1) 1914 All 552: 12 ALJ 1145: 25 Ind Cas 821.

——**S. 66 — "Claiming title under a purchase".**

Section 66 is a bar to a suit by the real purchaser against a mortgagee from the benamidar and the plea of bona fide purchaser for value without notice is available to such mortgagee. (1910) 12 Bom LR 1044: 35 Bom 342: 8 Ind Cas 752 (754) (DB).

——**S. 66, (S. 317 of Old Code) — No bar to plea in defence that the certified purchaser was benamidar.**

Section 317 does not debar a plea in defence that the certified purchaser is only a benamidar for the defendant. The fact that a previous suit by the defendant for a declaration to that effect was dismissed as non-maintainable does not preclude the defence in a subsequent suit by the certified purchaser. (1905) 1905 AWN 39: 2 ALJ 111: 27 A 443 (446) (DB).

11. Possession.

——**S. 66 — Suit by real owner for possession alleging benami purchase and alleging dispossession by defendant shortly before suit — Maintainability.**

A suit by the real owner against the certified purchaser on the ground that the plaintiff was in possession but was recently dispossessed by the defendant who was his benamidar at the Court sale is barred by S. 66, C. P. Code. AIR (Vol 37) 1950 Bom 277: 52 Bom LR 286.

——**S. 66 — Adverse possession — Real purchaser allowed to remain in adverse possession for more than 12 years, if entitled to sue for possession on title so acquired.**

Where the certified purchaser is a plaintiff, the real owner, if in possession, and if that possession has been honestly obtained, is not precluded by Section 66 from showing the real nature of the transaction. While Section 66 protects the certified purchaser, so long as he retains the possession given him by the Court, from a suit by the true owner, if he allows the real purchaser 'being the true owner' to get possession, the section does not enable him to sue for possession, because possession has come into the hands of the true owner, who is entitled to it. Where, however, the real purchasers have been allowed to remain in adverse possession for more than 12 years before dispossession, they are entitled to sue for possession on the title so acquired under the Limitation Act, and it is unnecessary for them to aver or prove that the auction purchases were made on their behalf. AIR (Vol 25) 1938 All 391: 1938 ALJ 513: ILR (1938) All 556: 1933 RD 727: 1938 AWR 338: 176 Ind Cas 483 (DB).

——**S. 66 — Applicability — Possession of plaintiff — Whether material — Suit by real owner against benamidar — Title to land, if can pass by admission — Deed of relinquishment of possession by benamidar in favour of real owner — Title, if conferred.**

For the application of Section 66, it is immaterial whether the plaintiff is in possession and seeks a confirmation of possession or whether he is out of possession and seeks to recover it.

Title to land cannot pass by admission where the statute requires a deed. A deed of relinquishment executed by a benamidar giving an undertaking not to interfere with the title of the real owner will not confer any title on him.

Per Mohammad Noor, J.— If the real owner is in possession of the property and the certified purchaser wants to take advantage of his name being in the sale certificate and brings the suit on that basis, the real owner can successfully defend it on the ground of his being the real purchaser. But if the plaintiff does not base his suit upon the title which he undoubtedly has on account of his being the real purchaser at the court sale, but on some other title subsequently acquired, his suit does not come within the mischief of S. 66. AIR (Vol 20) 1933 Pat 264: 14 PLT 208: 12 Pat 616: 149 Ind Cas 393 (DB).

——**S. 66 — Benami purchase.**

A suit based on dispossession after an adverse possession of 12 years is clearly not a suit "on

the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims" within the meaning of Section 66 and does not become so merely because the plaintiff as part of an alternative cause of action sets up and proves that the purchases were, in fact, benami: AIR (Vol 8) 1921 All 165: 43 All 416: 62 Ind Cas 725, Reversed. AIR (Vol 16) 1929 PC 228: 57 MLJ 177: 120 Ind Cas 651: 33 CWN 1061: 6 OWN 637: 30 MLW 395: 1929 ALJ 930: 1929 MWN 734: 56 IA 330: 31 Bom LR 1393: 50 CLJ 357: 51 All 675.

——S. 66 — Suit for confirmation of possession.

Section 66 applies equally to a suit for confirmation of possession as well as to a suit to recover possession from the benamidar. 23 Cal 699, Diss. AIR (Vol 13) 1926 Cal 542: 53 Cal 297: 30 CWN 160: 92 Ind Cas 984 (DB).

——S. 66 — Possession — Suit — Purchaser's duty to enquire.

Section 66, C. P. C. bars a suit against any person claiming title under a purchase certified by the Court on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claimed. This section is clearly aimed at benami purchases in execution sales. A real purchaser cannot base a suit against the benamidar on the fact of possession. AIR (Vol 3) 1916 Cal 762: 43 Cal 20: 20 CWN 147: 29 Ind Cas 787 (DB).

——S. 66 — Possession — Suit for against purchaser's heirs.

Where B's widow purchased in Court auction, from out of B's estate, a house in the name of C and enjoyed it till her death, and C during her life time never laid any claim thereto.

Held that a suit by B's heir against C's heir after the death of B's widow for possession of the house is not covered by Section 66 of C. P. C. (1913) 35 All 138: 11 ALJ 101: 18 Ind Cas 246 (DB).

——S. 66 — Benamidar — Purchase at Court sale — Suit by, for possession — Defendant pleading that plaintiff is benamidar — Plaintiff's right to recover — Fraud.

A plaintiff, a purchaser, at a court sale is not entitled to recover the property from the defendant of whom he was found to be the benamidar and the benami transaction was found to be free from fraud. (1912) 36 Bom 116: 13 Bom LR 1002: 12 Ind Cas 564 (DB).

12. Principal and Agent.

——S. 66 — Principal and agent — Purchase at execution sale by agent with principal's money — Suit by principal to recover properties — Maintainability.

Section 66 of the C. P. C. is no bar to a suit brought by the principal against the agent for the recovery of properties purchased by the agent in his own name but with the principal's money and for the principal a benefit in a Court auction though without the knowledge of the principal, 19 WR 356, P. C. and 37 All 545, foll. 17 Mad 282 and 18 Mad 436 ref. If the plaintiff does not seek relief on the ground that the certified purchaser is a name lender but relies on a certain state of facts as establishing certain other kinds of legal relations between himself and the certified purchaser and entitling him to the property purchased he can rely on such facts and circumstances notwithstanding Section 66 of the C. P. C. AIR (Vol 6) 1919 Mad 942: (1919) MWN 693: 9 LW 276: 49 Ind Cas 734 (DB).

13. Representatives.

——S. 66 — Representatives — Section applicable.

The section is applicable to the cases of the persons claiming title under certified purchasers and not the real ones. AIR (Vol 7) 1920 Cal 932: 24 CWN 659: 58 Ind Cas 745.

——S. 66 — Representatives — Person claiming under certified purchaser, if within the section.

The words "certified purchaser" in Section 66 includes persons standing in the shoes of the Court purchaser, AIR (Vol 6) 1919 Oudh 420: 22 OC 222: 6 OLJ 563: 53 Ind Cas 961 (DB).

——S. 66 — Representatives of purchaser — Applicability to.

Section 66, C. P. C. applies only to suits against certified purchasers. Hence in a suit by an heir of the certified purchaser to eject the defendant it is open to defendant to set up her own title to show that the certified purchaser was a benamidar for her. AIR (Vol 2) 1915 Nag 51: 11 NLR 130: 31 Ind Cas 58.

——S. 66 — Representatives — "Certified purchaser" — Meaning of.

The term "certified purchaser" in S. 66 does not include his successor in title. The judgment-debtor purchased his property sold in execution of a decree against himself obtained by third defendant in the name of first defendant who sold it to second defendant. The plaintiff sued for declaration of title and confirmation of possession. The second defendant could plead that the plaintiff could not seek the assistance of the court as the purchase was made to defraud his creditors which had been accomplished. 19 CLJ 330: 19 Ind Cas 909: AIR (Vol 1) 1914 Cal 175 (DB).

——S. 66 — Representatives — Applicability to.

S. 66 C.P.C. is intended to preclude the institution of a suit against the certified purchaser by the beneficial owner or the successor-in-title of the beneficial owner . 11 Mad 234: 17 Mad 282, not Appr.: (1912) 10 ALJ 97: 16 Ind Cas 489.

——S. 66 (S. 317 of Cold Code) — "Certified purchaser" meaning of — Includes person standing in his shoes.

The words "certified purchaser" in S. 317, C.P.C., include the person standing in the shoes of the Court purchasers. (1906) 8 Bom LR 873: 31 B. 61 (66) (DB).

——S. 66 (S. 317 of Old Code) — Bar — Benamidar — Suit by mortgagee for sale on a mortgage — Case of benami purchase for mortgagor by defendant — C. P. C., S. 43 — "Who cannot bring suit."

One R.S. mortgaged a house representing himself as owner thereof, to R.N. and others. As a matter of fact, part of the house did not belong to R.S. but to one J.S. In execution of a money decree against J.S. the portion of the house which belonged to him was sold by auction, and it was purchased by M.M. the wife of R.S. The mortgagees brought a suit for sale on their mortgage, alleging, as to the portion of the house purchased by M.M., that it was purchase benami for, and was really the property of, their mortgagor R.S.

Held, that inasmuch as the plaintiffs claimed as representatives of the alleged beneficial owner they were precluded by S. 317, C.P.C., from suing for the sale of the portion of the house purchased by M.M. S. 317 prohibits a suit by a person claiming to be the beneficial owner or the successor in title of the beneficial owner:

Quaere:—Whether any suit can be maintained against the certified purchaser by a stranger. (1903) 1903 AWN 198: 26 A. 82 (87, 88).

14. Specific performance.

——S. 66 — Applicability — Principles — Suit based on agreement subsequent to auction sale — Whether barred.

The following principles can be extracted from a review of case-law of on S. 66, C.P. Code: (1) S. 66 must be construed strictly as it encroaches upon the rights of the true owner remembering that benami transactions are only being discouraged by the legislature but are not being made illegal. (2) Where a true owner recovers possession or has always been in possession and he bases his relief in the suit (other than that of possession or confirmation of possession) upon a title obtained by the purchase, the provisions of S. 66 have no application. (3) The real owner, if he is in possession, can always resist a suit by the certificate auction-purchaser as a plaintiff. (4) The real owner is entitled to maintain a suit for specific performance of an agreement by the ostensible owner to transfer the property to him provided such an agreement is made after the auction purchase. (5) Where the true owner has dispossessed the certificate holder and is adversely in possession for over 12 years, he can maintain a suit for recovery of possession even against the certificate purchaser because his claim is now based upon a different title and it is immaterial for him to allege or prove that he was the real owner at the date of the auction sale.

Plaintiff who was the real owner of a property purchased at a Court auction sale in the name of the defendant as benamidar was in possession of the property since the delivery of possession. He subsequently negotiated for the sale of that property and had the sale deed executed by the defendant, as the sale certificate stood in his name, on his agreeing to hand the sale consideration to him after it was paid before the Registrar into the hands of the defendant. In a suit to recover that money,

Held, that the suit was not barred by S. 66, C.P. Code, as it was based upon an agreement subsequent to the auction sale. 26 Pat 505: AIR (Vol 35) 1948 Pat 350 (DB).

——S. 66 — Suit for specific performance of contract to sell against benamidar purchaser in court sale.

A person who had entered into a contract for sale with beneficial owner cannot maintain a suit for specific performance against the certified purchaser on the ground that the latter was the benamidar of his vendor, unless the suit falls within the exception enacted in cl. (2) of S. 66, Civil P. C. AIR (Vol 32) 1945 Cal 355 : 49 CWN 371 (DB).

——S. 66 — Agreement to convey property to be purchased in court-sale — Sale of such property after court-sale — Validity.

There was an agreement before the court-sale by which one person agreed to purchase at court-auction and then to convey to the other party to the agreement. After the court-sale, there was not merely an agreement to convey the property, but there was an actual sale-deed executed by the person who purchased the property in court-auction conveying the property to the other party :

Held, that S. 66 was no bar and the sale was valid. AIR (Vol 32) 1945 Mad 32.

——S. 66 (1) — Benami purchase at court-sale for mortgagor — Subsequent sale to mortgagor — Suit for rectification of sale-deed — Cause of action.

Section 66 (1) has to be strictly applied. Its object is to prohibit on grounds of public policy a suit against the certified purchaser on the ground specified in the section. It does not render benami transactions illegal. If the cause of action is not based on the benami purchase but on a contract, or title acquired subsequent thereto, S. 66 is not a bar.

If a person purchases a house benami for the mortgagor at court-sale and sells the same by a sale-deed to the mortgagor, the cause of action for a suit for rectification of the sale-deed is the title under the conveyance — an event which happened subsequent to the court sale. The fact that the basis of the contract embodied in the sale-deed is the prior benami purchase does not affect the title obtained under the conveyance. AIR (Vol 24) 1937 Mad 362 : 173 Ind Cas 387.

——S. 66 — Agreement — Execution — Suit to enforce agreement to sell against purchaser.

A suit against a purchaser in court auction to enforce an alleged agreement entered into by him before the confirmation of the sale to convey to the plaintiff a share in the property purchased is barred under S. 66.

Obiter.—An agreement subsequent to the purchase is not affected by the section. AIR (Vol 19) 1932 Cal 170 : 35 CWN 940 : 54 CLJ 147 : 136 Ind Cas 538.

——S. 66 — Bar of suit — Defendants agreeing to manage plaintiff's property — Agreement to reconvey properties purchased in execution sale after certain period — Plaintiff's suit for possession.

Seeing that the rent of the estate could not be collected and the property could not be managed, the plaintiff entered into an agreement with the three defendants who were to manage the property for four years. In pursuance of this, these three defendants thereafter took from her the documents and papers that she had and the estate began to be managed by the aforesaid defendants. They made her borrow monies which they themselves took, appropriated the collections that were made and went on in that way. They suggested to her that in order to avoid trouble and difficulties arising from the fact of joint ownership with co-sharers and also in order to facilitate collection of rents, the properties should be allowed to be sold up for arrears of rent and purchased at auction by themselves assuring her that there would be no change in the ownership of the properties in spite of the change in the name of the owner and agreeing that they would reconvey to her properties so purchased by them at the time of settlement of accounts after four years. Ten items of property were given in the plaint as properties so purchased by them. The plaintiff brought a suit praying for accounts from the defendants and for declaration of her right to and confirmation of the possession in the ten items of properties, and for other reliefs :

Held, that S. 66 was no bar to the suit.

Held, further that the defendants were bound by their undertaking to reconvey the property purchased in execution sale, after getting their dues. (1936) 164 Ind Cas 164 : 62 CLJ 88.

——S. 66 — Agreement to convey.

Agreement to convey property made after property is purchased — S. 66 does not debar suit for specific performance upon such agreement. The suit in such a case is not brought "on the ground that the purchase was made on behalf of the plaintiff" within the above-mentioned sub-section. AIR (Vol 17) 1930 Bom 81: 31 Bom LR 1271 (DB).

——S. 66 — Suit on contract to sell.

An agreement to sell to plaintiff certain properties which were to be purchased by the defendant in a certain Court auction, is a valid and enforceable agreement, whether the agreement

was before or after the auction-sale. AIR (Vol 10) 1923 Nag. 11: 68 Ind Cas 559.

——S. 66 — Suit on prior contract — Suit on a prior contract to convey property to plaintiff is not barred.

S. 66 bars an enquiry on the question whether the certified purchaser is a real or a nominal purchaser, and provides that the certified purchaser shall be conclusively deemed to be the real purchaser and shall not be ousted on the ground that his purchase was really made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims: But inasmuch as the provisions of that section bar the equitable jurisdiction of the Court, the section must be strictly construed and not extended beyond its express terms. That section does not bar a suit by a plaintiff against a defendant, not on the ground that the purchase was made on behalf of the plaintiff but on the ground that there was a prior contract by virtue of which the defendant is bound to convey the property to the plaintiff. AIR (Vol 8) 1921 Pat 39 (2): 62 Ind Cas 720: 1921 PHCC 21.

——S. 66 — Specific performance — Agreement by purchaser at Court auction to convey property purchased — Enforceability.

The object of S. 66, C. P. C., is to put an end to purchases by one person in the name of another. An agreement subsequent to a purchaser is not affected by that section and is specifically enforceable. AIR (Vol 7) 1920 PC 30: 43 Mad 643: 47 IA 108: 39 MLJ 11: 18 ALJ 584: 28 MLT 13: 12 LW 1: 24 CWN 699: (1920) MWN 389: 56 Ind Cas 395.

——S. 66 — Specific performance — Contract for sale.

Where defendant after having bid for the property and paid the earnest money on his own account entered into an agreement with plaintiffs to buy the property for plaintiffs and himself jointly in certain shares and paid the balance in part out of money taken from the plaintiff:

Held, that the case was not covered by the second proviso to S. 66 of the C. P. C. but that the plaintiffs were entitled to sue the defendants for specific performance of the agreement. AIR (Vol 7) 1920 Cal 101: 24 CWN 27: 54 Ind Cas 726 (DB).

——S. 66 — Specific performance — Contract to sell properties purchased.

S. 66 of the C. P. C. is no bar to a suit to enforce the specific performance of an agreement by the auction purchaser subsequently to the auction purchase to convey the property purchased to the plaintiff even though the plaint alleged that the certified purchaser was a benamidar for the plaintiff. AIR (Vol 6) 1919 Mad 94: 42 Mad 615: 37 MLJ 98: 26 MLT 46: (1919) MWN 355: 9 LW 598: 51 Ind Cas 111 (FB).

——S. 66 — Specific performance — Benami purchase — Suit, if maintainable.

A suit by a judgment-debtor against an auction purchaser to enforce an agreement before the sale to reconvey the properties to the judgment-debtor is barred by S. 66, C. P. C. AIR (Vol 6) 1919 Pat 523: 50 Ind Cas 546 (DB).

——S. 66 — Specific performance — Benami purchase — Enforceability by real purchaser.

A suit for execution of a sale deed and for recovery of possession on the ground that defendant's father purchased the properties as benamidar for the plaintiff falls within S. 66, C. P. C., and is barred. AIR (Vol 3) 1916 Mad 1156: 29 Ind Cas 138 (DB).

——S. 66 — Specific performance — Suit against certified purchaser for specific performance and possession.

A suit for specific performance and possession against a certified purchaser who had agreed to purchase land for the plaintiff and deliver the same to him is barred under S. 66 of the Code but where the plaintiff is a minor he will be allowed to amend his plaint by inserting a prayer for damages. (1910) 8 Ind Cas 258 (Mad) (DB).

——S. 66 (S. 317 of old Code) — Purchase by decree-holder without leave — Defendant a benamidar — Suit for recovery of money, maintainability of — Suit for money had and received.

The plaintiffs put up certain property of their judgment-debtor to sale. They applied for leave to bid but the Court refused the application. They then according to the finding of the Court purchased the property in the name of the defendant who promised to convey it to them. Upon the defendant's refusal to convey they brought this suit for specific performance of the contract of sale or in the alternative for recovery of the money advanced. The first relief was subsequently withdrawn:

Held, that the money could not be recovered as money lent, as in fact no money was lent.

Held, further, that even if the suit could be treated as a suit for money received by the defendants for the plaintiffs, the plaintiffs could not succeed except by showing that the defendant made the purchase on their behalf. Such a suit being prohibited by S. 317 of the Code of Civil Procedure 1882 was not maintainable. (1910) 7 ALJ 623 (626) (DB).

15. Suit for declaration.

——S. 66 — Benami — Suit for declaration that plaintiffs are true owners and auction-purchaser was benamidar.

Where in a suit the plaintiffs claim that the auction purchaser was a benamidar for them and that they themselves are the real owners of the property and the sons of the auction-purchaser do not contest the suit, such a suit is not barred by S. 66, Civil P. C., since the section provides for a suit only against a certified purchaser or persons claiming under him. It does not exclude evidence as to auction-purchase being benami when such evidence is relevant for the purposes of determining title between plaintiff and a third person. AIR (Vol 23) 1936 All 750: 1936 ALJ 1169: 1936 AWR 844: 165 Ind Cas 709 (2) (DB).

——S. 66 — Joint purchase — Suit by member of joint Hindu family for declaration that property was purchased with joint family funds.

Where a member of a joint Hindu family sues for declaration of title to and recovery of possession of a property on the ground that a property purchased by the then karta of the family in the name of his son at an execution sale was really purchased by funds of the family, S. 66 does not bar the suit. AIR (Vol 21) 1934 Cal 567: 61 Cal 440: 38 CWN 494: 150 Ind Cas 1051 (DB).

——S. 66 — Benami — Suit by purchaser for declaration of title against benamidar's creditors.

A purchased a house in court sale benami for B. B transferred it to C. A attested the deed and executed a rent note to C but afterwards borrowed money from the defendant bank on the security of the sale certificate which had been issued in his name. The Bank sold the house and in the course of execution proceedings C objected. The objection was overruled and she brought a suit for declaration of title:

Held, that the suit was not barred under S. 66. (1931) 133 Ind Cas 551: 32 PLR 295.

——S. 66 — Suit when maintainable.

A real owner can seek for a declaration of his real title against one who does not claim under a certificated purchaser. AIR (Vol 15) 1928 Cal

448: 55 Cal 1070: 32 CWN 759: 108 Ind Cas 585 (DB).

——**S. 66 — Suit for declaration — Benami purchase — Suit by real owner for declaration of title — Maintainability.**

S. 66 applies to suits for declarations also and even where defendant has recognised plaintiff's title. S. 66 of the C. P. C. (1908), is merely declaratory of the real meaning of S. 317 of the Code of 1882.

Per Srinivasa Aiyangar, J. Obiter: S. 66 of the C. P. C. is merely a regulation of procedure. It does not purport to take away or affect any right which the real owner had, but like the Limitation Acts prevents a particular person from bringing a suit against the certified purchaser on certain grounds. AIR (Vol 4) 1917 Mad 324: (1916) 1 MWN 220: 3 LW 86: 32 Ind Cas 434 (DB).

——**S. 66 — Suit for declaration — Maintainability.**

A suit for declaration that the purchase by certified purchaser is benami for plaintiff is barred by S. 66. 32 Ind Cas 365: AIR (Vol 3) 1916 Oudh 225: 2 OLJ 584.

——**S. 66 — Suit for declaration — Benami purchase — Real purchaser in possession — Declaratory suit.**

The real purchaser in a benami sale who remains in possession is not precluded by S. 66, C. P. C. from suing for declaration that he is the owner. AIR (Vol 1) 1914 Low Bur 275: 7 LBR 260: 25 Ind Cas 810.

——**S. 66 — Representatives — Mortgagees from real purchaser.**

Mortgagee from the real purchaser is precluded from bringing a suit for declaration that the purchase was benami on behalf of his mortgagor. (1911) 33 All 382: 8ALJ 184: 9 Ind Cas 298 (DB).

16. Third parties.

——**S. 66 — Sale in mortgage decree — Property purchased by decree-holder, S—Mortgage-money of S's husband — Brother of husband cannot succeed in claming property.**

Where the property has been purchased at the sale in execution of a mortgage decree and the name of S has been entered in the sale certificate, a plaintiff cannot succeed if he had to allege that S had purchased the property on behalf of her husband & the plaintiff's brother merely because the mortgage-money was of S's husband. AIR (Vol 33) 1946 All 85 : 1945 OWN (HC) 297 : 1945 ALJ 480 (DB).

——**S. 66 — Benami transaction — Suit by third party — Burden of proof.**

From a sale certificate which stands in the name of a certain person, the Court is bound to presume that that person is the real owner of the property. The party alleging the contrary has then to rebut this presumption and show that it is not the real state. AIR (Vol 32) 1945 Cal 458 : 79 CLJ 248 : 222 Ind Cas 319 (DB).

——**S. 66 — Section applies to suits between the benami and the benefical owners.**

There is nothing to prevent a member of a joint family from recovering the property which has been bought out of the joint family money in the name of some person benami at a Court auction by the managing member of the family, he himself being the decree-holder. Under the new section the penal provision is confined to purchase on behalf of a plaintiff or persons through whom he claims whereas before, it was wide enough to cover purchases on behalf of any other person. A managing member buying property using family funds for that purpose cannot be properly said, within the meaning of that section, to buy on behalf of other members of the family; he is doing some thing wholly wrong. There is no distinction between the case of a co-parcener and the case of a partner. Where partnership money is used for a benami transaction of that kind it would follow, if the interpretation suggested above is right, that the innocent partner would lose his property; that is not the meaning of the section. The proposition that the property is held on behalf of the whole family by the benamidar where the property stood in the name of a member of the family is equally applicable when the nominee is a stranger, provided that members of the family are merely seeking to enforce their claim to what they allege to be the undivided family property. 73 Ind Cas 478 : 45 Mad 856 : 16 MLW 358 : 1922 MWN 584 : 43 Mad LJ 363 : AIR (Vol 9) 1922 Mad 481 (DB).

——**S. 66 — Third parties — Suit by beneficiary against the benami certificated purchaser.**

A Muhammadan having bought land at a court sale with his money in the name of one of his sons settled the same with a tenant who attorned to him and paid his heirs rent after his death. Held, in a suit brought by the heirs other than the certificated purchaser against the tenant for arrears of rent making the certificated purchaser a pro forma deft., the latter supported him.

Held, that the suit was not barred by S. 66, C P. C. 24 CWN 51 : 54 Ind Cas 127 : AIR (Vol 7) 1920 Cal 48 (DB).

——**S. 66 — Third parties — Property mortgaged by judgment-debtor — Sale in execution — Suit by mortgagee against the judgment-debtor and execution purchaser.**

In execution of a money-decree a decree-holder attached immoveable property of his judgment-debtor. The latter mortgaged it to the plaintiff to pay off the decree amount. The property was sold in execution. Plaintiff brought a suit on his mortgage against the judgment-debtor and the execution purchaser.

Held, that the suit was not barred by S. 66, C. P. C. 37 MLJ 586 : 54 Ind Cas 967 : AIR (Vol 7) 1920 Mad 422 (DB).

——**S. 66 — Third parties — Rival claimants from purchaser.**

S. 317 of the Code (old) does not apply to persons claiming through the certified purchaser. 46 Ind Cas 216 : AIR (Vol 6) 1919 Cal 979 (DB).

——**S. 66 and O. 21, Rr. 98 to 103 — Third parties — Certified benami purchaser suing in ejectment.**

A person who derives his title from a judgment-debtor and who has obstructed a certified benami purchaser at an execution sale in getting possession cannot be successfully sued in ejectment by the certified benami purchaser, and S. 66 of the Code gives no such power of suing, being inapplicable to the case of a purchaser seeking to oust another from possession. 4 LW 609 : 31 MLJ 877 : 37 Ind Cas 497 : AIR (Vol 5) 1918 Mad 1258 (DB).

——**S. 66 (S. 317 of old Code) — No bar — Purchase for plaintiff — Certified purchaser admitting plaintiff's title — Defendants claiming under independent title — "Suit against certified purchaser, etc."**

Where there is no contest between the plaintiff and the certified purchaser, and the defendants other than the certified purchaser claim under an independent title, S. 317 does not bar the suit of the plaintiff claiming the property on the ground that the purchase is benami for him. In such a case there is no "suit against the certified purchaser on the ground that the purchase was made on behalf of another person" within the

meaning of S. 317, C. P. C. (1901) 13 MLJ 354 (355) (DB).

17. Trust.

——S. 66 — **Adverse possession — B purchasing property at auction sale with C's money in 1876 — After purchase B giving all profits from the property to C for 15 years — B must be deemed to be trustee for C and C is entitled to declaration of right to and possession of property — Also C can be deemed to have acquired right to property by adverse possession.**

A mortgage was executed in 1872 in favour of B, who was the uncle of C, a minor, and who managed C's property during the minority of C. The mortgage money belonged to C. B brought a suit on the mortgage and purchased the property in his name in 1876. Thereafter B used to pay all the profits arising out of the property to C till 1899 though the property was mutated in B's name. Thereafter B stopped paying the profits to C and C brought a suit for declaration of right to and for absolute possession of the property. It was, however, found that C did not receive the profits for 15 years prior to suit:

Held, that B's right arising from the auction sale in his favour cannot be questioned by C, having regard to S. 66. It is, however, permissible for C claiming title, not on the ground that he was the real auction-purchaser but on the ground that B should be deemed to have constituted himself a trustee immediately after he became the auction-purchaser in 1878 and he gave effect to the trust by payment of the entire profits tc C, no instrument for creating a trust being necessary in 1878. Further 12 years enjoyment by C as beneficiary conferred a prescriptive right on C. Though C did not receive the profits for 15 years prior to the suit, he having acquired the title under the trust or by adverse possession, cannot lose the title unless it was proved that B resumed possession and held it adversely to C for 12 years. AIR (Vol 21) 1934 All 990 : 4 AWR 676.

——S. 66 — **Applicability of — Two persons claiming under a 'Benami' purchase.**

Where at an auction, a person purchased property in the name of one and it was alleged by another that it was in trust for him, a suit between these two claimants is not within the prohibition contemplated by S. 66. AIR (V 4) 1917 Mad 365: 3 LW 233: (1916) 1 MWN 184: 33 Ind Cas 1000 (DB).

——S. 66 — **Possession — Real owner — Suit against — Trust — Transfer of title.**

A Court auction-purchaser must be treated as the real purchaser for all purposes where the suit is brought against and not by him (or those claiming under him) excepting in the case provided for by S. 66 (2), C. P. C. Mere consent or mere permission to hold possession given after the Transfer of Property Act cannot transfer title from one party to another and the latter cannot sue. The auction purchaser is not a trustee for the real purchaser unless a trust has been created under S. 5 of the Trusts Act. AIR (V 3) 1916 Mad 657 : (1915) MWN 204: 17 MLT 158: 28 MLJ 251: 28 Ind Cas 205 (DB).

——S. 66 and O. 21, R. 72 — **Trust — Decree-holder, if can enforce.**

A decree-holder not being allowed to purchase property at auction sale, asked a third person to purchase it for him. His claim to have the property transferred to him on the ground that the purchaser had borrowed the money from him and had promised to convey the property to him cannot be maintained under S. 294, C. P. C. (1882). Nor can he ask for refunds of the purchase money according to S. 317, C. P. C. 1882. The purchaser cannot be held to be trustee for the money. (1910) 7 ALJ 623 : 6 Ind Cas 404 (DB).

——S. 67.

See also Civil P. C., Ss. 54 and 68 to 72.

——S. 67 (2) — **Rule under, promulgated by Coorg Local Government — Rule, if restrains execution of Coorg decree for money by sale of land when it is transferred for execution in British India.**

The rule embodying the restriction upon sales of land in execution of decrees of Civil Courts applies only to sales of land within the jurisdiction of the Local Government of Coorg. It cannot be read as restraining the execution of a Coorg decree for money by the sale of lands even when the decree has been transferred for execution in British India. AIR (V 28) 1941 Mad 45 : (1940) MWN 861 : (1940) 2 MLJ 420 : 52 MLW 851 : 193 Ind Cas 46.

——S. 67 — **(As amended by Act 1 of 1914) — Commissioner's sanction.**

Where the Local Government had not issued any notification in accordance with S. 3 of Act I of 1914, that the special rules as to sale of agricultural land framed under S. 327 of the Code of 1882 was in force,

Held, that the sanction of the Commissioner was not necessary as a condition precedent to the sale of agricultural land. AIR (V 8) 1921 Lah 223 (2) : 66 Ind Cas 893 : 3 LLJ 5.

——S. 67 — **Sale of agricultural land in execution of decree — Sanction of Commissioner.**

The sanction of the Commissioner is no longer required for the sale in execution of a decree of land applied to agricultural or pastoral purposes. S 327 of the C. P. C., 1882, has not been re-enacted in the new Code and hence the special rules under it have no application since the passing of the new Code. (1910) 4 PR (Rev.) 1910 : 117 PLR 1910 : 7 Ind Cas 495.

——S. 67 — **Sanction of Commissioner to sale of agricultural land in execution — Unnecessary.**

The section re-enacts only the first paragraph of S. 327 of the old Code and has omitted the second paragraph. From the date when the Civil Procedure Code came into force, the sanction of the Commissioner of the Division is not required for the sale of agricultural land in execution of a decree for money. (1913) 15 Bom LR 249 : 19 Ind Cas 480 (DB).

——S. 68.

See also Civil P.C., Ss. 51, 54, 67 and 69 to 72.

1. **Agricultural land.**
2. **Alienation by Judgment-debtor.**
3. **Ancestral land.**
4. **Applicability and Scope.**
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8. **Limitation.**
9. **Non-transferable property.**
10. **Notification — Applicability.**
11. **Objection — Jurisdiction to consider.**
12. **Recall of cases.**

1. Agricultural land.

——S. 68 — **Notification under — Property devolving on non-agriculturist — Notification, if applies.**

Notification issued under Section 68 does not apply to a decree passed against an agriculturist when the property has devolved on a non-agriculturist at the time when it is to be sold in execution. Consequently, sale proceedings are not void merely because they are conducted not by

Collector but by Civil Court. AIR (Vol 30) 1943 Bom 127: 45 Bom LR 248: 207 Ind Cas 335.

——S. 68 — U. P. Government Notification No. 576-1-A-93, dated March 26, 1932 — Applicability — Decree-holder asking for sale of agricultural land — Decree, if to be transferred to Collector.

The words "in cases in which Civil Court has ordered ....." in the U. P. Government Notification No. 576-1-A-93 of March 26, 1932, apply to all cases where a Court executing decree orders agricultural land to be sold. All that the Court to which an application for execution of a decree has been made has to see is whether it is a case in which a decree-holder asks for the sale of the agricultural property, and if that is the case, the decree has to be transferred to the Collector for execution as soon as the Court orders that the property should be sold. Where the property sought to be sold is agricultural, the decree should be transferred to the Collector. AIR (Vol 21) 1934 All 253: 3 AWR 579: 147 Ind Cas 1201 (DB).

2. Alienation by Judgment-debtor.

——S. 68, Sch. III, Para. 11 — Mortgage decree — Property ancestral and revenue paying — Transfer of, to Collector — Mortgage of property, without his permission.

Where the property is ancestral and revenue-paying, execution of the mortgage decree should, under the law, be transferred to the Collector under S. 68.

And where after the decree is so transferred for execution, the judgment-debtor mortgages the property in execution at a time when the Collector is seized of the case, the mortgage deed is incompetent under Paragraph 11 of Sch. III unless it can be shown that it was executed after obtaining the written permission of the Collector. AIR (Vol 24) 1937 Oudh 517: 1937 OWN 1096: 171 Ind Cas 296 (DB).

——S. 68, Sch. III, Paras. 11, 10 — Villages attached — Decree satisfied by sale of some — Rest of villages, if can be transferred by judgment-debtor.

So long as a property is under the management of the Collector under Section 68, Civil P. C., any transfer of it by the judgment-debtor is wholly void. Where some of the villages are under the management of the Collector for satisfaction of a decretal amount of a certain decree-holder and this amount is satisfied by auction sale of some of the villages, it cannot be said that the remaining property is liable to be transferred by the judgment-debtor. Until the sale by the Collector is confirmed, his powers and duties under Sch. III, Para. 11, Civil P. C., do not cease and until then the property is under his management. AIR (Vol 24) 1937 Oudh 410: 1937 OWN 784: 13 Luck 531: 169 Ind Cas 785 (DB).

3. Ancestral land.

——S. 68 — Ancestral property — Sale of grove with houses.

An ancestral grove with a house which have been assessed by Government can be sold in execution by the Collector only. AIR (Vol 1) 1914 All 339: 36 All 33: 11 ALJ 1009: 21 Ind Cas 831 (DB).

——Ss. 68, 70, 71, (Ss. 320, 325 A of old Code) — Ancestral property — Execution of decree — Property taken under management of the Collector — Disabilities of proprietor pending term of management.

In pursuance of the powers conferred upon him by rules framed by Government under Section 320 of the C. P. C., the Collector sanctioned a lease of certain zamindari property of the judgment-debtor for a period of seventeen years, the lease being executed in the name of the judgment-debtor but with the permission of the Collector.

Held, that the disabilities imposed by the first paragraph of Section 325-A of the Code affected the judgment-debtor during the pendency of such lease; and (Semble) that such disabilities continued so long as any of the debts for the satisfaction of which the judgment-debtor's property was taken under management by the Collector remained unpaid. (1907) 1907 AWN 112: 29 A 415 (417) (DB).

——S. 68, (S. 320 Old Code) — Execution of decree — Sale of ancestral property — Rules framed by Local Government — Application under Rule 17 (XIII-A).

One of several co-owners of ancestral property which had been sold by the Collector under the rules framed by the Local Government under Section 320 of the Code of Civil Procedure applied under Rule 17 (XII) to have the sale set aside upon the ground of material irregularities in the conduct of the sale causing substantial loss. Another of such co-owners, whilst the first application was pending, applied under Rule 17 (XIII-A) to have the sale set aside, making at the same time the necessary payments into Court required by the rule.

Held, that upon the presentation of the latter application under Rule 17 (XIII-A) the Collector was bound to set aside the sale, and was in no way precluded from so doing by the existence of the former application under Rule 17 (XII). (1908) 1908 AWN 77: 5 ALJ 253: 30 A 192 (DB).

——Ss. 68, 70, 71, (S. 320 of Old Code) — Execution of decree — Property to be sold ancestral in part — Transfer to Collector (Local Government Notification No. 671 of August 31, 1880):

Held, that where the Civil Court is satisfied that the land which is ordered to be sold or any portion of it is ancestral, it should transfer the decree for execution to the Collector so far as regards ancestral land only. (1906) 1906 AWN 143 : 28 A 631 (DB).

4. Applicability and Scope.

——Ss. 68 to 72 — Applicability to decrees of Revenue Court.

Sections 68 to 72 apply to decrees passed by Civil Courts, the execution of which is transferred to the Collector in accordance with the provisions of Section 68, and do not apply to cases in which the decree has been passed by a Revenue Court. AIR (Vol 29) 1942 All 257: 1942 ALJ 416: 1942 AWR HC 155: 1942 RD 760: ILR (1942) All 237: 203 Ind Cas 93 (DB).

——S. 68 — Where there is a declaration under S. 68 in force, Section 72 does not apply. AIR (Vol 25) 1938 All 290: 1938 ALJ 444: 1938 AWR 310: ILR (1938) All 528: 175 Ind Cas 238 (FB).

——S. 68 — Transfer when not possible.

Simple money decree — No immovable property ordered to be sold in execution — Decree cannot be transferred to Collector. AIR (Vol 13) 1926 Oudh 318: 92 Ind Cas 906 (DB).

5. Collector's Power.

——Ss. 68, 71, O. 21, R. 2 — Decree sent to Collector for execution — Application for adjustment.

A Collector to whom a decree is sent for execution, under Section 68, is not a Court whose duty it is to execute a decree within R. 2, O. 21. The power to record adjustments under O. 21, R. 2,

is not conferred by rules on the Collector. Powers which are not conferred on the Collector are exercisable by the Civil Court and, therefore, the judgment-debtor's application to the Civil Court is competent. AIR (Vol 23) 1936 Bom 277: 38 Bom LR 505: 60 Bom 729: 164 Ind Cas 9 (DB).

——**Ss. 68 to 72, Sch. III — Collector executing decree, if can go behind it — Validity of decree — Question whether land is liable to attachment.**

It is not open to the Collector executing a decree transferred to him for execution to allow the validity of the order for sale to be questioned. In that respect he can be in no better position than a Court executing a decree transferred to it; he cannot go behind the decree.

The mere fact that the carrying out of the Court's order has been delegated to the Collector cannot deprive the Court of jurisdiction to consider the validity of the order.

The Civil Court retains jurisdiction and consequently the appeal lies, over the question whether the lands are liable to be attached in execution and whether the appellant has a saleable interest in them; such questions cannot be determined by the Collector. AIR (Vol 23) 1936 Bom 227: 38 Bom LR 221: 60 Bom 516: 163 Ind Cas 305 (DB).

——S. 68 — Collector acting under Section 68, has inherent power to recall his own order confirming sale if he is satisfied that the order ought to be re-called in order to secure the ends of justice. AIR (Vol 22) 1935 All 868: 1935 ALJ 919: 1935 AWR 1021: 58 All 249: 158 Ind Cas 753 (DB).

——**S. 68 — Mamlatdar.**

Mamlatdar holding sale in course of execution proceedings sent to the Collector — Judgment-debtor producing receipt of adjustment of decree and asking for adjournment — Receipt suspected to be forged:

Held, that the Mamlatdar was acting merely as an agent for executing the decree of the Court of the Subordinate Judge and was not exercising the functions of the Court under Order XXI, Rule 2, Civil P. C. which could not be delegated to the Collector or his Subordinates. AIR (Vol 22) 1935 Bom 158: 37 Bom LR 93: 59 Bom 345: 156 Ind Cas 752: 36 Cr LJ 1005 (DB).

——**S. 68 — Sale taking place in Civil Court — Collector, if empowered to set aside sale.**

Under the provisions of S. 68, the Local Government has no power to transfer to the Collector an execution case pending in a Civil Court in which that Court has already sold the property but the sale has not been confirmed. The power of the Local Government is confined only to those cases in which the property has not been sold but only an order for sale has been passed.

Under the law, the Collector has no power to confirm or set aside a sale which has been lawfully made by a Court of competent jurisdiction. The powers of the Civil Collector are confined to sales which have been made by his own Court and not by the Civil Court. He has no jurisdiction to set aside a sale which has been made by the Civil Court. AIR (Vol 21) 1934 Oudh 143: 11 OWN 411: 9 Luck 554: 148 Ind Cas 464 (DB).

——**S. 68 — Court.**

Nowhere in the Civil Procedure Code it is enacted that a Collector is a Court. AIR (Vol 20) 1933 Bom 369: 35 Bom LR 761: 149 Ind Cas 507 (DB).

——**S. 68 — Transfer of decree to Collector for execution — Effect of.**

Section 68 does not state that on transfer the Collector shall become the Court executing the decree. The powers conferred by the Code on the Court executing the decree remain with that Court and do not pass to the Collector. AIR (Vol 18) 1931 All 320 (2): 1931 ALJ 166: 133 Ind Cas 609 (DB).

——**S. 68 — Interference with orders of Collector.**

Once the execution of the decree has been transferred to a revenue court, the civil court cannot interfere with the orders passed by the Collector or rectify mistakes committed by him. AIR (Vol 15) 1928 All 558: 50 All 827: 26 ALJ 769: 115 Ind Cas 125 (DB).

——S. 68 — A Collector, executing a decree under S. 9, C. P. Tenancy Act, and S. 68, C. P. Code, is a judge of a civil court to which the decree has been transferred for execution, but his powers are limited to those which the court from which the decree was transferred to him could exercise in the execution of the decree only. He has no power to enquire into the objections to attachment or applications for rateable distribution or matters of that kind. AIR (Vol 15) 1928 Nag 297 (2): 109 Ind Cas 381.

——**Ss. 68, 70, 71 (S. 320 of old Code) — Appeal — Collector's orders in execution — Appeal.**

No appeal lies to the High Court from an order passed by the Collector in an execution proceeding transferred to him under S. 320. (1905) 7 Bom LR 682 (683) (DB).

6. Court's Jurisdiction.

——**S. 68 — Notification transferring execution to Collector — Sale by Civil Court, if void.**

It is declared by notification that a decree for sale of a particular kind of property should be transferred to the Collector for execution; a sale of the property, if made by a Civil Court, is void; and such a notification ousts the jurisdiction of the Court so far as regards the execution of the decree. AIR (Vol 21) 1934 All 314: 1934 ALJ 859: 3 AWR 545: 151 Ind Cas 244 (DB).

——**S. 68, Sch. III, Para. 11 — Decree transferred to Collector — Order passed by Collector — Interference by Civil Court.**

When a decree is transferred to a Collector for execution under S. 68, and an order is passed by him under Sch. III in respect of the decree, the order should not be interfered with by Civil Court. AIR (Vol 20) 1933 Bom 369: 35 Bom LR 761: 148 Ind Cas 507 (DB).

——**S. 68 — Powers of Civil Court after transfer.**

Where once the case has been transferred to the Collector, the civil court has no power to pass any order in that case. In spite of the sale having taken place, it is for the Collector to decide whether he would re-sell the property or not in order to realise the balance of the purchase money. Under rules framed by Local Government (Rule No. 26), it is entirely in the discretion of the Collector to decide whether he would or would not realise the balance of the purchase money by re-sale. AIR (Vol 11) 1924 All 704: 83 Ind Cas 766: 46 All 562: 22 ALJ 452: 5 LRA Civ. 350 (DB).

——**Ss. 68, 69, 70 and 71 — Relations between Civil Court and Collector.**

When a decree is transferred for execution to the Collector the Civil Court cannot interfere in a matter which the Collector can decide but its power to interfere with matters outside the Collector's jurisdiction is unaffected. A suit to set aside a sale which would lie but for the transfer, would lie in spite of the transfer. (1909) 5 NLR 121: 3 Ind Cas 572.

7. Interest in immovable property.

——**S. 68 and U. P. Notification of 1936 thereunder — Civil Court cannot sell grove-holder's interest in mango grove in execution of decree.**

It is clear from the notification dated 8th October 1936 that an agricultural land or any in-

terest in agricultural land can be sold only by the Collector and not by the Civil Court.

A grove-holder has certainly some interest in the grove-land which is included in the term "agricultural land"; and the sale of a mango grove cannot be said to be the sale of standing timber which, under the notification, is not agricultural land. Therefore, a Civil Court has no right to sell a grove-holder's interest in a mango grove in execution of a decree. AIR (Vol 33) 1946 All 483.

8. Limitation.

——S. 68 — Limitation Act, 1908, Art. 182 — Execution.

Where a decree is transferred to a Collector under S. 68, Civil P. C., the application for execution remains pending throughout the period when the papers are in the Court of the Collector. AIR (V 32) 1945 Oudh 110: 1944 OWN 169: 220 Ind Cas 17 (DB).

9. Non-transferable property.

——S. 68, Sch. III, O. XXI, R. 11 (j) — C. P. Land Alienation Act (II of 1916), Ss. 16, 4 — Non-transferable property — Collector, if has jurisdiction over it — Property not capable of being sold compulsorily — Attachment, if effective.

It is only when the property that is attached is capable of being sold and is a revenue-paying estate that the Civil Court can transfer the decree to the Collector with a clear direction to sell the land. If the property is non-transferable, no Civil Court is competent to transfer the decree for execution to the Collector as it cannot legally direct the sale of the property in execution of its decree. The Civil Court's order to sell the property is what clothes the Collector with jurisdiction. When the Court cannot order sale, the Collector can have no jurisdiction over the property.

Where property cannot be voluntarily sold on the one hand and cannot be compulsorily sold in execution on the other, mere attachment can have no meaning. The attachment is always with a view to compulsory sale by the Court and the prevention of voluntary private sale. When the property is not alienable by a coercive process of law, the Court can have no jurisdiction to attach the property. The jurisdiction is conferred on the Court to administer relief to the decree-holder by sale of the judgment-debtor's property and when the Court is unable to grant that relief, the mere attachment of the property would be idle if it cannot be followed by sale. AIR (Vol 22) 1935 Nag 133: 31 NLR 239: 156 Ind Cas 65.

10. Notification — Applicability.

——S. 68 — Notification rescinding previous declaration conferring jurisdiction on Collector is intra vires and applies to pending executions.

The Notification No. 2937-2890-XII, dated September 17, 1943 C. P. Gazette under Section 68 issued by the Provincial Government is intra vires and subject to the reservations contained in the notification the Collector will cease to exercise any power to execute decrees even in pending cases. The change effected was merely a change in procedure, and did not affect any vested right. AIR (Vol 31) 1944 Nag 188: 1944 NLJ 139: ILR (1944) Nag 331: 219 Ind Cas 58 (DB).

——S. 68 — Notification under, by Punjab Government, No. 365-R (Revenue Department) dated January 17, 1939 — Applicability to pending execution in which order for sale has been passed.

Notification No. 365-R (Revenue Department) dated January 17, 1939, published by the Punjab Government under S. 68, C. P. C., applies even to pending execution proceedings in which an order for sale of such land has been passed, provided of course the sale had not been actually carried out before the notification.

The executing Court does not become 'functus officio' entirely after land covered by the notification is ordered to be sold. It is not, therefore, necessary to transfer the execution of the decree as a whole to the Collector merely because some land falling within the purview of the notification issued by the Punjab Government under S. 68 had been ordered to be sold. However, as soon as any "land" falling within the purview of the notification is ordered to be sold, the execution of the decree, so far as that land is concerned, must be transferred to the Collector. AIR (Vol 27) 1940 Lah 346: 191 Ind Cas 704.

——S. 68 — Date on which status of judgment-debtor is to be considered.

Section 68 and the rules made thereunder require that when an order for sale is passed and the judgment-debtor is an agriculturist, the proceedings should be transferred to the Collector for execution of that order; in other words, the date at which the status of the judgment-debtor is to be considered is the date when the order for sale is passed. AIR (Vol 26) 1939 Bom 526: 41 Bom LR 1166: 186 Ind Cas 61.

——S. 68 — U. P. Government Notification No. 576-1-A-93 of 1932 — Scope of — Whether applies to case in which a sale has already taken place.

U. P. Government Notification N. 576-1-A-93 published in the 'Government Gazette' of March 26, 1932, Part I is not applicable to those cases in which the sale had already taken place in pursuance of an order passed by the Court in execution before the date on which the notification came into force, although a sale by a Civil Court of agricultural property, after the date of the above-mentioned notification, would be a nullity. AIR (Vol 21) 1934 Oudh 143: 11 OWN 411: 9 Luck 554: 148 Ind Cas 464 (DB).

——Ss. 68 to 71 — Applicability.

Sections 68 to 71, C. P. Code, have no application in the Punjab as no notification by the Local Government has been issued as is contemplated under S. 68. AIR (Vol 15) 1928 Lah 475: 110 Ind Cas 173.

——S. 68 — Agricultural land.

Agricultural land cannot be attached and decree cannot be transferred to Collector for realizing decretal amount even otherwise than by sale. AIR (Vol 13) 1926 All 339: 48 All 392: 24 ALJ 397: 93 Ind Cas 1020 (DB).

11. Objection — Jurisdiction to consider.

——S. 68 — Jurisdiction of Collector — Order by executing Court staying sale — When takes effect — Sale by Collector in ignorance and before communication of order to Collector — If null and void. See 52 Bom LR 294. AIR (Vol 37) 1950 Bom 260.

——Ss. 68, 47 — Objection to sale on grounds of irregularity and fraud.

Execution—Transfer of decree to Collector for sale of ancestral property — Sale by Collector — Objection to sale on grounds of irregularity is cognisable by Collector only — Objection on ground of fraud falls under S. 47 and can be entertained by execution Court and not by Collector. AIR (Vol 25) 1938 Oudh 188: 1938 OWN 758: 1928 OLR 371: 14 Luck 213: 177 Ind Cas 77 (DB).

——S. 68, O. 21, R. 90 — Sale by Collector on transfer to him of decree — Validity, if can be considered — Application under O. 21, R. 90 — Substantial injury.

In cases in which the execution of decrees is, in accordance with S. 68, transferred to the Collec-

tor, an objection to the validity of a sale on any ground whatsoever cannot be entertained by the Court executing the decree. It is not open in such a case either to the decree-holder or to the judgment-debtor to assail the validity of the sale by means of an application under S. 47. If the sale is held by the Collector and it is null and void, neither the Collector nor the execution Court can set aside the sale on that ground irrespective of the fact whether the decree-holder or a third person is the auction-purchaser, and a suit by the aggrieved party to set aside the sale on the ground that it was a nullity is maintainable.

Judgment-debtor applied to set aside the sale and the ground for setting aside the sale as mentioned in the application was, that there was material irregularity in conducting the sale that had resulted in substantial injury to the judgment-debtor. The application went on to state that the sale was illegal and irregular, but the validity of the sale was not assailed by the judgment-debtor on the ground that the sale was null and void. The Court that accepted the bid of the decree-holder had undoubtedly jurisdiction to hold the sale and property that was sold was liable to sale:

Held, that the application of the judgment-debtor for setting aside the sale was not only in fact but in substance as well, under O. 21, R. 90, and, therefore, not an application under S. 47. The application could, therefore, be allowed only if the judgment-debtor succeeded in proving, not only material irregularity in publishing and conducting the sale, but also the fact that substantial injury had resulted to him by reason of that irregularity. AIR (Vol 24) 1937 All 407: 1937 ALJ 288: 1937 AWR 262: 170 Ind Cas 559 (DB).

——S. 68 — Suit against sale by Collector — Rules made by Local Government, U.P. Rules 30, 31, 32 (3) — Suit to set aside sale confirmed by Collector does not lie.

At an auction-sale B. and T. bid for the property, T. asserting himself, to be a co-sharer capped each bid as it was made with a bid of a correspondingly equal sum intending to exercise the preferential right which is accorded to a co-sharer by C. P. Code, O. 21, R. 88. In due course the matter came before the Collector for the confirmation of sale. Notices were served on both B. and T., but T. remained absent and did not substantiate his allegation about co-sharership. The sale was therefore confirmed in favour of B. T. thereafter sued B. for a declaration that by virtue of right of preemption T. was the owner of shares and also, that the sale certificate in favour of B. was ineffectual against T. and for possession.

Held, that, as T. was the person against whom the order of confirmation of sale was made, rule 32, clause 3, operates as a bar to the suit. AIR (Vol 10) 1923 All 186: 4 LRA Civ 43: 21 ALJ 53: 45 All 203: 79 Ind Cas 82 (FB).

12. Recall of Cases.

——Ss. 68, 47 — Decree transferred to Collector for execution — Jurisdiction of Court passing decree — Stay of proceedings before Collector ordered — Sale and subsequent confirmation, held invalid.

The transfer of a decree to the Collector does not oust the jurisdiction of the Civil Court in all matters.

After such a transfer the judgment-debtor applied to the Court which passed the decree for payment of the decree by instalments under S. 11, C. P. Moneylenders' Act. The Court entertained the application and ordered the stay of the proceedings before the Collector. But the stay order was not communicated to the Collector with the result that the Collector held the sale and confirmed it:

Held, that the order of the Civil Court must be construed as an order recalling the decree and the Collector ceased to have jurisdiction to sell or to confirm the sale after the Court passing the decree recalled it. Consequently, the power of the Collector to proceed with the case was suspended by virtue of the order made by the Court passing the decree;

Held, also that when the Civil Court exercised its authority and recalled the decree, its order recalling the decree by its own force deprived the Collector of the power to execute the decree and the Civil Court's order came into effect as soon as it was passed so as to suspend the Collector's power to proceed with the sale. AIR (Vol 27) 1940 Nag 372: 1940 NLJ 473: 193 Ind Cas 274.

——S. 68 — U. P. Government Notification, R. 3 — Court passing decree, recalling it under R. 3 — Jurisdiction of Collector to confirm sale during subsistence of order of recall.

The Collector ceases to have jurisdiction to sell or to confirm the sale, if one has already taken place, after the Court passing the decree recalls it under R. 3 of the U. P. Government Notification in respect of sale under S. 68. Anything done by the Collector during the time that the order of recall subsists is without jurisdiction. AIR (Vol 24) 1937 All 550: 1937 ALJ 723: 1937 RD 365: ILR (1937) All 766: 1937 AWR 608: 171 Ind Cas 359 (DB).

——S. 69.

See also C. P. C. Ss. 68, 70 to 72 and Sch. III.

——S. 69 — Sale held but no confirmation — Order prohibiting sale would prohibit confirmation.

Confirmation of a sale is an integral part of the transaction of sale. Consequently, an order prohibiting sale would prohibit confirmation of sale which had already taken place but which had not been confirmed before the passing of the prohibitory order. AIR (Vol 27) 1940 Pat 565: 6 BR 630: 188 Ind Cas 269 (DB).

——Ss. 69, 70, Sch. III, Para 11(2) — Sale under Sch. III, Para 11 (2) — Civil Court, if has jurisdiction to issue warrant for arrest of judgment-debtor.

Where a sale is being held by the Collector in exercise of his powers under Sch. III, Para. 11 (2), the jurisdiction of the Civil Court which passed the decree, to issue any process in execution either against the person of the judgment-debtor or his property is barred. (1936) 160 Ind Cas 723: 18 NLJ 138

——S. 69 — Injunction after transfer.

Where the execution proceedings have gone into the hands of the Deputy Commissioner the issue of an injunction to the Court which passed the decree originally, is obviously, futile. AIR (Vol 16) 1929 Oudh 235: 6 OWN 226: 117 Ind Cas 471: 4 Luck 635 (DB).

——Ss. 69 and 70 — Collector — Powers of.

The Collector must decide the best method of satisfying the decree whether by management by the Collector himself or by sale or by letting. But he has not got the discretion to decide whether the decree has been satisfied. (1913) 37 Bom 32: 14 Bom LR 787: 17 Ind Cas 142 (DB).

——S. 70.

——Ss. 70, 69 — Execution transferred to Collector — Stay of execution.

Sub-section (2) of S. 70 does not exclude the jurisdiction of the Chief Court to pass an order directing stay of sale. In cases which are not covered by the provisions of the third schedule

of the rules framed under that section, the jurisdiction of the Civil Court is not ousted and the Civil Court is the only Court competent to determine matters arising in execution.

Where the execution of the decree by sale of the property (e.g., grove) has been questioned in the appeal, the Chief Court is competent to pass an order staying execution of the decree and 'a fortiori' to stay the sale even if the execution is transferred to the Collector for execution. AIR (Vol 30) 1943 Oudh 265: 1943 OWN 28: 1943 AWR 3: 204 Ind Cas 569 (DB).

——S. 70 — Rules under.

Rules by U. P. Revenue Department — The jurisdiction of Collector and Commissioner is restricted by Rr. 998 and 1011 — They have no jurisdiction to confirm or set aside a sale except under the terms of R. 998. (AIR Vol 25) 1938 Oudh 62: 1938 OWN 40: 172 Ind Cas 655 (DB).

——S. 70, Sch. III — S. 71, if alters powers of judicial officer — Court's authority to see that Collector does not exceed his powers.

Per Tyabji, J. — Section 71, Civil P. C., does not alter the essential nature of the powers exercised by the Collector. What S. 71 does is to throw the same protection on the Collector and his subordinates as that which guards judicial officers.

The authority to see that the Collector does not exceed his powers continues in the Court, though R. 17 made by the Local Government (Bom.), precludes appeals to the Civil Courts against orders passed in the exercise of jurisdiction derived from Sch. III or the rules made under S. 70, Civil P. C. AIR (Vol 23) 1936 Bom 227: 38 Bom LR 221: 60 Bom 516: 163 Ind Cas 305 (DB).

——S. 70 — Bombay Local Government Rules, Rr. 11 and 15 — O. XXI, R. 72, Civil P. C.

When execution proceedings are transferred to the collector for sale of immovable property & the judgment-debtor is a minor, a Civil Court has power to give permission to the decree-holder to bid at the sale. AIR (Vol 23) 1936 Bom 189: 38 Bom LR 276: 60 B 688: 162 Ind Cas 806 (DB).

——S. 70 — Execution transferred to Collector under S. 68 — Sale confirmed — Collector satisfied that by fraud decree-holder kept judgment-debtor ignorant of proceedings — Collector setting aside sale — Propriety of order cannot be questioned in Civil Court.

A Collector has jurisdiction to set aside the sale of immovable property held in execution of a decree transferred to him by Civil Court in accordance with the provisions of S. 68, Civil P. C., after the sale has been confirmed by him and the record of the execution case has been retransmitted to the Civil Court, if he is satisfied that the decree-holder, by the exercise of fraud, kept the judgment-debtor ignorant of the execution proceedings culminating in the sale of the property and of the confirmation of sale, when as a consequence of his fraud the decree-holder succeeded in purchasing the property of the judgment-debtor for much less than its real value. The propriety of his order cannot be called into question in the Civil Court. AIR (Vol 22) 1935 All 868: 1935 ALJ 919: 1935 AWR 1021: 58 A 249: 158 Ind Cas 753 (DB).

——S. 70 — Sale by Collector — Order by Commissioner for re-sale — Suit to set aside order — Jurisdiction of Civil Court.

When a matter exclusively within the jurisdiction of a Court of Revenue has been tried and decided by the Court as between the parties, no subsequent suit will lie in the Civil Court having for its sole object the annulment of the decree passed by the Court of Revenue. Where the order of the Revenue Court, be it right or wrong, is not without jurisdiction, the Civil Court has no jurisdiction to question its validity. AIR (Vol 19) 1932 Oudh 273 : 9 OWN 610 : 139 Ind Cas 478.

——S. 70 —Jurisdiction after notification of transfer.

The jurisdiction of the Civil Court in the matter of the execution of decrees in cases in which any interest in land used for agricultural purposes or held on a tenure which is recognized at the time of the settlement of such land, or of houses or of other immovable property connected with such land or interest, and used for agricultural purposes is to be sold, is ousted by notification which transfers it to the Collector with effect from 1st April 1927. 103 Ind Cas 884 : AIR (Vol 14) 1927 Nag 324.

——S. 70 —The Collector has no power left to interfere with the sale or to set it aside after it has been confirmed and the decree re-transmitted to the Civil Court, though he can make any correction in the sale certificate to make it conform with the proclamation of sale, if he is approached for the purpose, as a consequential or incidental exercise of the authority vested in him to grant a certificate of sale after the sale is confirmed. The fact that such order, passed without jurisdiction, was upheld by the Board of Revenue in appeal, would make no difference. 48 All 568 : 95 Ind Cas 578 : 24 ALJ 687 : AIR (Vol 13) 1926 All 575 (DB).

——S. 70 — Suit against sale by Collector.

Decree transferred to Collector —Civil Court has no authority in the matter — Suit for declaring sale by Collector null and void is not maintainable. 1 Luck 558 : 13 OLJ 807 : 3 OWN 739 : 97 Ind Cas 1036 : AIR (Vol 13) 1926 Oudh 612 (DB).

——S. 70 — Orders of Collector — Remedies against.

According to rules framed under S. 70(2), Chief Court has neither appellate nor revisional powers over orders passed by Collector. 92 Ind Cas 549 : AIR (Vol 13) 1926 Oudh 288 (DB).

——S. 70 — Collector's powers.

A collector acting under the section is a Revenue Court and can pass order under S. 476, Cr. P. C. 14 ALJ 1077 : 18 Cr.LJ 307 : 38 Ind Cas 419 : AIR (Vol 4) 1917 All 59

——Ss. 70 and 71 — Execution of decree — Decree sent to Collector — Civil Courts, if can interfere.

Where a decree is sent to the Collector for execution, a civil court cannot interfere in matters declared to be in the Collector's jurisdiction, but it is not deprived of its ordinary jurisdiction in regard to other matters because the decree has been sent to the Collector. 46 Ind Cas 885: AIR (Vol 4) 1917 Nag 19.

——S. 70 — Execution — Objections to sale of property — Court, power of, to amend application — Date of application.

On objection being taken to sale of certain properties that the judgment-debtor has no proprietary title to them but only a right to collect and appropriate their revenue the Court acted under S. 70 and R. 3 framed by U. P. Government and without waiting for the result of the petition to the Local Government, the Court allowed the objections and amended the decree-holder's application of sale accordingly. It was held, that the court acted rightly in not waiting for the result of petition to the Local Government and that the Court had power to amend under rule 3 and the date of the application must be taken to be the date on which it was filed and not when it was

amended. AIR (Vol 4) 1917 Oudh 92: 3 OLJ 529: 37 Ind Cas 78 (DB).

——S. 70 (1) — C. P. Rules, R. 15 — Order of Financial Commissioner in revision — Jurisdiction of Civil Court.

An order passed by the financial Commissioner in exercise of his powers of revision under R. 15 of the rules framed by the Provincial Government under S. 70 (1), C. P. Code, against an order of the Collector, is final and Civil Courts have no jurisdiction to interfere with it. By the rules framed by the Provincial Government a precise and self-contained code of appeal is provided in regard to the orders passed in the proceedings before the Collector and the jurisdiction of the Civil Courts has been excluded by implication. AIR (Vol 35) 1948 Nag 14: ILR (1947) Nag 815: 1947 NLJ 483 (DB).

——S. 70 (1) (b) — Powers of Collector — Dismissal and restoration of execution application — Revenue Book Circulars III-8, R. 12.

Though R. 12 of the Revenue Book Circulars III-8 invests the Collector with all the powers of the civil Court executing a decree, the powers are not entirely coterminous with those of the civil Court. He cannot amend the C Form nor can he cancel the C Form and draw one up for himself. He cannot review the orders of the civil Court attaching the property and he cannot hear objections under O. 21, R. 58, C. P. Code. The Collector's powers commence at the stage a C Form is drawn up and he cannot go behind the C Form and his action can have no operation on anything which is prior to the C Form.

There is no provision in the rules enabling the Collector to dismiss an execution case in default. There is nothing to prevent the Collector from terminating proceedings before him and reporting the matter to the civil Court. But dismissing an application for execution, which is not before him, is an entirely different matter. Therefore, such an order of the Collector must be interpreted as merely signifying his inability to proceed with the case. There is nothing to prevent the Collector from resuming the proceedings before he has reported the matter to the civil Court. The termination of the proceedings by him has not the result in law which O. 21, R. 57, C. P. Code, contemplates, and his restoration of the proceedings to the file is permissible under his inherent powers which he derives from S. 151, C. P. Code. The Collector need not issue notice to the judgment-debtor before restoring the case to the file, if the proceedings were terminated by him in the absence of the judgment-debtor. AIR (Vol 36) 1949 Nag 160: ILR (1948) Nag 631 (DB).

——S. 70 (1) (c) — Rules made under by Local Government — Finality of order confirming sale.

The Local Government has power under S. 70, C. P. C. to confer upon the Collector all or any of the powers which a Civil Court might exercise in the execution of a decree if its execution is not transferred to the Collector's Court. If the Local Government makes such rules which give finality to an order of Revenue Court and the Revenue Court confirms the sale of an ancestral property sold in execution of decree, a suit to set aside the sale is not maintainable. AIR (Vol 7) 1920 All 9: 18 ALJ 124: 2 UP LR (HC) 35: 54 Ind Cas 801 (DB).

——S. 70 (2) and O. 21, R. 72 — Bombay Civil Circulars, Chap. II, Cl. 91, sub-cl. 16 — Decree transferred to Collector — Civil Court's power after transfer.

Where a decree is transferred to the Collector for execution, a Civil Court cannot entertain an application under O. 21, R. 72 in as much as that power has been conferred on the Collector by Bombay Civil Circulars, Chap. II, Cl. 91, sub-cl. 16. AIR (Vol 5) 1918 Bom 216: 42 Bom 621: 20 Bom LR 708: 46 Ind Cas 653 (DB).

——S. 71.

It is only when the Collector is authorised to provide for the satisfaction of the decree that he assumes judicial functions under S. 72(2) read with S. 71 and becomes responsible for further proceedings. AIR (Vol 18) 1931 Lah 141: 32 PLR 60: 131 Ind Cas 274.

——S. 72.

See also Civil P. C., Ss. 51, 54 and 68 to 71.

——S. 72 and (Mad) Civil Rules of practice, R. 199 — Leave to bid — Principles that should guide Court in granting.

When leave to bid is asked for by a decree-holder the question to be considered is whether it will be to the advantage of every one concerned that leave to bid ought to be given. The power to grant leave to bid must be cautiously exercised and unless the Court is satisfied from the circumstances shown in the affidavit that otherwise an advantageous sale could not be obtained, no such leave should be granted. Where the affidavit in support of an application for leave to bid merely states that if leave to bid is not given the property might be sold for a low price and petitioner is likely to suffer loss by reason of that, it is not enough to justify any Court to exercise its mind and come to the conclusion that an order for permission to bid asked for may be granted. AIR (Vol 37) 1950 Mad 392: 63 LW 225: (1950) MWN 111: (1950 1 MLJ 111.

——S. 72 — Applicability.

Judgment-debtor's property protected by S. 16, Bundelkhand Land Alienation Act — Civil Court cannot execute decree by granting lease of the land either under S. 51 or under S. 72. AIR (Vol 25) 1938 All 290: 1938 ALJ 444: 1938 AWR 310: ILR (1938) All 528: 175 Ind Cas 238 (FB).

——S. 72 — Applicability.

Section 72 has application only where there is order for sale. Before this section can be applied the property to be sold must be property which the Civl Court is entitled to sell and has ordered to be sold. Where there is a declaration under S. 68 in force S. 72 does not apply. AIR (Vol 25) 1938 All 290: 1938 ALJ 444: 1938 AWR 310: ILR (1938) All 52: 175 Ind Cas 238 (FB).

——S. 72 — Several applications pending against same judgment-debtor — All decree-holders asking for execution by temporary alienation of land — Proper course to be followed.

When several applications for execution are pending against the same judgment-debtor, and all the applications have been made within the time required to give them a right to share in any realizations, it is obviously inequitable to adopt a form of execution which will favour one of the decree-holders at the expense of the rest, and where all decree-holders ask for execution by temporary alienation of the judgment-debtor's land the proper course for the Court is to refer all the applications to the Collector and to ask him to suggest a method of temporary alienation which will provide as far as possible for the satisfaction of these decrees. (1937) 169 Ind Cas 511 (Lah).

——Ss. 72, 68, 51 — Power to order temporary alienation.

The power to order temporary alienation which the Collector possesses can no more be attributed to the Civil Court than the power to order sale under S. 51 to the Collector. AIR (Vol 24) 1937 Nag 41: ILR (1937) Nag 261: 167 Ind Cas 807.

——S. 72 — Course suggested by Collector likely to result only in partial satisfaction of decree — Arrangement, if to be followed — Financial Commissioner's Standing Order No. 64, Para. 16.

Ordinarily, the executing Court must proceed at the instance of the decree-holder until the decree is fully satisfied; and it is only when a statutory bar exists that execution to the full extent can be refused and there is no statutory provision that a judgment-debtor holding land not liable to sale is entitled to have a sufficient area for his maintenance exempted from the farm or lease which an executing Court is empowered to arrange. Standing Order No. 64, Para. 16 of the Financial Commissioner, containing instructions to Collectors refers only to those cases in which the Collector decides to intervene under S. 72, Civil P. C.

Where, therefore, the course suggested by the Collector would result only in partial satisfaction of the decree, the executing Court should not be ordered to follow the advice of the Collector in preference to arrangement made by the executing Court which would go to satisfy the full amount of the decree. AIR (Vol 23) 1936 Lah 30: 37 PLR 629: 158 Ind Cas 842.

——S. 72 — Intervention of Collector — Land protected from sale by special enactment.

The intervention of the Collector contemplated by S. 72 is a preliminary requisite to the application of that section. If the legislature had intended to confer upon the Civil Courts discretion to grant a temporary alienation instead of ordering a sale with or without the intervention of the Collector, there is no reason whatever why any reference should have been made to the intervention of the Collector. Further that section can only be applied in cases where the land is saleable. Where the land is protected from sale by a special enactment, it can have no application. AIR (Vol 23) 1936 Pesh 90: 161 Ind Cas 628 (DB).

——S. 72 — Satisfaction by transfer of judgment-debtor's debt or mortgagee right — Lease of judgment-debtor's land at valuation fixed by Collector.

The Collector has no authority to suggest satisfaction of the decree in part by transfer of certain debts from the judgment-debtor to the decree-holders, or that mortgagee rights should similarly be transferred to the decree-holder. He has furthermore no right to compel the decree-holder himself to take the lands on lease at a valuation fixed by the Collector. AIR (Vol 23) 1936 Pesh 14: 160 Ind Cas 571.

——S. 72 — Revision.

Where the Court fails to exercise judicially the discretion which is vested in it under S. 72, it amounts to material irregularity in the exercise of its jurisdiction and the revsion is competent. AIR (Vol 22) 1935 Lah 964 : 161 Ind Cas 237.

——S. 72 — Procedure when public sale is objectionable — Giving details on such applications to Collector who should be asked to alienate temporarily certain portion for satisfaction of decree.

When more applications than one are pending and the Collector has represented that the public sale of the property under attachment is objectionable, the correct procedure would seem to be for the Court to give the Collector full details of the pending applications and to ask the Collector to suggest a method of temporary alienation which will provide as far as possible for the satisfaction of these decrees. AIR (Vol 22) 1935 Lah 964 : 161 Ind Cas 237.

——S. 72 — Lease — Farm of land in favour of decree-holder for adjustment of decree.

A farm of land in favour of a decree-holder is more in the nature of an adjustment of a decree, the decree-holder receiving a tenure of the land in satisfaction of his decree as a whole, and it stands on a different footing from a lease which is given out either on payment of an initial lump sum, or of rent at stated intervals. A decree-holder may be prepared to surrender his rights under the decree in return for receiving a limited tenure of the land rather than face a continuation of the execution proceedings. AIR (Vol 22) 1935 Lah 964: 161 Ind Cas 237.

——S. 72 — Collector, if can represent that temporary alienation is objectionable — Punjab Alienation of Land Act (XIII of 1900), S. 16.

Section 16, Punjab Alienation of Land Act, prohibits the sale in execution of a decree of land belonging to an agriculturist; it does not however, prohibit its temporary alienation. Under S. 72, the Collector is empowered to represent to the Court that the public sale of land in other cases is objectionable and that a temporary alienation of the land would satisfy the decree. He has, however, no authority to represent that a temporary alienation is objectionable and even if he represents that a public sale is objectionable, it is for the Court to decide whether his objection should be maintained. AIR (Vol 22) 1935 Pesh 113: 157 Ind Cas 953.

——S. 72 — Once the Civil Court has decided to authorize the Collector to provide for the satisfaction of the decree all proceedings thereafter are to be taken by the Collector and the Civil Court becomes 'functus officio'. AIR (Vol 18) 1931 Lah 141: 32 PLR 60: 131 Ind Cas 274.

——S. 72— Presumption — Collector acts judicially.

Paragraph 74 of the Punjab High Court, Vol. 1 of the Rules and Orders, applies to cases which are governed by S. 72, C. P. Code. Under sub-s. (2), S. 72, read with S. 71, C. P. Code, the Collector is to be deemed to be acting judicially, and all objections relating to the proceedings before him must be disposed of by him. AIR (Vol 15) 1928 Lah 475: 110 Ind Cas 173.

——S. 72 — Collector's inability to act.

Decree sent for execution to Collector — Collector reporting his inability to act — Executing Court should not file execution application but should proceed with the execution. AIR (Vol 13) 1926 Lah 682: 96 Ind Cas 199.

——S. 72 — Action of Collector — Administrative.

The Collector when acting under S. 72 of the C. P. C. does not perform any judicial function. If he makes any representation under the section he does so as an officer of the Court and it is within the discretion of the Court to accept or decline to accept such representation. AIR (Vol 7) 1920 Lah 456: 1 Lah 192: 2 Lah LJ 333: 58 Ind Cas 603 (FB).

——S. 72 — Attachment — Intervention of Collector — Power of Court.

The refusal of the Collector to intervene was wrong and the executing Court erred in accepting the position taken by the Collector. Though the land could not be sold in execution, the Court could act under S. 72, C. P. C. AIR (Vol 7) 1920 Lah 443: 52 Ind Cas 356.

——S. 72 — Judgment-debtor member of agricultural tribe — Collector — Power to propose temporary alienation of judgment-debtor's land — Punjab Alienation of Land Act (XIII of 1900), S. 16 (1).

A member of agricutural tribe, was a judgment-debtor under a decree of Civil Court and his land

was attached in execution. The executing Court asked the Collector to intervene. Held, that the Collector had, under S. 72 of the C. P. C. jurisdiction to make a proposal for temporary alienation of land notwithstanding the provision of S. 16(1) of the Punjab Alienation of Land Act. (1919) 51 Ind Cas 399: 1 PR (Rev) 1919.

——S. 72 — **Execution — Sale of Revenue paying land — Collector's sanction, if necessary.**

The sanction of the Revenue authorities is not necessary for the sale of revenue paying land, in execution of a decree. AIR (Vol 5) 1918 Lah 361: 69 PLR 1918: 143 PWR 1918: 46 Ind Cas 864.

——S. 72 — **Decree for sale of land — Power of execution of Courts.**

Where a District Judge, executing a decree for sale of land, orders its sale, he is not bound to accept the recommendation of a Sub-divisional Officer to the Collector to arrange to have the decree satisfied by a temporary alienation. AIR (Vol 2) 1915 Lah 197: 9 PLR 1915: 34 PWR 1915 : 27 Ind Cas 630.

——S. 73.

See also, Civil P. C., Ss. 47, 63, 64 and O. 21, Rr. 52, 72, 89 and 90.

1. **Appeal.**
   See also, Civil P. C., S. 47.
2. **Applicability.**
3. **Appropriation.**
4. **Assets.**
   See also, N. 7.
5. **Attachment.**
   See also, N. 13.
6. **Condition necessary.**
7. **Court.**
   See also N. 10 and 14.
8. **Decree.**
9. **Enquiry.**
10. **Execution.**

10A. **Execution application.**
   See N. 10.

10B. **Insolvency of judgment-debtor.**
   See N. 13.

10C. **Limitation.**
   See N. 20 and 21.

11. **Mode of.**

11A. **Notice.**
   See N. 14.

12. **Person entitled.**
13. **Priority.**
14. **Procedure.**

14A. **Receipt of assets.**
   See N. 4.

15. **Remedy.**
   See also, N. 17 and 21.
16. **Restitution.**
   See also, Civil P. C., S. 144.
17. **Revision.**
18. **Right of encumbrancer.**

18A. **Rival decree-holders.**
   See N. 12.

19. **Same judgment-debtor.**
20. **Scope and object.**
21. **Suit.**
22. **Transfer of decree.**
   See N. 7.

1. **Appeal.**
   See also, Civil P. C, S. 47.

——S. 73 — **Order under S. 73 — Appeal against.**

No appeal lies against an order passed under S. 73, Civil P. C. when the contest in appeal is between the rival decree-holders only and is one in which the judgment-debtor is not interested. An appeal, however, lies if any question arises in the appeal as between the judgment-debtor on one hand, and one or other of the rival decree-holders on the other. AIR (Vol 30) 1943 Nag 320: 1943 NLJ 450: ILR (1943) Nag 562: 209 Ind Cas 281.

——Ss. 73, 47 — Order under S. 73 determining question of rateable distribution between rival decree-holders — Judgment-debtor not interested — Order does not fall under S. 47 and is not appealable. AIR (Vol 28) 1941 Rang 113: 1940 Rang LR 718: 194 Ind Cas 46 (DB).

——S. 73 — Order of rateable distribution affecting not only creditors but also surety and judgment-debtor to a lesser extent — Appeal lies under S 47 read with S. 145. AIR (Vol 26) 1939 Bom 112: 41 Bom LR 176: ILR (1939) Bom 133: 181 Ind Cas 246.

——S. 73 — An order made under S. 73 is an order in execution proceedings & not a decree and is therefore, not appealable. AIR (Vol 25) 1938 Lah 801: 161 Ind Cas 22.

——S. 73 — **Execution application only for rateable distribution rejected.**

Where an application for execution by a decree-holder praying only for rateable distribution is rejected, the order comes under S. 73, and is not appealable. AIR (Vol 25) 1938 Lah 307: 40 PLR 49: 176 Ind Cas 459.

——S. 73 — **Question affecting rival decree-holders — Appeal, if lies — Order under S. 73 affecting judgment-debtor — Whether appealable.**

Where the question is solely between the two rival decree-holders, the decision of that question is purely one under S. 73, and no appeal having been allowed from an order under that section the aggrieved person has no right to appeal. Of course, S. 73 (2) gives him a right of suit. Where, however, the judgment-debtor is directly or indirectly interested in the order under S. 73, it falls under S. 47 as well, and is, therefore, appealable. AIR (Vol 25) 1938 Pesh 63: 1938 Pesh LJ 71: 177 Ind Cas 872 (DB).

——S. 73 — Where an order under S. 73 determines the question of rateable distribution as between rival decree-holders and the judgment-debtor has no interest in it, the order does not fall under S. 47 and is not appealable. AIR (Vol 24) 1937 Rang 134: 169 Ind Cas 644 (DB).

——Ss. 73, 47 — The appellant in execution of his decree applied for the attachment and sale of the property of the judgment-debtor and purchased the property himself at a Court auction. By the amount of his bid the entire decree in his favour was satisfied & he paid in Court only the excess over the decretal amount, i.e., the difference between the decretal amount and the amount of his bid. In the meantime, however, after the auction had taken place but before the amount had been paid in Court or the auction-sale had been confirmed, the respondent made an application for a rateable share in the assets to be realised in execution of the decree of appellant. The lower Court held that the respondent was entitled to a rateable share:

Held, that the order must be deemed to have been passed only under S. 73 and not under S. 47 and hence no appeal lay. AIR (Vol 23) 1936 Lah 181: 162 Ind Cas 309.

——S. 73 — Question relating to dispute between rival decree-holders claiming rateable distribution — Judgment-debtors not interested — Question does not fall under S. 47 — Decision thereon is not appealable — Fact that one of the decree-holders had before obtaining judgment attached the property sold does not bring such a dispute under S. 47. AIR (Vol 23) 1936 Mad 136: 59 Mad 399: 43 MLW 31: 70 MLJ 33: 1936 MWN 44: 160 Ind Cas 573 (DB).

——S. 73 — Disputes between rival decree-holders claiming against each other distribution of assets

or the disputes between the joint decree-holders 'inter se' do not fall under S. 47 and hence the order on the point is not appealable. (Court treated the appeal as revision). AIR (Vol 23) 1936 Oudh 277: 1936 OWN 559: 12 Luck 720: 163 Ind Cas 175 (2) (DB).

——S. 73 — Order in execution determining claims of decree-holders and rateably distributing balance of assets — Whether one under S. 73 — Appeal, if lies — Revision — Competency of.

Where after sale of the attached property the executing Court orders that after satisfaction of the prior claim the balance of the assets should be rateably distributed and the essence of the order is one which determines the rights of the three decree-holders 'inter se' and rateably distributes the assets available amongst them, the order is one under S. 73, and not under S. 47; no appeal lies against the order, and as the aggrieved party has another remedy provided by S. 73(2), the Court will not interfere on the revision side also. AIR (Vol 23) 1936 Pesh 52: 160 Ind Cas 892.

——Ss. 73, 47 — Order ostensibly under S. 73 but deciding matter covered by S. 47 (1).

Although an appeal does not lie against an order passed wholly and simply under S. 73, yet where the order decides, as a fact, a matter covered by S. 47 (1), it may be the subject of appeal though it be passed ostensibly under S. 73. AIR (Vol 22) 1935 Lah 302: 16 L 990: 38 PLR 48: 156 Ind Cas 845 (DB).

——S. 73 —Order between rival decree-holders — Appeal.

An order refusing rateable distribution made under S. 73 between two rival decree-holders, which does not affect or interest the judgment-debtor, is an 'order' in execution proceedings, but is not a 'decree' as all the conditions enumerated in S. 47 of the Code are not present and consequently, is not appealable. AIR (Vol 19) 1932 Lah 96: 33 PLR 89: 134 Ind Cas 195.

——S. 73 — Determination of question of rateable distribution between rival decree-holders — No appeal lies. AIR (Vol 18) 1931 Bom 252: 33 Bom LR 503: 133 Ind Cas 737 (DB); (1910) 12 Bom LR 365: 6 Ind Cas 522 (DB) (Case under old Code).

——S. 73 — Order not refusing rateable distribution but refusing execution of an order for rateable distribution is appealable. AIR (Vol 18) 1931 Pat 359: 12 PLT 477: 10 Pat 830: 133 Ind Cas 166 (DB).

——S. 73 — Letters Patent (Cal.), cl. 15 — "Judgment" — Order not deciding matters finally — Appeal.

A person got an order for payment out to him of money in the hands of the Sheriff. The Judge subsequently set aside this order and directed the Official Referee to hold an enquiry and report as to who, under the provisions of S. 73, were entitled to share in the fund. The minute of the proceedings before the Judge ran as follows: "Order for rateable distribution. Counsel certified. Previous for payment out set aside."

Held. that the order was not appealable under the Letters Patent as it did not finally decide the rights of the parties. AIR (Vol 17) 1930 Cal 623: 57 C 736: 129 Ind Cas 189.

——S. 73 — Procedure — Appeal.

Where the matter before the Court is one under S. 73 and the Court proceeds to decide the question under that section though finally the order passed is not such as is contemplated by S. 73 the order is not appealable. AIR (Vol 16) 1929 Lah 645: 118 Ind Cas 908.

——S. 73 — Order under S. 73 is not a decree.

An order under S. 73 is an order in execution proceedings but it is not a decree unless all the conditions enumerated in S. 47 are present, and a question arising between rival decree-holders which does not affect or interest the judgment-debtor is not a question which arises between the parties to the suit in which the decree under execution was passed and so the decision of such question is not appealable. AIR (Vol 16) 1929 Rang 198: 120 Ind Cas 693.

——S. 73 — No appeal lies against an order passed wholly and simply under S. 73 of the Code. But an order which does, as a fact, decide a matter covered by S. 47 (1) may, although it be passed ostensibly under S. 73, be the subject of appeal.

Therefore, where an order forbidding amendment does not merely decide that a decree-holder is not entitled to share rateably with other decree-holders in the assets after attachment, but it dismisses the application for execution in 'toto', such an order is appealable under S. 47(1). AIR (Vol 14) 1927 Lah 100: 98 Ind Cas 884.

——S. 73 — Appeal — When lies.

Per Walmsley, J. — Though there is a question between D.H. and J.D. relating to the discharge of decree still if third persons have to be brought into the proceedings, the question is not covered by S. 47, C. P. Code.

Per M. N. Mukerji, J. — An order under S. 73 is not appealable unless it also comes under S. 47 and satisfies all the requirements thereof. In order to be appealable the order must therefore decide a question arising between the decree-holder on the one hand and the judgment-debtors on the other. In cases where as between the parties to the suit a question relating to the execution satisfaction or discharge of the decree passed therein has been decided by the order for rateable distribution it has always been held that an appeal lies. AIR (Vol 11) 1924 Cal 801: 78 Ind Cas 731: 51 Cal 761: 39 CLJ 439: 28 CWN 704 (DB).

——S. 73 — Restitution — Order under S. 144.

An order for rateable distribution in a contest between rival decree-holders is not an order under S. 47 and is not a decree within the provisions of S. 144. Powers under S. 151 should be exercised when necessary for the ends of justice i.e., when this is the only legal method by which dues will be obtained. AIR (Vol 9) 1922 Mad 99: 67 Ind Cas 546: 1922 MWN 184: 15 MLW 421: 30 MLT 178: 42 MLJ 473 (DB).

——S. 73 — Order under S. 73 is not a decree.

An order under S. 73 is not an order under S. 47 inasmuch as the question which arises is not one between the parties to the suit and the order rejecting the application under S. 73 does not otherwise come within the definition of decree in S. 2, because it does not conclusively determine the rights of the parties. It would also be unduly extending the meaning of the word "suit" in that section, to make it include an application under S. 73. AIR (Vol 8) 1921 Pat 401: 1921 PHCC 204 (DB).

——Ss. 73 and 104 — Appeal.

No appeal lies from an order passed under S. 73. (AIR Vol 1) 1914 Mad 437: 1 LW 234: 23 Ind Cas 422(DB).

——Ss. 73, 47 (Ss. 295, 244 old Code) — Appeal.

An order under S. 295, C. P. C., passed between persons not parties to the decree, but between decree-holders of two totally different decrees, is not appealable but is liable to be set aside in revision under S. 622, C.P.C. (1908): 36 C 130 (132, 133) (DB).

2. Applicability.

——S. 73 — **Person entitled to receive assets rateably receiving such assets — S. 73 (2), if applies.**

Section 73 (2) does not apply to a case where the assets liable to be rateably distributed are paid to a person entitled to receive rateable assets. AIR (Vo 25) 1938 Oudh 12: 1937 OLR 534: 1937 OWN 1040: 171 Ind Cas 222.

——S. 73 — **Subsisting application when assets are received — Necessity of.**

All that S. 73 prescribes is that there must be an application for execution before the assets are received. AIR (Vol 24) 1937 Nag 16: ILR (1937) Nag 420: 168 Ind Cas 158.

——**Ss. 73, 63 — S. 63, whether exception to S. 73 — Property under attachment by more Courts than one — Conditions under S. 73 must be satisfied.**

Although the decree-holder claiming rateable distribution should ordinarily, as prescribed by S. 73, have applied for execution to the Court by which the assets are held, S. 63, recognising an exception, lays down when and to what extent this rule may be departed from. Where the property is under attachment in execution of decrees of more Courts than one, if the other conditions specified in S. 73 are fulfilled, the right to rateable distribution arises. AIR (Vol 23) 1936 Mad 797 : 59 M 1028: 1936 MWN 655: 71 MLJ 328: 44 LW 358: 166 Ind Cas 769 (DB).

——**S. 73, O. XXXIV, R. 6 — Two decrees in two Courts — Applications for execution in same Court — Application for rateable distribution in respect of one — Sale — Application for personal decrees.**

The decree-holder obtained two decrees, one in the Court of the Munsif and the other in the Court of the Subordinate Judge in respect of money which he had to pay to the creditors as his vendee did not pay them though on sale the entire consideration was left with him for payment to them. Both the decrees took the form of preliminary decrees for sale, the money not paid by the vendee to the creditors being regarded as a charge upon the property. A final decree was obtained from the Additional Subordinate Judge on March 5, 1930 and a final decree was obtained from the Munsif on April 26, 1930. The plaintiff applied on April 1, 1930, to the Additional Subordinate Judge for execution of the decree he had obtained in that Court, and on May 21, 1930, he applied for execution of the decree he had obtained in the Court of the Munsif. That application was transferred to the Additional Subordinate Judge. Afterwards, on December 2, 1930, the decree-holder asked for rateable distribution in respect of the decree he had obtained in the Court of the Munsif, out of the proceeds of the property that was about to be sold in execution of the decree obtained from the Additional Subordinate Judge. The property was in the end sold, apparently sometime in the month of March, 1931, and out of the sale proceeds, a sum of Rs. 267-12-9 was applied in part satisfaction of the decree obtained in the Court of the Munsif, the rest of it being applied in part satisfaction of the decree obtained from the Court of the Additional Subordinate Judge. The decree-holder afterwards applied to both the Courts under O. XXXIV, R. 6 for personal decrees against the judgment-debtor for the balance of the decretal amounts. Both the Courts gave him these decrees:

Held, that the decrees were properly given and that in the circumstances of the case, it must be deemed in law that the sale took place in execution of both the decrees and that in his application of December 2, 1930, under S. 73, the decree-holder, though the application was not clearly worded, meant to ask that the property that was going to be sold in execution of the decree of the Additional Subordinate Judge should be sold also in execution of the decree of the Munsif. AIR (Vol 23) 1936 Oudh 143: 1935 OWN 1081: 11 Luck 481: 158 Ind Cas 422 (DB).

——**S. 73, O. XXI, R. 72 — Assets received by Court on date of confirmation — Application for rateable distribution before that date — Whether in time.**

Where a decree-holder purchases the property brought to auction by himself, and thereby sets off the sale proceeds against his decree and particularly where he obtains an exemption from payment of 25 per cent. the assets are received by the Court within the meaning of S. 73 on the date on which the sale is confirmed, as it is on that date the decree-holder should be supposed to have finally made the payment and to have been reimbursed in satisfaction of his decree. As a result, the applications of the other decree-holders presented before the date of the confirmation of sales are within time and they are entitled to have a pro rata share in the sale proceeds of the property. AIR (Vol 23) 1936 Pesh 164: 164 Ind Cas 568.

——S. 73 — **Attorney's lien.**

S. 73 does not apply to an attorney's lien. (English and Indian Case law considered). AIR (Vol 14) 1927 Bom 542: 51 Bom 855: 29 Bom LR 1196: 105 Ind Cas 383 (DB).

——S. 73 — C. P. Code, S. 73 applies to a case where money is realised in execution by process of the Court and not when the judgment-debtor deposits in Court for payment to a particular decree-holder. AIR (Vol 12) 1925 Nag 157: 81 Ind Cas 7.

——S. 73 — **Section is imperative — Necessary inquiry must be made by the Court.**

The addition of the word 'passed' in S. 73 has not in the least altered the sense thereof in the old Code, but has on the other hand, made it clearer than what it was under the old Code. There is no authority for the proposition that no rateable distribution can be allowed of the assets realised from the judgment-debtors common in all the decrees concerned on the ground that in some of the decrees there are judgment-debtors other than the common judgment-debtors.

There is no room for any contention that S. 73 is not applicable where six of the judgment-debtors are common in all the decrees. The section is imperative. It does not need any application by the parties for rateable distribution. Only an application for execution of the decree is necessary in order to obtain the benefit of it, and once an application has been made for execution the Court is bound to distribute the assets rateably among the several decree-holders. The provision in S. 73 intends to give a substantial relief to holders of decree passed against the same judgment-debtor inasmuch as it enables all of them to get the fruit of their decrees when money is realised in the execution of one of the decrees. Therefore even if the procedure is summary, the consequences thereof are very material to the decree-holders and any enquiry that may be needed in order to give relief to the decree-holders should not be grudged by any Court. AIR (Vol 10) 1923 Pat 521: 74 Ind Cas 626: 4 PLT 373: 1923 PHCC 216 (DB).

——S. 73 — **Liquidation.**

The proceeds of a sale held in pursuance of an attachment of a company before its liquidation, must be distributed in accordance with Civil P. C. AIR (Vol 3) 1916 Cal 918: 43 Cal 586: 20 CWN 350: 34 Ind Cas 253 (DB).

——S. 73 — **Conditions of.**

A case comes under S. 73 only when more persons than one have applied for execution against

the same judgment-debtor and their decrees remain unsatisfied till assets whereof rateable distribution is claimed, are received. AIR (Vol 3) 1916 Cal 264: 21 CLJ 624: 30 Ind Cas 49 (DB).

—S. 73 applies where a judgment-creditor makes an application in the prescribed form under O. 21 R. 10 to the Court by which assets of the judgment-debtor are held, for the execution of his decree before the receipt of those assets by the Court. 38 Mad 221: 29 Ind Cas 239: AIR (Vol 3) 1916 Mad 792.

3. Appropriation.

——S. 73 — Money received by decree-holder as result of rateable distribution — Appropriation of, in case of single or more than one debt.

A decree-holder cannot appropriate the sum he receives by way of rateable distribution in any way he likes. What he receives goes towards the payment of every rupee of his debt if it be regarded as a single debt, or equally towards the payment of all the debts, if they are more than one including also his claim for costs. AIR (Vol 26) 1939 Mad 268: 1938 MWN 1210: (1939) 1 MLJ 137: ILR (1939) Mad 301: 50 MLW 908: 181 Ind Cas 388.

——S. 73 — Case not falling under S. 73 — Creditors attaching surplus sale proceeds — Same should be distributed 'pro rata'.

None of the parties had applied for execution before the date of receipt of assets as a result of which, none of them were entitled to claim rateable distribution. But all the same they had made attachments of the surplus sale-proceeds:

Held, that these attachments did not create any lien in favour of any of them and, therefore, the Courts holding the assets can divide the surplus sale-proceeds amongst all of them 'pro rata', i.e., in proportion of their decrees. AIR (Vol 23) 1936 Cal 390: 166 Ind Cas 814.

——S. 73 — Liquidation — Company — Distribution of proceeds.

The proceeds of a sale held in pursuance of an attachment of a company before its liquidation, must be distributed in accordance with the provisions of C. P. C. 43 Cal 586: 20 CWN 358: 34 Ind Cas 253: AIR (Vol 3) 1916 Cal 918 (DB).

——S. 73 (1) (c) — Applicability of.

The provisions of Cl. (c) of the proviso to sub-S. 1 of S. 73 operate, only when the litigant concerned has himself obtained a decree and applied for rateable distribution in execution thereof. 19 CWN 535: 19 Ind Cas 226: AIR (Vol 2) 1915 Cal 380 (DB).

——S. 73 — Surplus sale proceeds.

Where the fund in Court was the surplus sale proceeds payable to the defendant mortgagor after sale under a mortgage decree:

Held that S. 73 was inapplicable and the fund was not available for rateable distribution and the attaching decree holders were to be paid fully in the order of their attachment. 26 MLJ 364: 24 Ind Cas 617: AIR (Vol 2) 1915 Mad 236.

4. Assets.

(a) What are.

(b) Assets held by Court.

(c) Application to be before receipt of assets.

(d) Application to Court holding assets.

See N. 10.

(e) Dismissal of application.

See N. 10.

(f) Fund in Court.

See N. 4(b).

(a) What are.

——S. 73 — Applicability — Money realised by receiver appointed in execution — If assets held by Court liable to rateable distribution.

Rateable distribution under S. 73, C. P. Code, cannot be confined to cases in which assets are realised by sale or by some other process of execution. The appointment of a receiver is one of the modes of execution sanctioned by law, and where a receiver appointed in execution proceedings has realised moneys by granting leases of coal mines of a village of the judgment-debtor, the money in the hands of the receiver are assets held by a Court for purposes of S. 73, and can be rateably distributed under S. 73. AIR (Vol 36) 1949 Pat 128: 27 Pat 816 (DB).

——S. 73 and O. XXI, R. 72 (1) (as amended in 1936) — Applicability of S. 73 — Requisites.

No order for rateable distribution can be passed under S. 73 unless assets are held by the Court. Where the sale has not yet been held and no assets have yet been received by the Court the provisions of S. 73 cannot be applied.

After the sale proclamation was issued in execution of a money-decree some other decree-holders against the same judgment-debtor applied for rateable distribution. The decree-holder whose decree was under execution applied for permission to bid for and purchase the properties and set-off the decretal amount against the purchase money. This application was heard together with the applications for rateable distribution filed by the other decree-holders and the Court passed the following order: "It is, therefore, ordered that the application of the decree-holder to be permitted to bid for and purchase the properties advertised for sale exclusively for himself be rejected and the application of the other decree-holders for rateable distribution be allowed".

Held, (i) that under O. XXI, R. 72 (1), as amended, the decree-holder was entitled to bid for and purchase the property in the absence of an express order to the contrary by the Court. Consequently, the first part of the Judge's order must be vacated.

(ii) that the order as to rateable distribution was premature and could not be allowed to stand. (1941) 196 Ind Cas 728: 8 BR 94.

——S. 73 — Set-off.

The right of having the assets of a judgment-debtor rateably distributed amongst the executing creditors mentioned in S. 73 is confined to assets received by the Court. Where one of the judgment-debtor's assets is a decree for the payment to him of a sum of money which is liable to be extinguished by being set-off against a cross-decree against him, no assets representing that decree will ever come into the possession of the Court if the right of set-off be exercised. AIR (Vol 27) 1940 PC 173: 7 BR 24: 1940 OWN 880: 52 LW 540: (1940) 2 MLJ 677: (1940) MWN 1194: 1940 ALJ 837: 42 Bom LR 1166: 45 CWN 281: 67 IA 350: ILR (1940) Kar (PC) 312 Sup: ILR (1941) Mad 1: 73 CLJ 96: 1940 AWR 180: 190 Ind Cas 13.

——S. 73 — Payment out of Court.

Any money recovered by the execution creditor will be held by the Court and be subject to the provisions of S. 73. Any payments made out of Court to the attaching creditor as representative of the holder of the attached decree would be avoided as against the other attaching creditors by S. 64. The other attaching creditors are thus adequately protected and their consent to the execution is unnecessary. AIR (Vol 27) 1940 PC 173: 7 BR 24: 1940 OWN 880: 52 LW 540: (1940) 2 MLJ 677: 1940 MWN 1194: 1940 ALJ 837: 42 Bom LR 1166: 45 CWN 281: ILR (1940) Kar (PC) 312 Sup: 67 IA 350: ILR (1941) Mad 1: 73 CLJ 96: 1940 AWR 180: 190 Ind Cas 13.

——S. 73 — Money voluntarily paid into Court by judgment-debtor to satisfy decree.

By the use of the words "where assets are held by a Court" in S. 73, the Legislature has considerably enlarged the scope of the section and it is no longer permissible to hold that rateable distribution must be confined only to those cases where assets are realized by sale or by some other process of execution. The words of the new section are wide enough to cover, not only the money which a judgment-debtor is compelled to pay, but also money voluntarily paid into Court by him to satisfy a decree under execution. The words "assets held by a Court" obviously mean any fund in possession of a Court or at its disposal which may be applied by it for the payment of a judgment debtor's debt.

Section 73 being imperative, it is obligatory upon a Court to distribute rateably the assets held by it (irrespective of how they came into its hands) among all the creditors who are entitled to the benefit of this section. The assets are so distributable by the operation of law and there is nothing in this section or any other provision of the Code to show that the Court must deal with them in accordance with the wishes of the judgment-debtor. When, therefore, there are several decrees outstanding against a judgment-debtor, and all the requirements of S. 73 are complied with, the judgment-debtor cannot prevent rateable distribution by merely earmarking his payments for the benefit of one of the decree-holders. Therefore, a sum of money paid by the judgment-debtor in the Court to satisfy the decree of certain creditors at whose instance his property had been attached, is an asset available for rateable distribution among other creditors. AIR (Vol 26) 1939 Pat 392: 18 Pat 404: 5 BR 914: 20 PLT 646: 183 Ind Cas 409.

—S. 73 — Award under Bombay Co-operative Societies Act, 1925 — Execution of — Sale proceeds in the hands of Collector — Another creditor cannot attach it on principles of S. 73 of Civil P. C. AIR (Vol 25) 1938 Sind 157: ILR (1939) Kar 104: 176 Ind Cas 709.

—S. 73 — A decree-holder purchaser who has been allowed to set off his decretal debt cannot take advantage of this and alter the substance of the transaction and alter the rights of other creditors. The Court must be regarded as holding the assets within the meaning of S. 73 at the time of the order granting the set-off. Consequently, it has power to grant rateable distribution and enforce that order by summary process in execution. AIR (Vol 24) 1937 Nag 383: ILR (1937) Nag 466: 172 Ind Cas 370.

——S. 73, O. XXI, R. 72 — Decree-holder allowed set-off — Right of other decree-holders to rateable distribution.

The right of the decree-holder to have and the power of the Court to allow set-off of the purchase money against the decretal amount where the decree-holder is the auction-purchaser is subject to the right of any other decree-holder who may be entitled to rateable distribution under S. 73.

Section 73 is so worded as to include cases in which it is possible that the purchase-money may not be actually deposited, but set off against the decree amount under O. XXI, R. 72. In such cases the Court should be deemed to be holding the assets within the meaning of S. 73.

Where a case of rateable distribution exists, the Court should not allow a set-off except possibly to the extent of the purchaser's own share in the amount available for rateable distribution. AIR (Vol 20) 1933 All 666: (1933) ALJ 1102: 147 Ind Cas 949.

——S. 73 — Assets — Decree-holder purchaser praying for set-off — Another decree-holder applying for rateable distribution in another Court before set-off is allowed — Money in the hands of the first decree-holder is assets.

A decree-holder was allowed to purchase the property of his judgment-debtor in execution of his decree. On purchasing the same he paid the poundage fee in the Court and prayed for the amount being set-off against the amount of his decree. Another decree-holder who had obtained a similar decree against the same judgment-debtor in another Court applied for rateable distribution to the Court which passed the decree in his suit before the set-off was allowed in the Court that held the assets. The Court communicated this order to the Court that held the assets after the set-off was allowed.

Held, that the purchase money in the hands of the decree-holder purchaser must be regarded as assets realized by execution Court in execution of the decree although such money was not paid by him in Court. 52 CLJ 19: AIR (Vol 17) 1930 Cal 761 (DB).

——S. 73 — Held by the Court — Stop order.

Certain moneys of the judgment-debtors were paid into Court in pursuance of an order of Court in garnishee proceedings taken by a creditor. The judgment-debtors obtained an order stopping the execution proceedings for two months. During the currency of this order, another creditor got an order for attachment before judgment of the same moneys. In a contest between the two creditors, the Court expressed its 'opinion', that the date when the moneys were paid into Court was the date of the receipt of assets by the Court and this was not varied by the stop order prohibiting the judgment-creditor from drawing it out; so no attachment obtained after that date could take away from the execution-creditor the rights he had under S. 73 or otherwise. AIR (Vol 17) 1930 Cal 623: 57 Cal 736 (DB).

——S. 73 — "Assets realised" meaning of — Attachment of deposit in Court is not.

In absence of any order by the Court for transfer of money realized by the sale of judgment-debtor's property attached before judgment in another civil suit to the account of the judgment-creditor or for its payment to him, the amount in custody of the Court cannot be treated as assets realized in execution of the decree within the meaning of S. 51 (1). 113 Ind Cas 319: 22 SLR 345: AIR (Vol 15) 1928 Sind 165.

—S. 73 — The moneys in the hands of the custody Court are not moneys which are realised within the meaning of S. 73 and therefore no 'pro rata' distribution of such moneys can take place among the attaching creditors at that stage. 29 Bom LR 689: 106 Ind Cas 184: AIR (Vol 14) 1927 Bom 405.

——S. 73 — Money in hands of Custody Court attached by different creditors — Decrees should be satisfied in order of time and not 'pro rata'.

Where notices under O. 21, R. 52 are served on the Receiver and in pursuance of a garnishee or other order of the Court he pays in the amount in respect of any such notice into the Sheriff's office, all execution creditors whose attachments are registered in the Negative Book of the Prothonotary before the realization of the assets by the Sheriff would be entitled to 'pro rata' distribution. In case the property in the custody Court has been attached at the instance of different Courts, the custody Court should seek to satisfy such attachments not 'pro rata', but in order of time, sending the moneys to the first attaching Court first, the balance to the second and so on. There is no warrant in the C. P. Code for granting of charging orders to creditors against the Receiver holding partnership assets. Such charging orders do not amount to attachment proceedings. 29 Bom LR 689: 106 Ind Cas 184: AIR (Vol 14) 1927 Bom 405.

——S. 73 — "Realised" meaning of — Actual receipt necessary.

Where in pursuance of an order passed by a superior Court assets realized in execution of a decree of a Subordinate Court are transferred to the superior Court, the assets are deemed to be received within S. 73 by the transferee Court when they are actually received by that Court. 29 Bom LR 319: 101 Ind Cas 411: AIR (Vol 14) 1927 Bom 247 (DB).

—S. 73 — Order for rateable distribution of assets cannot be made in anticipation of assets being realised. 84 Ind Cas 747: 28 CWN 988: AIR (Vol 12) 1925 Cal 102 (DB).

——S. 73 and O. 21, R. 52 — Fund in Court — Attachment — Rival decree-holders — Priority — Receipt of assets.

Where a fund in the Court is attached by another Court in execution of a decree it is the duty of the former Court to hold the fund subject to the directions of the executing Court and to transfer it to that Court. The fund as soon as it is transferred to the execution Court becomes "assets held by that Court" within S. 73 of the C. P. C. All decree-holders who have applied for execution to the executing Court before the receipt of such assets are entitled to rateable distribution. If the executing Court and the custody Court are the same, the fund becomes the assets within S. 73 of the C. P. C. by an order of attachment coupled with a formal order of transfer of the fund to the credit of the suit in which the execution is sought. 44 Mad 100: 39 MLJ 608: (1921) MWN 14: 12 LW 744: AIR (Vol 8) 1921 Mad 218 (FB).

——S. 73 — Receipt of assets.

If the executing Court and the custody Court (Court holding funds) are the same, the fund becomes the assets within meaning of S. 73 by an order of attachment coupled with a formal order of transfer of the fund to the credit of the suit in which the execution is sought. 44 Mad 100: 39 MLJ 608: (1921) MWN 14: 12 LW 744: AIR (Vol 8) 1921 Mad 218 (FB).

——S. 73 — Assets — Sale proceeds in the hands of the decree-holder purchasers — Refund — Remedy by suit.

Where one of two decree-holders attaches and buys in execution the property of the judgment-debtor and the other applies for execution.

Held, that the application came under S. 73 of the C. P. C. and that respondent was entitled to rateable distribution of the proceeds of the sale, in as much as although the money remained in the hands of the purchasing decree-holder it was open to the Court to direct him to pay that sum into Court and it was therefore, in the power and at the disposal of the Court and was held by it within the meaning of S. 73. A refund of this kind might be enforced by process in execution. 43 Ind Cas 715: AIR (Vol 5) 1918 Cal 400 (DB).

——S. 73 and O. 21, R. 89 — Assets — Right to rateable distribution — Sale set aside.

Where a sale is set aside under O. 21 R. 89, C. P. C., the result is there are no assets realised under which other creditors of the judgment-debtor can claim rateable distribution under S. 64. The attaching decree-holder cannot use the attachment for the satisfaction of other decrees obtained by him. 7 LW 573: 45 Ind Cas 782: AIR (Vol 5) 1918 Mad 280 (DB).

——S. 73 and O. 21, R. 52 — Fund in Court — Attachment by several decree-holders — Applicability.

Where the fund in court was the surplus sale proceeds payable to the deft. mortgagor after sale under a mortgage decree, Held, S. 73 was inapplicable and the fund was not available for rateable distribution and the attaching decree-holders were to be paid fully in the order of their attachment. 26 MLJ 364: 24 Ind Cas 617: AIR (Vol 2) 1915 Mad 236.

——S. 73 — Judgment-debtor having other property.

An application for a rateable distribution by a decree-holder cannot be refused on the ground that there is other property of the debtor which may be made available for the satisfaction of his claim. (1909) 32 Mad 334: 5 MLT 125: 19 MLJ 307: 4 Ind Cas 509.

——S. 73 — "Assets realised in execution" — Case under Old Code.

It is essential to a valid claim for rateable distribution that the assets should have been realised in execution of the decree of the attaching decree-holder. Any arrangement entered into by an attaching decree-holder with the judgment-debtor for making the money realized in execution of the judgment-debtor's attached decree available to the attaching creditor cannot avail the subsequent attaching creditors of the same judgment-debtor, who can only put forward claims enforceable under the attachment of the prior attaching creditor. (1907) 20 MLJ 330 (DB).

——S. 73 (S. 295, Old Code).

Assets realized by sale of perishable property attached before judgment before any application for execution are not assets realized in execution. (1906) 10 Cal WN 634 (635).

——S. 73 (S. 295, Old Code) — "Assets realized in execution".

The words "assets realized by sale or otherwise in execution of a decree" in section 295 of the Code of Civil Procedure mean that the assets must be realised by some process of Court in execution and can apply only to a sale by the Court and not to a private sale by the judgment-debtor of properties attached. The assets are not realised by the attachment but by the sale. The realisation must be by sale by the Court in execution or by one of the other remedies prescribed by the Code of Civil Procedure. The fact that the money is paid into Court in satisfaction of the attaching creditor's debt does not make such money assets realised under section 295 of the Code of Civil Procedure. (1905) 15 MLJ 290: 28 Mad 380 (384, 385) (DB).

——S. 73 — Case under Old Code — "Assets realized in execution".

The term "realized" as used in S. 295 of the Civil Procedure Code, prima facie means converted into cash or into a form whereby it becomes available for immediate distribution; and there is nothing in the word itself which requires that that process should take place as the result of any ulterior proceeding in the course of execution. (1904) 6 Bom LR 11 (12): 28 Bom 264 (DB).

——S. 73 (S. 295, Old Code) — "Assets realized in execution of a decree".

Where a certain property attached before judgment is in the possession of a third person who claims it as a pledgee and who undertakes to bring the property or its market value into Court when ordered, and it is subsequently found that he has no right as a pledgee over the property and in consequence the market value is paid into Court, the money so paid answers the description of "assets realized by sale or otherwise in execution of a decree" within the meaning of S. 295 (Old Code). (1904) 6 Bom LR 376 (378) (DB).

(b) Assets held by Court.

——S. 73 — Property attached sold for land revenue — Price recovered is "assets" within S. 73 —

Suit to recover one's share comes within S. 73 (2) and is governed by Limitation Act, Art. 62.

The word "assets" in S. 73, Civil P.C., includes the sale proceeds of the property attached when it is sold for arrears of land revenue and such property is, therefore, available for rateable distribution under that section. The suit by a decree-holder for his share of the amount is one under S. 73 (2) of the Code. To such a suit Art. 62, Limitation Act, applies. AIR (Vol 31) 1944 Nag 313: 1944 NLJ 391: ILR (1945) Nag 427.

——S. 73 — Amount paid by judgment-debtor in Court for specific purpose.

When the judgment-debtor pays the amount for a specific purpose, it cannot be regarded as assets held by the Court liable to rateable distribution. The reason is that the "assets" referred to in S. 73 are assets held in the process of execution. Where an amount is not realised by a process in execution, but is produced by the judgment-debtor for the specific purpose of securing a postponement of the sale and it is clearly mentioned by him in his application that the amount should be paid to the decree-holder in that darkhast, it is not open to the Court to turn round and allow the amount to be rateably distributed among all the decree-holders. AIR (Vol 26) 1939 Bom 468: 41 Bom LR 997: 168 Ind Cas 372.

——S. 73 — Assets paid for specific purpose — Amount paid by surety in Court.

The words "assets held by a Court" in S. 73, Civil P.C., must be assets received in execution. The section does not apply to moneys paid into Court in a suit when no question of execution arises. One other limitation must also be applied to these words and that is, that when the assets have been paid in for a specific purpose, they cannot be applied generally in execution, so as to defeat the specific purpose.

Plaintiff obtained an ex parte decree and applied for its execution. The defendant applied for stay of execution which was granted on condition of his furnishing security. A surety executed a surety bond by which he undertook to pay a certain amount if plaintiff suffered owing to stay of execution. The ex parte decree was subsequently set aside but a decree inter partes was passed. The plaintiff applied for execution of the new decree. The surety paid the amount agreed in the Court. Other decree-holders who had previously obtained decrees against the same judgment-debtor applied for rateable distribution of the amount paid by the surety in the Court:

Held, that the other creditors were not entitled to rateable distribution because the Court having received the amount in terms of being applied towards the payment of the plaintiff's debt, it could not be applied towards payment of anybody else's debt as well as the plaintiff's debt. AIR (Vol 26) 1939 Bom 112: 41 Bom LR 176: ILR (1939) Bom 133: 181 Ind Cas 246.

——S. 73 — Five per cent compensation paid to auction-purchaser, if can be treated as asset.

Per Manohar Lall, J. (Obiter). — The five per centum of compensation which is paid to the auction-purchaser is not in payment of a debt due to the auction-purchaser. It is a statutory payment in order to ensure the setting aside of the sale. The auction-purchaser is never executing any decree and nothing is due to him from the judgment-debtor. The amount which is being paid by the judgment-debtor as a part of the statutory requirement is not being paid by him to his creditor, and therefore, it cannot be called an asset available for distribution. AIR (Vol 26) 1939 Pat 392: 18 Pat 404: 5 BR 914: 20 PLT 646: 183 Ind Cas 409.

——S. 73 O. XXI, R. 89 — Money held by Court to satisfy decree — Money deposited under O. XXI. R. 89.

A deposit made by a judgment-debtor for the purpose of setting aside an execution sale under O. XXI, R. 89 can be regarded as an asset liable to rateable distribution under S. 73 of the Code.

The expression "assets" in S. 73 clearly includes assets held by the Court, the ultimate purpose of which is to satisfy a decree outstanding against a judgment-debtor. The source from which such assets originated is immaterial provided they are in the custody of the Court. AIR (Vol (25) 1938 Cal 521: 42 CWN 840: 176 Ind Cas 607.

——S. 73 — Sum attached and brought into Court by one decree-holder — Sum, if assets.

In execution proceedings, the Court directed that the sum which had been brought in the Court under an attachment taken out by the decree-holder should be paid to him and declined to order rateable distribution in favour of another decree-holder of the same judgment-debtor who had taken out execution prior to the date on which the sum was received by the Court. The Court had declined to exercise a jurisdiction vested in it on the ground that the money was received simply to satisfy the decree of the suit which had been brought by the first decree-holder and, as such, it could not be said to be assets in the hands of the Court:

Held, that the sum received was assets capable of rateable distribution and the Court should have exercised its jurisdiction in favour of the other decree-holder and allowed him rateable distribution. (1938) 177 Ind Cas 269: 4 BR 803.

——S. 73 — Judgment-debtor assigning certain property to a particular decree-holder — Such property, if assets.

A sum of Rs. 1,000 was awarded by the Magistrate to A out of the fine to be paid by the accused in a defamation case. Before A could recover that amount, one of his creditors B, instituted a suit in the Court of Munsif, claiming, inter alia, a sum of Rs. 451, and took out attachment before judgment under the Court's order and had the aforesaid sum of Rs. 1,000 attached. On the date the case was fixed A stated through his Counsel, admitting the claim of B to Rs. 451 that out of Rs. 1,000 which stood to his credit in the Criminal Court and which had been attached before judgment, Rs. 451 be sent for and given to B in satisfaction of the decree which was or was to be passed that day. The order of the Court passed on the statement was that a decree under O. XXI, R. 6, Civil Procedure Code be passed and the sum of Rs. 451 attached before judgment be requisitioned from the Court of the Joint Magistrate. In the meantime, C, who was also a creditor of A, instituted a suit for recovery of Rs. 1,010 and obtained attachment before judgment of the sum of Rs. 1,000 standing to the credit of the debtor in the Court of the Magistrate. A decree was passed in favour of C who thereupon claimed the entire deposit contending that there was no execution application pending in B's decree:

Held, that since there was an assignment of his right by A to B to recover Rs. 451 from deposit and the Court which had the domain over it had effected that assignment, B got an absolute right in respect of that sum which could not be affected by C's rights:

Held, further that even if A's admission in B's favour did not amount to an assignment, it amounted to a charge and as such, C's claim could not have preference over that charge. AIR (Vol 24) 1937 All 424: 1937 ALJ 345: 1937 AWR 284: 169 Ind Cas 836.

——S. 73 — Proceeds of property where charge is created thereon.

The execution of a decree as against one of the defendants was stayed on his furnishing security of immovable property for the decree amount. He executed a security bond which stated inter alia "until the aforesaid decree amount is fully realised I have kept the aforementioned property belonging to me viz., my house worth about Rs. 1,000 as security. I shall not alienate in any manner the said house until the aforesaid decree amount is fully satisfied." Application was made by another decree-holder for rateable distribution of the sale proceeds of this property:

Held, that the surety bond and the decree clearly created a charge on the property concerned in favour of the decree-holder whose decree had been stayed and under S. 73, proviso (c), the proceeds of the property were not available for rateable distribution. The whole question when considering rateable distribution in a matter of this kind is to consider whether the property is open to the other decree-holders and if it is charged as security for a specific decree, it is not so open. AIR (Vol 24) 1937 Mad 531: 1937 MWN 206: 45 LW 432: 170 Ind Cas 15.

——S. 73 — "Assets" — Whether confined to those realized by sale or otherwise in execution of decree.

Money realised by sale of attached property for arrears of revenue is available for rateable distribution. "Assets" in S. 73 are not confined to those which were realised "by sale or otherwise in execution of a decree". AIR (Vol 24) 1937 Nag 80: ILR (1937) Nag 219: 171 Ind Cas 371.

——S. 73 — Preliminary decree in mortgage suit attached by simple money-decree creditor of mortgagee — Such creditor joining mortgage proceedings and getting final decree — Property put to sale — Another creditor getting money-decree against mortgagee at the same time as the previous creditor, if entitled to rateable distribution.

A creditor of the mortgagee got a money-decree against him and attached the preliminary decree obtained by the mortgagee against his mortgagor. Thereafter, he joined in the mortgage proceeding and got a final decree and sold the property in execution of the same. Another creditor of the mortgagee who had obtained a money-decree against him at the same time as the first creditor, applied for rateable distribution:

Held, that the sale proceeds were assets in the hands of the Court and the rateable distribution asked for could be granted. AIR (Vol 24) 1937 Pat 651: 18 PLT 817: 4 BR 127: 172 Ind Cas 195.

——S. 73 — Property placed in charge of superatdar — Superatdar's failure to produce — Payment of Superatdar — Liability for rateable distribution.

A decree-holder A applied for execution and the property of the judgment-debtor was attached and most of the property was placed in charge of a superatdar. Other persons R and S also held decrees against the same judgment-debtor and applied for execution praying for rateable distribution of the assets that may be realized in execution of A's decree. As the superatdar failed to produce the property of the judgment-debtor which was entrusted to him, the execution Court issued warrants for attachment of his property to realize the value of the judgment-debtor's property. At the first warrant so issued, the superatdar paid Rs. 40 to A and avoided attachment. Subsequently, he deposited in Court two sums of Rs. 30-11-6 and Rs. 27-8-6. By these three payments the total value of the judgment-debtor's property, viz., Rs. 98-4-0, which was entrusted to the superatdar, was realized and by its final order the lower Court distributed it rateably between the several decree-holders:

Held, (i) that the payment of Rs. 40 was made in coercive process issued against the superatdar and A received the amount constructively for the Court and, therefore, it must be held that it was an amount held by the Court executing the decree so as to make it liable for rateable distribution among the other creditors:

(ii) that the amount realized from the superatdar was, in the eye of the law, the sale proceeds of the judgment-debtor's property which was admittedly attached in execution of the decree against him. Simply because the superatdar failed to restore the property which was entrusted to him, it does not follow that the nature of the execution case was changed. For all practical purposes the superatdar represented the judgment-debtor. AIR (Vol 21) 1934 Nag 62: 148 Ind Cas 944.

——Ss. 73, 64, O. XXI, R. 55 — Assets not held by Court — Two decrees against same judgment-debtor — Attachment in execution of first — Private sale of property by judgment-debtor — Deposit — Release of property from attachment — Waiver.

A fund or a sum of money cannot be regarded as assets unless it is in some sense the property of the judgment-debtor and can, therefore, be legitimately applied to the payment of his debt. Any money which belongs to the stranger or any money paid into Court by a third party under a misapprehension cannot be described as assets. When no assets are held by the Court, the holder of the second decree is not entitled to rateable distribution.

The decree-holder had two decrees against the same judgment-debtor. In pursuance of execution of first decree, a property of the judgment-debtor was attached. Before the sale, the judgment-debtor sold the property. In execution of the second decree, the decree-holder applied for rateable distribution of the assets in the first execution proceedings. The purchaser of the property with the consent of the decree-holder deposited the decretal amount and costs in the first execution case and the property was released from attachment. The execution case was struck out on full satisfaction. To this the decree-holder objected contending that the order striking out the execution case was wrong in law and that as he had applied for rateable distribution, the sum deposited should be rateably distributed between the two execution cases in which he was the decree-holder and that the sum, if so rateably distributed, would be in part satisfaction of the decrees and he was entitled to have the property sold in execution:

Held, that as the decree-holder had consented to the deposit and by his conduct he must be deemed to have waived the benefit of S. 64, the attachment of the property must be necessarily deemed to have terminated and the private sale by the judgment-debtor must be held to be valid. AIR (Vol 21) 1934 Pat 685: 13 Pat 446: 1 BR 521: 155 Ind Cas 918.

——S. 73, O. XXI, R. 89 — Amount received from judgment-debtor under R. 89.

Although O. XXI, R. 89, specifically mentions payment to the decree-holder, that is only an injunction to the judgment-debtor as to what amount he has to pay for the purpose of getting the sale set aside. The sale may be held at the instance of one of the execution creditors but any amount received from the judgment-debtor in Court under pressure of the sale must enure for

the benefit of all the execution creditors who have acquired a claim to rateable distribution under S. 73. AIR (Vol 20) 1933 Nag 347: 147 Ind Cas 564.

——S. 73, O. XXI, R. 89 — **Money paid into Court under O. XXI, R. 89 — Whether assets.**

All money paid by a judgment-debtor into Court under stress of execution before sale, whether to avoid attachment or whether made at an earlier or later stage, should be treated as assets held by the Court liable to rateable distribution under S. 73, and the fact that under O. XXI, R. 89 this money is described as being paid for payment to the decree-holder does not make it earmarked for his exclusive benefit any more than any other money realized under stress of execution towards satisfaction of his decree is to be regarded as specially earmarked and so as to remove it from the operation of S. 73, Civil P.C. AIR (Vol 20) 1933 Pat 303: 14 PLT 357: 12 Pat 772: 145 Ind Cas 390.

——S. 73 — **"Where assets are held by a Court" — Deposit by judgment-debtor to get sale postponed — Whether assets.**

The expression, "where assets are held by a Court" in S. 73 must be given a liberal construction and the word "assets" is not restricted in its application to assets realised by sale or otherwise in execution of a decree.

Where a judgment-debtor deposited in Court a sum of money to get a sale of his property which was about to be put up for sale at the instance of the decree-holder, and then another decree-holder who had made an application for execution of his decree against the same judgment-debtor claimed to have a rateable distribution of the sum of money already deposited in Court:

Held, that the money so lying in Court constituted 'assets' available for rateable distribution. AIR (Vol 19) 1932 All 411: (1932) ALJ 359: 54 A 516: 138 Ind Cas 106.

——S. 73 — **'Assets held by Court' — Voluntary deposit by debtor of price.**

Where a judgment-debtor voluntarily deposits in Court a sum of money as the price of his property privately sold by him with the Court's permission, rateable distribution can be claimed in respect of the amount to deposited.

The words 'assets held by a Court' in S. 73 are wide enough to cover such money as comes into the custody of the Court otherwise than by a coercive process, and whatever money is realised in execution at the instance of one decree-holder becomes assets held by the Court within the meaning of S. 73 for the benefit of all decree-holders who have applied for execution before the receipt of the assets. AIR (Vol 19) 1932 Nag 156: 28 NLR 179: 140 Ind Cas 193.

——S. 73 — Where permission is granted to a decree-holder under O. XXI, R. 72 to set off the decree amount against the purchase-money, the notional receipt amounts to the holding of assets within the meaning of S. 73 and the said section is applicable to the case. This is now made clear by the wording of O. XXI, R. 72, cl. (2) which provides "subject to the provisions of S. 73". AIR (Vol 18) 1931 Bom 252: 33 Bom LR 503: 133 Ind Cas 737.

——S. 73, O. 21, R. 72 (2) — **Amount set off, whether available for distribution.**

When a decree-holder applies for rateable distribution under S. 73, the Court is not competent to pass an order under O. 21, R. 72 (2), allowing another decree-holder who has proclaimed the properties of the judgment-debtor for sale to set off his decree-debt against the purchase-money.

A proclaimed B's properties for sale and purchased them on August 9, 1929. A was allowed to set-off the purchase-money against his decree though no formal order had been passed to that effect. C who held a decree against B in another Court had applied on July 25, 1929, for rateable distribution with A:

Held, that the purchase-money for which the property was purchased by A must be regarded as assets realised by the Court though no money was actually put in by A into the Court, and should be taken into account for distribution among the decree-holders. AIR (Vol 17) 1930 Cal 761: 52 CLJ 19: 129 Ind Cas 776.

——S. 73 — When money is paid to the Sheriff of the Court in garnishee proceedings it is money paid into Court and is 'assets held by the Court' within the meaning of S. 73. AIR (Vol 17) 1930 Cal 623 : 57 Cal 736 : 129 Ind Cas 189.

——S. 73 — **'Assets' — Money paid into Court by judgment-debtor for avoiding attachment is an asset.**

The words "assets held by the Court" include money paid into Court by the judgment-debtor for the purpose of avoiding attachment of his property issued in execution of any particular decree. All that is necessary for the purpose of attracting the applicability of S. 73 is that money should be paid into Court or obtained from the judgment-debtor, in execution proceedings. 128 Ind Cas 686: AIR (Vol 17) 1930 Sind 300.

——S. 73 — Partnership assets held by Receiver in partnership action — Creditors can take out notice under C. P. C., O. 21, R. 52, without waiting for accounts being taken. 29 Bom LR 689 : 106 Ind Cas 184 : AIR (Vol 14) 1927 Bom 405.

——S. 73 — **Money paid under O. 21, R. 43.**

Money paid by a judgment-debtor under a warrant of attachment of his moveable property under Order 21, Rule 43, are assets held by the Court, and are liable to be rateably distributed among all persons who have applied to the Court for execution before the receipt of such assets: 36 Bom 156, Diss. 28 Bom LR 237 : 93 Ind Cas 852 : AIR (Vol 13) 1926 Bom 242.

——S. 73 — Where the auction-purchaser makes default in the payment of full amount of the sale, the 25 per cent. deposit which is deposited in Court becomes 'assets' within S. 73 and are liable to rateable distribution. 49 Mad 570: 97 Ind Cas 86: AIR (Vol 13) 1926 Mad 872 (DB).

——S. 73 — **Earnest money are not "assets".**

The mere deposit of the earnest money cannot be said to be the assets realised by the sale of any property until the balance of the purchase money is deposited & the sale becomes a concluded transaction. 87 Ind Cas 783 : 29 CWN 575 : AIR (Vol 12) 1925 Cal 966 (DB).

——S. 73 — **Mean only assets levied in execution.**

Assets held by a Court do not include all money lying in Court to the credit of the judgment-debtor but only the assets levied in execution or paid into Court in satisfaction of the decree under execution, and there is no receipt of assets within Section 73 until the Court holding the money comes to the conclusion that no objection exists and orders the money to be transferred to the credit of the first attaching creditor's suit, the decree in which it is engaged in executing.

Therefore where one creditor has filed a suit and attached before judgment some money belonging to the judgment-debtor, all creditors who apply for execution before the attaching creditor has obtained a decree, and applied for execution, are entitled to rateable distribution. None of them can get preference over the other. 32 MLT

198 : 72 Ind Cas 820 : 46 Mad 506 : 17 MLW 390 : AIR (Vol 10) 1923 Mad 505 : 44 MLJ 413 (FB).

——S. 73 — Payment by sureties are "assets".

Attachment before judgment raised on security being furnished. Sureties depositing money after decree and on execution being taken out — Money so deposited is "assets" held by Court — C. P. Code, S. 115 — Order rejecting application under S. 73 is revisable. 36 Bom 156, Diss. from. 70 Ind Cas 539 : 26 CWN 169 : AIR (Vol 9) 1922 Cal 19.

——S. 73 — Voluntary payment by judgment-debtor.

The term "assets" includes any assets held by the Court irrespective of the manner in which they came into possession of the Court. Money brought voluntarily into Court by the judgment-debtor is also "assets". 36 Bom 156, Diss. from. 33 LJ 186 : 70 Ind Cas 541 : AIR (Vol 8) 1921 Cal 749.

——S. 73 and Sch. III, Cl. 9 — Assets — Sale by Collector.

In an execution proceeding, when the Collector sells the property and received whole of the money agreed to be paid at the sale, he holds the proceeds as assets received.

Held, by the Court under S. 73 any application for its rateable distribution after that date is out of time. 22 Bom LR 1001 : 58 Ind Cas 992 : AIR (Vol 7) 1920 Bom 35 (DB).

——S. 73 — Assets — Money paid to Sheriff in execution of a decree — Costs of previous execution — Right to.

Where a decree-holder applied for execution money was paid by the judgment-debtor to the Sheriff who paid it into Court. Two other creditors who had previously applied for execution asked for rateable distribution.

Held, that the money so lying in Court was assets available for rateable distribution. The right to rateable distribution is limited to the amount due under the decree and does not apply to costs of a previous application for execution. 36 Bom 156, Diss. 47 Cal 515 : 59 Ind Cas 458 : AIR (Vol 7) 1920 Cal 785.

——S. 73 — Moneys paid to avoid arrest are not assets.

Money paid into Court by a defendant under S. 73 and O. 38, C. P. Code, to avoid his arrest in a suit, is money paid for specific purpose and as it is intended to satisfy the plaintiff who has been instrumental in compelling the deposit he acquires a lien over it and consequently other judgment-creditors of the defendant cannot attach such money. 61 Ind Cas 424 : 14 SLR 164 : AIR (Vol 7) 1920 Sind 118.

——S. 73 — Assets — Realization in execution — Warrant for attachment of moveable property — Payment by judgment-debtor before levy of attachment — Rateable distribution.

Money paid to a bailiff under O. 21, R. 55 to avert the levy of an attachment of moveables is payable only to the attaching creditor and is not available for rateable distribution. 21 Bom LR 975 : 53 Ind Cas 599 : AIR (Vol 6) 1919 Bom 152.

——S. 73 and O. 21, Rr. 55 and 83 — Assets — Permission of Court to raise money by private alienation — Money paid into Court — Rateable distribution.

A Court should not grant permission to raise money by private alienation to satisfy only one of the decrees against the judgment-debtor when there are more decrees than one against him and all the decree-holders have attached and seek to sell the judgment-debtor's property in execution. When permission is granted under O. 21, R. 83 to raise money by private alienation such money if paid into Court is assets. Money paid into Court by one of the modes mentioned in O. 21, R. 55 of the C. P. C., is assets, held by the Court within S. 73 of the Code.

Unless there is something clear in the language of the Code to exempt payment from being applied to the benefit of all the creditors, Courts should incline to the view that moneys in the hands of the Court should be shared by the decree-holders rateably.

Semble:— The language of S. 73 of the Code is wide enough to cover cases where moneys are in the hands of the courts by whatever process the same have been realised. 35 MLJ 150: (1918) MWN 524 : 47 Ind Cas 538 : AIR (Vol 6) 1919 Mad 647: 41 Mad 616 (DB).

——S. 73 — Assets — Money paid under O. 21, R. 86.

Money paid into Court under O. 21, R. 89, C.P.C., is not 'assets realised in execution' available for rateable distribution under S. 73, C. P. C. 42 Ind Cas 507 : AIR (Vol 5) 1918 Mad 704

——S. 73 and O. 41, R. 5, Cl. (3) — Assets — Property given as security under O.41, R. 5 (3) — Realisation — Rateable distribution.

The effect of immoveable property being given as security is something more than an attachment. Property given as security under O. 41, R. 5 (3) of the C. P. C., by the judgment-debtor is applicable solely in discharge of the judgment debt, and is not liable to rateable distribution though the mode of realisation of the security is by sale in execution. 41 Mad 327 : 6 LW 762 : (1917) MWN 872 : 34 MLJ 84 : 43 Ind Cas 187 : AIR (Vol 5) 1918 Mad 442 (DB).

——S. 73 — Assets — If includes money paid by judgment-debtor on arrest.

As money paid by a judgment-debtor to the officer arresting him to get himself released is not assets held by a Court, they are liable to rateable distribution under S. 73 among persons who have applied to the Court for execution of decrees against the judgment-debtor. 19 Bom LR 274 : 39 Ind Cas 623 : AIR (Vol 4) 1917 Bom 275.

——S. 73 — Assets — Purchase money.

The receipt of purchase money by the person nominated by parties and ordered by Court as auctioneer is a money received by Court under S. 73 (1). 44 Cal 789 : 25 CLJ 303 : 35 Ind Cas 850 : AIR (Vol 4) 1917 Cal 740 (DB).

——S. 73 — Assets — Prohibitory order — Money paid under — If property of Creditor.

Money paid into Court under a prohibitory order does not become the property of the creditor at whose instance it was issued without a further order directing payment to him. Till then it is assets available for rateable distribution. 167 PWR 1917 : 42 Ind Cas 436 : AIR (Vol 4) 1917 Lah 410.

——S. 73 and O. 21, R. 89 — Assets — Deposit for setting aside sale.

There can be no rateable distribution, under S. 73 of the amount deposited under O. 21, R. 89 'for payment to the decree-holder'. 40 Cal 619 : 19 CWN 1125 : 18 CLJ 144 : 17 CWN 636 : 18 Ind Cas 839 : AIR (Vol 2) 1915 Cal 838 (DB).

——S. 73 and O. 41, R. 5 — Assets — Money paid as security — Rateable distribution.

Where money as of a judgment-debtor is paid into Courts as security for the performance of an

appellate decree under O. 41, R. 5, C. P. C., it is not liable to be rateably distributed among other attaching creditors of the same debtor. 36 PLR 1916 : 120 PWR 1915 : 29 Ind Cas 791 : AIR (Vol 2) 1915 Lah 147 (DB).

——S. 73 and O. 38, R. 2 — Assets — Money paid for specific purpose — Availability for other creditors — Money paid on arrest before judgment.

Where money is deposited in Court under O. 38, R. 2 on the arrest of the defendant before judgment, a lien is created on it in favour of the plaintiff from the time it was deposited and no other creditors could claim rateable distribution of the same, as it was money paid for a specific purpose. 8 Bur LT 22 : 29 Ind Cas 714 : AIR (Vol 2) 1915 Upp Bur 15.

——S. 73 — Assets — Money paid into court by judgment-debtor — No process issued — Whether money is one realised by application.

Payment into court by a judgment-debtor of the decree money without any process having been issued on the execution petition is money realised by application though not coming within S. 295, C. P. C. of 1882. AIR (Vol 1) 1914 Mad 641 : (1914) MWN 309: 23 Ind Cas 241 (DB). (S. 73 of the new C. P. C. is clear to the same effect.)

——S. 73 — Assets — Meaning of.

Assets mean all property of a man, whatever, which can be used for satisfying debts or demands against the person. The salary of Government servant attached under the Code is assets. (1912) 14 Bom LR 633: 16 Ind Cas 640 (DB).

——S. 73 and O. 21, R. 55 — Assets — Meaning of.

Assets in S. 73 are assets held in process of execution and do not include money paid into Court under O. 21, R. 55. (1912) 36 Bom 156: 13 Bom LR 1193: 12 Ind Cas 911 (DB).

——S. 73 — "Assets" — Meaning of.

In order to constitute realization within the meaning of S. 295 C. P. C. (1882) the sum must be realised either in execution under process of Court or in one of the modes prescribed by the Code, so that a payment made privately by a judgment-debtor to a decree-holder is not "assets" within the meaning of S. 295, C. P. C. (1912) 15 Cal LJ 49: 13 Ind Cas 907 (DB).

——S. 73 — Assets — Execution of personal decree.

Where moneys are realised in execution of a personal decree they are assets realised under S. 73, C. P. C. (1912) MWN 407: 15 Ind Cas 406 (DB).

(c) Application to be before receipt of assets.

——S. 73 — Receipt of assets — Crucial date.

Where in pursuance of an order passed by a superior Court, assets realized in execution of a decree of a subordinate Court are transferred to the superior Court, the assets are deemed to be received within the meaning of S. 73, C. P. Code, by the transferee superior Court when they are actually received by that Court. AIR (Vol 37): 1950 Mad 34: 1949 MWN 658: (1949) 2 MLJ 403.

——Executing Court and custody Court same — Requirement — Procedure.

Where the executing Court and the custody Court are the same, before there can be said to be receipt of assets within the meaning of S. 73, two things must take place; first, the custody Court must come to the conclusion that there was no objection to transfer the amount necessary to pay the decree-holders at whose instance the fund was attached; secondly there must be an order by the custody Court transferring the amount to the credit of the first attaching creditor's suit which it is engaged in executing. It is only then that there can be said to be receipt of assets within the meaning of S. 73. In case an executing creditor has drawn out money giving an undertaking to the Court that he would pay back the same, whatever sum is found repayable has to be paid with interest.

(Procedure, in case where custody Court and executing Court are different, discussed.) AIR (Vol 32) 1945 Mad 412: (1945) 2 MLJ 49: 1945 MWN 492

——S. 73 — Permission to bid and set-off obtained — Sale held — Application for execution and rateable distribution after sale.

A decree-holder who has not applied for execution before the sale cannot be allowed rateable distribution when another decree-holder has already been permitted to purchase at that sale and to set-off.

On August 30, 1939 the decree-holder, A, obtained permission to bid at an auction sale and permission to set off the price if he paid the poundage fee at once. He accordingly purchased in auction sale on September 2, 1939 and paid the poundage fee. No application for execution by the decree-holder R and no application by them for rateable distribution was made till September 8, 1939 when the case was fixed for report of the sale. On that date, A filed a receipt and made a superfluous request for set-off:

Held, that no claim for rateable distribution could be allowed for the reason that execution had not been asked for by R prior to the date when set-off was allowed and the sale had taken place on which date the assets must be deemed to have been received by the executing Court. AIR (Vol 31) 1944 Nag 295: 1944 NLJ 347: ILR (1944) Nag 806.

——S. 73 — Application for rateable distribution, when does not lie.

A decree-holder cannot apply for rateable distribution under S. 73 after the assets have been realised. AIR (Vol 30) 1943 Mad 165: (1942) 2 MLJ 607: 55 LW 733: 1942 MWN 682: ILR (1943) Mad 175: 207 Ind Cas 223.

——S. 73 — Decrees by A, B and C against D and his father E who became insolvent — In execution of A's decree Court-allowing Official Receiver to sell entire property as, Court agent within certain time and to pay D's share into Court — Property sold beyond period fixed — Execution petitions by B and C — Sale proceeds subsequently deposited into Court — B and C held entitled to rateable distribution.

A, B and C obtained decrees against D and his father E who became insolvent. On application of A for the execution of his decree, the Official Receiver was permitted by the Court to sell the entire property as an agent of the Court within certain time and deposit into Court the share of D who was non-insolvent. The property was, however, sold after the period fixed by the Court. B and C applied for execution of their decrees and subsequently the Official Receiver paid into Court D's share in the sale proceeds. B and C applied for rateable distribution:

Held, that the receipt by the Official Receiver in contravention of the rules under which he should have been operating could not, by virtue of subsequent ratification of his irregular sale, be deemed to have been a receipt by the Court. It could not be said that there had been, at the time when these two execution petitions of B and C were filed, any receipt of these sale proceeds by the Court. All that had then happened was an unauthorized and irregular sale by the Official Receiver and an unauthorized receipt by the Official Receiver of the proceeds of that sale. There was nothing in the hands of the Court resulting from

this sale and there was, at the time when these execution petitions were filed, no subsisting authority to the Official Receiver to sell. Hence the date of the receipt of the assets by the Court must be that date on which the money was actually paid by the official Receiver into the Court. B and C were therefore entitled to rateable distribution. AIR (Vol 27) 1940 Mad 826: (1940) 2 MLJ 23: 1940 MWN 699: 52 LW 191: 193 Ind Cas 536.

——S. 73 — Application before assets are received — Application dismissed for default before assets are distributed.

The crucial date for determining the right for rateable distribution under S. 73 is the date on which the assets are received. On this date all the decree-holders whose applications are pending for execution in the Court and who had not received satisfaction become entitled to share the assets rateably. Their right to share having accrued to them, it cannot be lost by the mere fact that their application is dismissed in default later on before the assets are actually distributed by the order of the Court. AIR (Vol 27) 1940 Nag 302: 1940 NLJ 340: ILR (1942) Nag 139: 190 Ind Cas 749.

——S. 73 — Collector.

The assets must be deemed to have been received by the court on the date when they were received by the collector. Receipt by the collector is for and on behalf of the court, though he is not the agent of the Court and while they are in his hands, they are held by the Court, just as they would be held by the Court when the Nazir receives them. AIR (Vol 25) 1938 Nag 14: ILR (1939) Nag 285: 173 Ind Cas 98.

——S. 73 — Court must find as a fact if application for rateable distribution is prior to deposit of proceeds.

Where an application for rateable distribution is made on the very day on which the sale proceeds are deposited in Court, there is no warrant for the assumption that the application must have been made prior to the deposit. It must be found as a fact whether the application was made prior or later. AIR (Vol 24) 1937 Mad 504: 45 LW 501: (1937) MWN 239: (1938) 1 MLJ 325: 170 Ind Cas 883.

——S. 73 — Rateable distribution — Application for, presented after 3 p. m. — Whether should be dismissed.

Lower Courts make rules fixing time when applications of various types should be presented for the convenience of the Court as well as for the convenience of the public, but the legal right of every applicant is that he is entitled to make his complaint and application any time during Court hours.

The auction-purchaser had deposited the three-fourth price (the balance of the purchase) price of the property which he purchased in the execution sale in the Imperial Bank. On the same date, another decree-holder who had obtained a decree against the same judgment-debtor put in his application for rateable distribution after 3 p. m. but it was not accepted by the 'munsarim':

Held, that it was a proper presentation and it was the duty of the 'munsarim' to accept application in spite of the fact that it had been made after 3 p. m.

An applicant for rateable distribution, before he can succeed, has to establish that he had made the application for rateable distribution before the receipt of the assets by the Court. AIR (Vol 23) 1936 All 626: 1936 ALJ 599: 1936 AWR 489: 162 Ind Cas 349.

——S. 73, O. XXI, R. 72 — Application made before amount to be deposited for other creditors is determined — Date of 'Realisation of assets', is the date on which the amount is actually deposited in Court and not the date of sale. AIR (Vol 23) 1936 Mad 437: 1936 MWN 223: 43 LW 703: 70 MLJ 683: 163 Ind Cas 209.

——S. 73 — Application for execution must be made before the receipt of the assets by the Court and no decree-holder who has not made such application will be entitled to rateable distribution. AIR (Vol 22) 1935 Nag 214: 31 NLR 423: 158 Ind Cas 347.

——S. 73 — Bid and set-off by decree-holder — Application for rateable distribution immediately after sale — Date when amount is realised.

When a decree-holder has been given permission to bid and set-off under O. XXI, R. 72, and when the amount of the successful bid is less than the decree amount, the whole of the amount must be deemed to have been received or realised 'eo instanti' the sale is held and S. 73 will give no benefit to other decree-holders who apply for rateable distribution after the conclusion of the sale however soon after its conclusion their applications may be made. AIR (Vol 20) 1933 Mad 804: 38 LW 579: 65 MLJ 569: (1933) MWN 1145: 57 M 38: 145 Ind Cas 975.

——S. 73 — Application for rateable distribution allowed when made before the assets actually realised and deposited in Court. (1931) MWN 1012.

——S. 73 — Compensation under Land Acquisition Act.

Compensation money awarded under Land Acquisition Act comes within the meaning of 'assets' held by the Court' either from the date of receipt or at least from the date of the final award: AIR (Vol 13) 1926 Mad 307: 49 Mad 38: 97 Ind Cas 496 (DB).

——S. 73 — Set-off — When assets can be said to be "received".

Where decree is transferred for execution, and money is realized by the transferee Court, the parent Court is deemed to have "received" the money on the date the transferee Court's officer conducting the sale receives the same: 44 Cal 789, Ref. An application for a set-off is equivalent to a payment by a cheque on the Court which is subsequently found to be in order and honoured, and, therefore, when the decree-holder applies for set-off of his claim against the decretal amount, the money is "received" on the date such application is made. If the application is, however, made, not to the transferee Court, but to the parent Court through the transferee Court, or if made to the transferee Court and simply transferred by it to the parent Court for acceptance the date of receipt is the date on which the application reaches the parent Court. AIR (Vol 13) 1926 Nag 380: 95 Ind Cas 205.

——S. 73 — Receipt must be of the whole assets

The receipt of the assets of which S. 73 speaks must be the receipt of the whole of the assets realized by one order for sale. This proposition holds good for property sold in two lots as moveable and immoveable just as much as for two lots of moveable or two lots of immoveable property. AIR (Vol 13) 1928 Nag 380: 95 Ind Cas 205.

——S. 73 — Sale in lots — Realisation in lots.

Where the properties were sold separate and their sale proceeds were realised separately,

Held, that the sale of each lot was at any rate completed when the whole of the balance of the purchase-money for that lot was deposited in Court, and that a person who had applied for rateable distribution after the properties began to

be sold was not entitled to rateable distribution of the sale proceeds of the whole of the properties but only of the sale proceeds of the properties that were sold subsequent to his application. 29 CWN 575 : AIR (Vol 12) 1925 Cal 966 : 87 Ind Cas 783 (DB).

——S. 73 — In a case where an application for set-off is made and there are no obstacles to the granting of it, that is to say, no application exists under S. 73, for rateable distribution at the time of making the application for set-off, the Court will ordinarily be bound to grant the set-off, and if that is done there can be no receipt of assets by the Court within S. 73. An order allowing a set-off under O. 21 R. 72 is not equivalent to receipt of the assets. It is a disposal of the purchase-money over which the Court re-acquired dominion on the date of the sale. 80 Ind Cas 40 : AIR (Vol 12) 1925 Oudh 287.

——S. 73 — Sale in parcels — Entire purchase-money to be paid.

To entitle a creditor to rateable distribution, he must make an application to the Court, which holds the assets, before the receipt of such assets, for the execution of an unsatisfied decree for the payment of money passed against the same judgment-debtor. Where property is sold in execution of a decree in separate parcels, the sale proceeds are not deemed to be realised until the entire amount of purchase-money in respect of all the parcels is paid into Court. 33 CLJ 7 : 62 Ind Cas 167 : AIR (Vol 8) 1921 Cal 801 (DB).

——S. 73 — Application must be made before assets are received — Else section does not apply.

On 22-11-1920, the court of the Subordinate Judge sold a property of the judgment-debtor. The property was purchased by the decree-holder, opposite party, who thereupon applied that the purchase-money and the amount due under the decree might be set off against one another under O. 21, R. 72, C. P. Code. The Court posted the case for the 9th December. On the 30th November the petitioner (another decree-holder) informed the Subordinate Judge that he had applied for execution of his decree against the judgment-debtor before the District Judge and had also prayed for rateable distribution and asked the Court not to grant the opposite party's prayer for a set-off. A notice was then served on the opposite party to show cause why he should not deposit the money in cash. On the 18th December the Subordinate Judge considered the question of set-off and was of opinion that it was not necessary for the opposite party to deposit the money in cash and adjourned the case till the 8th of January 1921 for confirmation of the sale. Meanwhile the execution case pending before the District Judge was transferred, upon the application of the petitioner, to the Subordinate Judge, and on the 4th of January the petitioner made an application before the Subordinate Judge for rateable distribution:

Held, that the assets must be taken to have been realised by the Subordinate Judge before the 4th of January, when for the first time the petitioner made his application to that Court for rateable distribution. Consequently S. 73 of the C. P. Code did not apply and the petitioner was not entitled to rateable distribution. (1921) 62 Ind Cas 857 (Cal) (DB).

——S. 73 — Realisation must be in execution proceedings for the section to apply.

Money deposited in Court to the credit of a judgment-debtor before any decree-holder applies in execution to have it paid towards the satisfaction of his decree should not be dealt with on a system of priority when several decree-holders afterwards come in and apply to the same Court to have it attached but it should be rateably distributed among them. The fact that money was lying in Court to the credit of the judgment-debtor in a suit other than in which the attachments were made does not make it assets "held by a Court" within the meaning of S. 73 which clearly refers to assets levied in execution or paid into Court in satisfaction of the decree under execution and not to assets lying in the same Court to the credit of the judgment-debtor in another suit. When the attaching Court and the custody Court are the same an order should be made by the Court as attaching Court for transferring the money from the suit in which it came into Court to the suit in which the attachment took place. It is only when this is done that the Court as attaching Court can properly be said to have received the assets and to hold it within the meaning of S. 73; and decree-holders who have attached prior to that are entitled to rateable distribution. 38 Mad 221, Overruled: 44 Cal 1072, Diss. from. 60 Ind Cas 302 : 44 Mad 100 : 1921 MWN 14 : AIR (Vol 8) 1921 Mad 218 (FB).

——S. 73 — Assets — Money not paid in Court — Rival decree-holders — Attachment in execution of one decree.

Where money is not paid into Court in execution of a decree the proceeds are not liable to rateable distribution and a decree-holder who has not applied for execution before the receipt of assets in Court is not entitled to rateable distribution. 3 PWR 1920 : 54 Ind Cas 41 : AIR (Vol 7) 1920 Lah 94 (DB).

——S. 73 — Assets — Date of receipt — Application for rateable distribution made on same day — Priority — Same judgment-debtor.

Where payment into Court of assets realised and the applications for rateable distribution are made on the same day, there is no presumption as to the order of events and the officer distributing the assets should have ascertained which act was prior in time. If the fund in Court is the joint property of two persons, one of whom is the judgment-debtor under one decree and both of them are judgment-debtors in another decree the former decree-holder is not entitled to rateable distribution. 24 MLT 179: (1918) MWN 520: 47 Ind Cas 296: AIR (Vol 6) 1919 Mad 758 (DB).

——S. 73 — Assets — Sale proceeds of moveables realised by Nazir.

An order for rateable distribution of the sale proceeds of moveable property realised by sale by the Civil Nazir takes effect only in respect of the sale proceeds realised after the date of such application. 33 PR 1918 : 45 Ind Cas 108 : AIR (Vol 5) 1918 Lah 75.

——S. 73 — Assets — Date of receipt.

Till the whole purchase money is deposited in Court it cannot be held that the assets are held by the Court so as to admit of rateable distribution under S. 73 of the C. P. C. and a decree-holder can apply for execution and rateable distribution under S. 73 till then. (1911) 14 CLJ 50: 15 CWN 872: 10 Ind Cas 527 (DB).

——S. 73 (O. S. 295) — Date of receipt of assets — Application for execution to Court of lower grade.

The petitioner attached the judgment-debtor's property in execution of his decree in the Munsif's Court. The same property was attached by another creditor of the judgment-debtor in execution of a decree passed by the District Court. The property was sold by the District Court and the purchaser made the deposit on 17th September

1909 & paid the balance of the purchase money on 29th September 1909. Petitioner applied to the District Munsif's Court for execution on 29th September 1909, but the order of transfer was not received in the District Court till the following day.

Held, (1) that the application for execution to the District Court before the receipt of assets, was an essential requisite of a general claim for rateable distribution. 6 M 357, Foll; (2) that the assets of the judgment-debtor should be taken to have been realised by the District Court only on 29th September 1909. (1911) 21 MLJ 505 : (1911) 1 MWN 47 : 9 MLT 121 : 8 Ind Cas 852.

——**Ss. 73, O. 31, R. 12, O. 45, Rr. 295, 490, 618 — Realized by sale in execution of a decree — Attachment before judgment — Effect of — Jurisdiction to attach property outside jurisdiction.**

The operation of S. 295 (of old Code) is not confined merely to the realization by sale of the property of the judgment-debtor only but also to the realisation by sale of other's properties in execution of a decree of the judgment-debtor. A judgment-creditor who has attached before judgment before the date of realization is entitled to rateable distribution; and the fact that subsequent to realization he again applies for attachment unnecessarily does not affect the matter. An attachment before judgment can be made by a Court of property outside its jurisdiction. (1908) 31 Mad 502.

(d) Application to Court holding assets.
See N. 10.

(e) Dismissal of application.
See N. 10.

(f) Fund in Court.
See N. 4 (b).

5. Attachment.
See also N. 13.

——**S. 73 — Undivided share of member of joint family — Other creditors, whether entitled to rateable distribution.**

Where a creditor has attached an undivided share of a member of joint Hindu family during his lifetime and sold that share and the member then dies, the attachment made by such creditor does not enure for the benefit of other creditors who have not obtained attachment of the share during that member's lifetime. Other creditors are, therefore, not entitled to rateable distribution in the assets. AIR (Vol 27) 1940 Bom 190 : ILR (1940) Bom 146 : 42 Bom LR 218 : 188 Ind Cas 433.

——S. 73 — Judgment-debtor adjudicated insolvent by foreign Court — Attachment by creditor before adjudication — Creditor remains entitled to benefit of attachment — Attachment after adjudication — Creditor is not entitled to anything — Section 64 read with S. 73 does not affect this conclusion. AIR (Vol 27) 1940 Mad 47 : 50 LW 701 : (1939) 2 MLJ 859 : (1940) MWN 195 : 190 Ind Cas 172.

——S. 73 — Clause (d) of R. 55 of O. 21 ought to be read in such a way that the provisions of S. 73 and O. 21, R. 55 do not conflict with each other. Consequently, where a sum paid by the judgment-debtor to satisfy the decree of the attaching creditor is made available for rateable distribution among other creditors, the entire decree of the attaching creditor is not satisfied and the attachment therefore continues. AIR (Vol 26) 1939 Pat 392 : 20 PLT 646 : 18 Pat 404 : 5 BR 914 : 183 Ind Cas 409.

——**S. 73 — Attachment before judgment.**

The only benefit which a party gets by an attachment before judgment is, that when he applies subsequently for execution, he need not reattach the properties. AIR (Vol 26) 1939 Rang 20 : 1938 Rang LR 565 : 179 Ind Cas 987.

——**S. 73 — Attached property sold for arrears of revenue — Surplus money attached by another decree-holder — Attachment of original decree-holder, if continues.**

The attaching decree-holder has a right to follow the property in the form into which it was converted and in spite of the sale of property for arrears of revenue his attachment continues and fastens itself on to the money even if the amount realised by such sale, over and above the arrears due, is attached by another decree-holder. He is, therefore, entitled to rateable distribution. AIR (Vol 24) 1937 Nag 80 : ILR (1937) Nag 219 : 171 Ind Cas 371.

——**S. 73 — No attachment.**

Application claiming distribution of assets without prayer for attachment is an application "for execution" within the meaning of S. 73. AIR (Vol 18) 1931 All 92 : (1930) ALJ 1552 : 53 A 125 : 131 Ind Cas 244.

——**S. 73 — Rateable distribution — Application claiming distribution of assets without prayer for attachment.**

When an application for rateable distribution is made after an attachment has already taken place, the attachment really enures for the benefit of all claimants and is as effective as if it had been brought about separately by each of them provided, of course, they had before the assets were realised applied for execution of their decrees. In such cases it is quite sufficient for them to ask that the sale should take place and the sale proceeds distributed amongst them proportionately and the mere fact that a decree-holder had omitted in his application for execution to ask for the attachment of the property afresh would not justify the Court in holding that he had not applied for execution of the decree within the meaning of S. 73, Civil P. C. AIR (Vol 18) 1931 All 92 : (1930) ALJ 1552 : 53 A 125 : 131 Ind Cas 244.

——**S. 73—Attachment by one decree-holder enough.**

In a case where out of many decree-holders, each competent to execute his decree by attachment and sale of a particular property, one has attached it, it is not necessary that the other decree-holders should again attach the same property; and in such a case all the decree-holders are entitled to claim rateable distribution. AIR (Vol 17) 1930 Mad 4.

——**S. 73 — Mere attachment before judgment without decree — Section does not apply.**

A person who has merely obtained an attachment before judgment cannot put up a claim for rateable distribution unless he has obtained a decree and made an application for execution. 30 Bom LR 1488 : 115 Ind Cas 414 : AIR (Vol 15) 1928 Bom 545 (DB).

——**S. 73 — Charging order.**

There is no warrant in the Code for granting of charging orders to creditor against the Receiver holding partnership assets. Such charging orders do not amount to attachment proceeding. 29 Bom LR 689 : 106 Ind Cas 184 : AIR (Vol 14) 1927 Bom 405.

——**S. 73 — No attachment — Section does not apply.**

Where none of the conditions necessary to constitute an attachment under O. 38, R. 5 had been complied with, i. e., no order to furnish security was made, nor monies were held by the defendant at the disposal of the Court.

Held, that there was no attachment and the money paid by the defendant into Court must be considered as a deposit in satisfaction of the plaintiff's claim under O. 24, R. 1, and plaintiff was entitled to have it paid out to him in satisfaction of his claim on application without taking out execution of his decree. 106 Ind Cas 77 : 5 Rang 753 : AIR (Vol 14) 1927 Rang 278.

——S. 73 — Attachment before judgment — Decree must be passed before realisation.

Although the respondents had actually had the money attached before judgment, this fact would not, entitle them to an order for the rateable distribution when they had not obtained their decree before the money was realised. 21 CLJ 614, Ref.

Where money was wrongly paid over to the petitioners,

Held, even if the petitioners had not been entitled to receive the money the respondents could not compel them to refund it without bringing a suit in accordance with the provisions of S. 73. 69 Ind Cas 718 : 40 PLR 1922 : AIR (Vol 11) 1924 Lah 70.

——S. 73 — Attachments before judgments — Distribution.

Moneys attached before judgment by a number of creditors, and realised before any of them obtained decrees, should be held to the credit of all the suits and distributed between all the attaching creditors who subsequently obtained decrees if they have obtained decrees before any of the others apply for payment. Priority of attachment by itself confers no prior right. 68 Ind Cas 714 : 15 MLW 531 : 1922 MWN 262 : 31 MLT (HC) 70 : AIR (Vol 9) 1922 Mad 236.

——S. 73 and O. 38, R. 10 — Attachment before judgment — Attachment of sale proceeds by puisne mortgagee, after sale of property — No application for execution prior to realization.

A puisne mortgagee does not lose his rights under the mortgage simply by attaching the sale proceeds in Court after the sale of the mortgaged property at the instance of the prior mortgagee. An attachment before judgment cannot by itself give a simple creditor priority over a mortgagee nor can the former get any benefit under S. 73 when not only is there no application by him for the execution of the decree but the money is realised before attachment. 32 Ind Cas 944: AIR (Vol 4) 1917 Mad 692.

——S. 73 — Order for attachment before judgment.

A person, by simply obtaining an order for attachment before judgment is not entitled to rateable distribution, for execution has been made before realisation of assets. 20 CLJ 614: 30 Ind Cas 38: AIR (Vol 3) 1916 Cal 371 (DB).

——S. 73, and O. 21, Rr. 52 and 63, O. 38, Rr. 5 and 10 — Attachment before judgment — Money paid into Court — Priority of attaching decree-holders.

An attachment before judgment confers no right on the party who obtains the order of attachment. Defendants attached before judgment some perishable property which was sold and the proceeds deposited in Court. Plaintiffs obtained a decree against the same debtor and applied for execution by attachment of the money in court to which defendants objected. Plaintiffs then sued for a declaration that they were entitled to the amount of their decree out of the deposit in Court.

Held, that priority of attachment gave no priority of title to the defendants and that the plaintiffs were entitled to a decree in the declaratory suit. 37 All 578: 13 ALJ 732: 29 Ind Cas 622: AIR (Vol 2) 1915 All 275 (DB).

——S. 73 and O. 21, R. 55 (O. Ss. 295, 275 and 276) — Attachment — Private alienation after subsequent attachment by another creditor — Debtor insolvent — First attachment raised by satisfaction of decree — Claim enforceable under attachment.

A obtained a decree against B and attached B's interest in certain property. On 6th January 1896, B assigned the whole of his right, title and interest in the property to C. In 1898 D obtained a decree against B. In 1903, B was adjudged an insolvent and in 1904, D levied an attachment on the same property as was already attached by A. In 1907, the judgment-debt due to A, was paid and his attachment raised. In 1910, C got an order raising the attachment to D. Held, that the assignment to C was not void as against D. As no assets were realized by sale or otherwise in execution of decree which could be divided rateably between the creditors D was not the possessor of a claim enforceable under S. 73, C. P. C., or enforceable under the attachment within S. 64. (1913) 37 Bom 138: 14 Bom LR 904: 17 Ind Cas 625 (DB).

(On appeal from (1912) 14 Bom LR 511: 15 Ind Cas 950.)

——Ss. 73 and 115, C. P. C. (1882), Ss. 295 and 622 — Attachment — Not necessary.

A decree-holder applying for a rateable distribution need not apply for the attachment of the assets also. Decree holders who attach the surplus sale proceeds subsequent to the realisation of the assets are not entitled to any share in the assets. (1909) 9 CLJ 210: 4 Ind Cas 52 (DB).

——S. 73 — Attaching creditor is entitled to rateable distribution.

A judgment creditor who has attached before judgment before the date of realization is entitled to rateable distribution; and the fact that subsequent to realization he again applies for attachments unnecessarily does not affect the other. An attachment before judgment can be made by a Court of property outside its jurisdiction. (1909) 32 Mad 592.

——S. 73 (S. 295, Old Code) — Attachment — Vesting order in favour of Official Assignee — Effect of.

A judgment-creditor who has attached his debtor's property before the bankruptcy proceedings has no priority over the Official Assignee in respect of that property. (1908) 6 CWN 577: 29 C 428 (431).

6. Condition necessary.

——S. 73 — For applying S. 73, execution application must be pending — Decree-holder getting his application struck off — He cannot then say that his application remained pending.

The execution application in a case under S. 73 must be a subsisting application. Where the party himself has got his application for execution struck off, if the execution Court intended to finish the matter which was pending before it and to dispose of it, then the application cannot be deemed to remain alive. As the decree-holder wanted his application for execution to be struck off, it does not lie in his mouth to say that his application remained a pending application. AIR (Vol 31) 1944 All 245: 1944 AWR 221: ILR (1944) All 321: 218 Ind Cas 241.

——S. 73 — Transferees of decrees — Adjudication of validity of transfer — Condition precedent.

Language of S. 73 is wide enough to cover transferees of decrees. The definition of "decree-holder" in S. 2 (3) is not relevant in interpreting the scope of S. 73. Nor can the use of this expression in the marginal note to the section be regarded as controlling and restricting the plain language of the provision itself. A transfer of a decree by an

instrument in writing takes effect from the date of such transfer, and the transferee is entitled to apply for executing the decree under O. XXI, R. 16 of the Code. The Court, before ordering execution has, no doubt, to issue notice of such application to the transferor and the judgment-debtor and hear their objections, if any but S. 73 does not require that the objections of the transferor should also have been enquired into and overruled before the receipt of such assets by the execution Court.

Therefore, the adjudication of the validity of transfer and the recognition of the same by the Court before receipt of assets is not a condition precedent for entitling the transferee to apply for rateable distribution under S. 73. AIR (Vol 28) 1941 Mad 795: (1941) 2 MLJ 219: 1941 MWN 699: 54 LW 714: 197 Ind Cas 238.

——S. 73 — Section 73, Civil P. C., only requires that an application for execution should have been made to the Court and does not provide for an application for rateable distribution. (1937) MWN 480.

——S. 73 — Application, should be one in accordance with law, not barred, not satisfied and pending.

The word 'application' in S. 73 is not unqualified. It means an application made in accordance with law, not barred by limitation, not yet satisfied and capable of being satisfied. It must also mean an application still subsisting and pending and not already disposed of, whether on the merits or by default. AIR (Vol 22) 1935 Rang 135: 13 R 514: 158 Ind Cas 515.

——S. 73 — Pendency of application — Whether necessary.

Section 73 only requires that application for execution should be made before the assets have been received and that the decree-holder, at the time the assets are to be distributed, has not obtained satisfaction. It is not necessary that the application should be pending. AIR (Vol 20) 1933 Pesh 52: 143 Ind Cas 87.

——S. 73 — The only two conditions laid down in S. 73 and which the decree-holder must comply with are that he must have a money decree against the same person and that he must have applied for execution of that decree before the assets were realised. If these two conditions are fulfilled, he is entitled to join in the rateable distribution. There is no condition that the execution application put in by the party should be such as would have ended in his successfully obtaining satisfaction of his decree, e.g., even an application for the arrest of a person who could not have been arrested, is sufficient. 22 MLW 744: 1926 MWN 27: 91 Ind Cas 11. AIR (Vol 13) 1926 Mad 179: 49 MLJ 753.

——S. 73 — The only persons entitled to a rateable distribution under S. 73, are persons who have not only obtained orders of attachment from another Court but who have got their decrees transferred to the Court having the custody of the attached property and have actually applied for execution of their decrees in the form prescribed under O. 22, R. 11, before the assets are realized out of such attached property in execution of a decree of that Court. 20 SLR 111: 93 Ind Cas 366: AIR (Vol 13) 1926 Sind 177.

——S. 73 — Conditions of — Rateable distribution.

Decree against judgment-debtor and application before receipt of assets are the only things that a Court has to look to under S. 73. (1917) MWN 859: 42 Ind Cas 897: AIR (Vol 5) 1918 Mad 512 (DB).

7. Court.

See also N. 10 and 14.

——S. 73 — Receipt of assets — Assets transferred by order of superior Court.

Where in pursuance of an order passed by a superior Court, assets realised in execution of a decree of a subordinate Court are transferred to the Superior Court, the assets are deemed to be received within the meaning of S. 73, C. P. Code by the transferee superior Court, when they are actually received by that Court. 1949 MWN 658: AIR (Vol 37) 1950 Mad 34: (1949) 2 MLJ 403.

—Ss. 73 and 63 — Rateable distribution of assets — Power of Court of superior jurisdiction — Condition pre-requisite. See AIR (Vol 33) 1946 Nag 170: 222 Ind Cas 652.

——S. 73 — A and B obtaining decree against same judgment-debtor in same Small Cause Court — A's decree transferred for execution to original side of that Court — B cannot apply for rateable distribution.

Where A and B obtain decrees against the same judgment-debtor in small cause suits tried by the same Small Cause Court and A's decree is transferred to the original side of that Court for execution on the ground that sale of immoveable property is involved, the assets received by sale in execution of A's decree must be regarded as received on the original side of the Court i.e., in a Court other than the Court of the Small Causes and hence B cannot apply for rateable distribution under S. 73 unless his decree is also transferred to the original side of the Court. AIR (Vol 30) 1943 Mad 262: (1943) 1 MLJ 57: 1943 MWN 34: 56 LW 380: 207 Ind Cas 79.

——S. 73, O. XXI, R. 52 — Custody Court holding money under O. XXI, R. 52, becoming execution Court — Order passed by such Court under S. 73.

Although the custody Court which holds money under O. XXI, R. 52 cannot proceed under S. 73, yet, where, long before the date on which the order under S. 73 was passed by the custody Court, that Court had ceased to be a custody Court under R. 52 and had become an execution Court by reason of various applications for execution being filed in it, it is perfectly competent to that Court to award rateable distribution. AIR (Vol 27) 1940 Oudh 237: 1940 OWN 132: 15 Luck 332: 1940 AWR 63: 185 Ind Cas 889.

——S. 73 — Sale proceeds held by First Class Sub-Judge — Senior Judge, if can transfer case to himself, for rateable distribution.

Where a First Class Sub-Judge holds sale proceeds, it is competent for the Senior Judge without the intervention of the District Judge to call for the sale proceeds to his Court to be rateably distributed amongst decree-holders qualified under S. 73. AIR (Vol 25) 1938 Lah 801: 181 Ind Cas 22.

——S. 73 — Assets received by Collector.

The assets must be deemed to have been received by the Court on the date when they were received by the Collector. It is one thing to hold that the Collector is not a Court and another thing to hold that the Court is not deemed to have received money when the Collector received it, bearing in mind the duties and purpose of a Collector in this matter. When the Collector receives into his hands moneys, those moneys are to be received by him for and on behalf of the Court, though he is not an agent of the Court and while they are in his hands, they are held by the Court just as they would be held by the Court when the Nazir receives them. AIR (Vol 25) 1938 Nag 14: ILR (1939) Nag 285: 173 Ind Cas 98.

——S. 73 — Sale by Collector.

Under S. 73, a person is not entitled to rateable distribution unless he has applied for the execution of his decree before the receipt by the Court of the assets and in the case of sale by Collector, the assets must be deemed to have been received by the Court on the date when they were received by the Collector. AIR (Vol 24) 1937 Nag 16: ILR (1937) Nag 430: 168 Ind Cas 158.

——S. 73 — Transfer of execution — Application under S. 73, if can be entertained by original Court.

An application for rateable distribution can be entertained by the Original Court even when the petition for execution was transferred from that Court under O. XXI, R. 6. AIR (Vol 21) 1934 Lah 113 (1): 35 PLR 305: 153 Ind Cas 731.

——S. 73, O. XXI, R. 52 — Custody Court.

Under O. XXI, R. 52, the custody Court which is not also the attaching Court has no authority to make any rateable distribution. It can only determine the question of priority and thereafter act under the instructions of the attaching Court. AIR (Vol 20) 1933 Cal 814: 37 CWN 820: 146 Ind Cas 761 (1).

——S. 73, and O. 44, R. 1, and O. 33 R. 11 — Rateable distribution — Pauper appellant directed to pay costs to Government — Collector must apply for execution — Merely asking the Court to reserve costs from out of sale proceeds is not enough.

Appeal made 'in forma pauperis' was dismissed and the decree was set aside directing the appellant to pay to Government the sum of Rs. 700 which he would have had to pay had he not been permitted to sue as a pauper and it was further ordered that a copy of the decree be sent to Collector for recovery of that sum. Copy of decree was sent accordingly with a note that the copy is sent for "necessary action". Collector then opened revenue proceeding and issued demand notice on the appellant who filed a petition that he had no property except some cinema films which had already been attached by the decree-holder in execution of the decree against him. Collector then wrote a letter asking the executing Court to set aside the sum of Rs. 703 out of the sale proceeds of the films under S. 45(1), Upper Burma Land Revenue Regulations.

Held, that the wording of the decree "for recovery of that sum", as also of the forwarding letter "for necessary action", was erroneous as the civil Court has no power to issue or suggest any kind of action to the Collector who is the officer in charge of the collection of the Government revenue.

Held further, that S. 45 of Upper Burma Land Revenue Regulation, had no application to the case.

Held also, that the decree ordering pauper appellant to pay the court-fee which he would have had to pay, had he not been permitted to appeal as a pauper, was a money decree in favour of the Collector and unless an application was made by him to the executing Court, no order could be passed in his favour under S. 73, C. P. Code, and that letter requesting the executing Court to set aside the same under a totally inapplicable section could not be regarded as an application for execution. 8 Rang 294: 127 Ind Cas 606: AIR (Vol 17) 1930 Rang 342 (DB).

——S. 73 — Execution in different courts — Section applies.

Where each of the 3 decree-holders of the same judgment-debtor took out execution of their decrees in the execution cases of the Sub-Divisional Court, and also in execution cases of the Township Court and where one of them in execution case of the Sub-Divisional Court attached and brought to sale certain properties belonging to the common judgment-debtor and where the other decree-holders claimed rateable distribution in the Sub-Divisional Court the decree-holders are entitled to rateable distribution in respect of the decrees for which they had taken out execution in the Township Court as well as those for which they had taken out execution in the Sub-Divisional Court. 120 Ind Cas 693: AIR (Vol 16) 1929 Rang 198.

——S. 73 — Application for execution to transferee Court after order of transfer but before actual receipt of decree is not one to proper Court. 27 MLW 423: 109 Ind Cas 404: AIR (Vol 15) 1928 Mad 496: 55 MLJ 120.

——S. 73 — Procedure.

There is no express provision of law that there should be an actual transfer of the decree to the Court granting rateable distribution. When an application for rateable distribution is supplemented with the transfer certificate subsequently received, all the requirements of law are duly complied with. 110 Ind Cas 524: AIR (Vol 15) 1928 Nag 332.

——S. 73 must be read with S. 63—Attachment of sum in execution of two small cause decrees — Subsequent attachment in execution of High Court decree on original side where the money was paid — Decree-holders in Small Cause Court need not apply for execution to High Court again. 6 Rang 131: 110 Ind Cas 744: AIR (Vol 15) 1928 Rang 157 (DB).

——S. 73 — The requirements of S. 73 have not been complied with if the decree is not transferred to the Court which holds the assets and no application for execution has been made to that Court, but only the records of cases of decree-holder of another Court are forwarded to the former Court. AIR (Vol 15) 1928 Rang 96 : 5 Rang 757 : 107 Ind Cas 169.

——S. 73 — Subordinate Judge holding assets — Decree-holder applying for execution to Munsiff — Subordinate Judge calling for execution records on application — There is no transfer of execution case. AIR (Vol 14) 1927 Pat 252 : 101 Ind Cas 908.

——S. 73 — Application for execution must be made to Court holding assets. AIR (Vol 13) 1926 Lah 538 : 95 Ind Cas 151.

——S. 73 — If attachment by inferior Court is prior to that by superior Court, application for rateable distribution to latter Court is not necessary by decree-holder attaching earlier. But if the decree-holder attaching through an inferior Court does so after an attachment has been effected by the superior Court, he cannot claim rateable distribution without an application to the superior Court. 21 Cal 200. Not Foll. AIR (Vol 8) 1921 Cal 87: 25 CWN 740: 63 Ind Cas 11 (DB).

——S. 73 — An application to the superior Court to transfer an execution case to itself from an inferior Court is not an application for execution to the superior Court within S. 73. AIR (Vol 8) 1921 Cal 87 : 25 CWN 740 : 63 Ind Cas 11 (DB).

——S. 73 — Rival decree-holders — Assets held by Munsiff — Power to order rateable distribution — Small Cause decree.

A District Munsiff cannot order rateable distribution of assets held by him in his ordinary jurisdiction to a person holding a small cause decree and applying to execute it without transferring the decree to his Court. (1913) 25 MLJ 601: 21 Ind Cas 869.

——S. 73 and Sch. III — Rateable distribution — Execution before Collector.

A Collector to whom a decree is transferred for execution, holds the amount realised, at the disposal of the Court passing the decree. A creditor of such decree-holder can apply for rateable distribution under S. 295 to the Court passing the decree which can be allowed under S. 324A. (1912) 36 Bom 519 : 14 Bom LR 527 : 16 Ind Cas 59 (DB).

——**Ss. 73 and 63 — Application for execution — Court realising — Transfer of decree to the Court where realization takes place — Necessity for.**

S. 295 of old Code (corresponding to S. 73 of the present Code), did not require the transfer of a decree to the Court where the realization takes place as a condition precedent to an application under S. 285, (S. 63 new Code) and, therefore, the decree-holder seeking rateable distribution need not apply for execution of his decree to the Court where the realization takes place. (1910) 13 OC 291 : 8 Ind Cas 372 (DB).

——S. 73 (S. 295 of old Code) — Rateable distribution — Transfer of decree for execution — Application not to be made to the Court to which the decree was transferred. (1903) 25 A 443. See also (1905) 1 CLJ 315 (318).

——S. 73 (S. 295 of old Code) — Rateable distribution — Court to decide — See (1902) 29 C 773 (777).

——**S. 73 (S. 295 old Code) — Sale by one Court — Application for execution pending in another Court — Transfer through the selling Court.**

Rateable distribution is allowed only to those decree-holders who have a pending execution in the Court which realizes the assets of the judgment-debtor. The fact that the decree-holder's application for execution was transmitted through a District Court to its subordinate Court does not make the application one pending in the District Court so as to entitle the applicant to rateable distribution. (1902) 29 C 548 (553) (DB).

8. Decree.

——**S. 73 — Order under S. 186 (1), Companies Act — S. 73, if applies.**

A Company which holds an order made under S. 186 (1), Companies Act, may resort to any procedure for its enforcement which would be open to it if the order had been a decree made in a suit, with the result that the method of enforcement provided by S. 73 of the Civil P. C. is open to the Company, and an application by the Company for its execution must rank as an application for the execution of a decree for the purpose of that section. AIR (Vol 32) 1945 PC 60 : ILR (1945) Kar (PC) 148 Sup : 1945 MWN 193 : 49 CWN 387 : (1945) 1 MLJ 309: 20 Luck 162: 58 LW 236: 11 BR 406: 47 Bom LR 640: 1945 ALJ: 388: 47 PLR 318: 219 Ind Cas 149: 72 Ind App 85.

[**Reverses: AIR (Vol 27) 1940 Oudh 237: 185 Ind Cas 889**].

——**S. 73 — H having decree against B —Land sold in execution to M — Amount withdrawn by H — Sale then set aside and H ordered to refund amount — On his refusal his property already attached in execution of decree against him, attached — Property sold in execution of decree — M held entitled to rateable distribution.**

H and P in execution of a decree against B attached three fields which were sold for Rs. 2,125 to M. After that amount had been withdrawn by H and P, the sale was set aside. At the instance of M the Court directed H and P to refund the amount and, as they refused to do so, attached their property. This property had already been attached in execution of a decree obtained by the plaintiffs against H and P and it was subsequently sold in execution of that decree. The question was whether M was entitled to rateable distribution:

Held, that the order of refund was an order under S. 47, unless it came within the ambit of S. 144. In either case the order would amount to a decree and there would be a right to rateable distribution. AIR (Vol 27) 1940 Nag 267 : 1940 NLJ 215 : ILR (1942) Nag 136 : 188 Ind Cas 380.

——**S. 73 — Decree prima facie unexecutable against immovable property — Rateable distribution in sale proceeds of such property.**

The application to the Court referred to in S. 73 must be one which on the face of it is entitled to succeed. If the decree under which the applicant's claim is, on the face of it, one which could not be executed against the property represented by the money in Court, the Court cannot allow the applicants to share in the rateable distribution of such money. AIR (Vol 25) 1938 Bom 90: 39 Bom LR 1212: ILR (1938) Bom 98: 173 Ind Cas 561.

——S. 73 — Decree for sale of mortgaged property and personal decree for balance passed without separate application under O. 34 R. 6, though improper, is valid. It is "a decree for the payment of money" within S. 73 and the decree-holder is entitled to rateable distribution. AIR (Vol 21) 1934 Cal 764 (2): 38 CWN 850: 60 CLJ 22: 152 Ind Cas 770.

——**Ss. 73, 151 — Decree for mesne profits — Attachment before ascertainment — Right of rateable distribution — Inherent power.**

A decree for payment of mesne profits is a decree for payment of money within the meaning of S. 73 notwithstanding that the amount has not yet been ascertained and the holder of such a decree who has applied for attachment under O. XXI, R. 42 is entitled to a rateable distribution with other decree-holders. The fact that under the Code of 1908, an application for ascertainment of mesne profits is deemed to be an application in the suit does not necessarily lead to the conclusion that without an application for execution after the ascertainment of profits, rateable distribution cannot be claimed under S. 73.

Where the holder of such a decree has attached under O. XXI, R. 42, delay in passing the final decree should not be allowed to stand in the way of his obtaining rateable distribution. Rateable distribution may, in a case of this nature, be allowed also under S. 151, Civil P.C. AIR (Vol 21) 1934 Mad 604: 58 M 233: 40 LW 291: 67 MLJ 303: (1934) MWN 886: 151 Ind Cas 609.

——**Ss. 73, 2 (2), (14) — Order for payment of money capable of being executed — Whether decree — Benefit of S. 73.**

Section 73 only permits application for rateable distribution by persons who have "made application to the Court for the execution of decrees for the payment of money" and not by persons who have obtained orders for payment of money which are capable of being executed. The definition of decree as given in S. 2 (2) does not include an order which is defined in S. 2 (14). Persons in whose favour orders for payment of money are passed do not stand on the same footing as persons who have obtained "decree" for the payment of money so as to entitle them to the benefit of S. 73. AIR (Vol 21) 1934 Nag 243: 17 NLJ 146: 151 Ind Cas 1027.

——S. 73 — Rateable distribution can be asked for in execution of money decree only. 1 Luck 569: 3 OWN 749: 98 Ind Cas 33: AIR (Vol 13) 1926 Oudh 616 (DB).

——**S. 73 and O. 34, R. 14 — Mortgage decree — Interest due on mortgage — Rateable distribution — C.P.C., O. 34, R. 14.**

Where a mortgagee under a mortgage executed during attachment claimed rateable distribution under S. 73 of the C.P.C. in respect of a simple money decree for interest due on his mortgage:

Held, that the disability imposed by O. 34, R. 14 of the Code did not apply and he was entitled to a rateable distribution. 22 OC 150: 6 OLJ 558: 1 UPLR (J.C.) 67: 52 Ind Cas 645: AIR (Vol 6) 1919 Oudh 351 (DB).

——S. 73 — Right to apply — Mortgage-decree — Personal decree for deficiency — Right of decree-holders to rateable distribution.

Mortgage decrees which provide for recovery of the deficiency of the decree after sale of hypotheca from the person and other properties of the mortgagor are decrees "for the payment of money" within the meaning of S. 73 and entitle the mortgagee to apply for rateable distribution under that Section. 39 Mad 570: 29 MLJ 96: (1915) MWN 334: 17 MLT 427: 29 Ind Cas 231. AIR (Vol 3) 1916 Mad 20 (DB).

——S. 73 — Right to rateable distribution — Decree charging properties — Money decree-holders.

The holder of a decree which provides for the hypothecation of certain properties cannot claim rateable distribution with simple money decree-holders against the owner of the properties. The Court in which money is deposited by a person for a specified purpose, is bound to apply it for that purpose. (1913) 42 PWR 1913: 55 PLR 1913: 18 Ind Cas 55.

——S. 73 — Money decree — Mortgage decree — Defendant exempted from personal liability.

A decree for the sale of the mortgaged property expressly exempting the defendant from personal liability is not a money decree. (1912) 23 MLJ 699: 12 MLT 660: 17 Ind Cas 940 (DB).

9. Enquiry.

——Ss 73, 63, 64 — Court, if can suo motu ascertain various claimants to particular sum of money and distribute it among them.

Neither S. 63 nor S. 64, Civil P.C., indicates that the Court should ascertain who are the various claimants to a particular sum of money and then divide that money among the persons who are entitled to a share of it. The Court can, under S. 73, only divide the assets among such persons as may have made application to the Court for the execution of decrees. Mere attachment before judgment of certain sum does not become an attachment in execution and the decree-holder is not entitled to rateable distribution when he has not applied for execution. AIR (Vol 28) 1941 Mad 125: (1040) MWN 1151: (1940) 2 MLJ 844: 52 LW 807: 192 Ind Cas 864.

——S. 73 — The Court acting under S. 73 is taking a step in execution and the ordinary rule is that the executing Court cannot go behind the decree and it cannot consider the question whether one of the decrees was obtained by fraud or collusion. But in such a case the decree must on the face of it, be good. AIR (Vol 25) 1938 Bom 90: 39 Bom LR 1212: ILR (1938) Bom 98: 173 Ind Cas 561.

——S 73 — Court, if can inquire as to whether decree is proper or bona fide one — Remedy of aggrieved judgment-creditor.

The executing Court is only concerned with those matters which are set out as being the conditions for participation, and so long as a decree is put forward by the holder of that decree, and the holder of the decree satisfies the Court that the money due under that decree has not been paid, then that decree-holder is entitled to come in and claim a proportionate share in the assets of the judgment-debtor. If any part of those assets is paid out to a decree-holder who has obtained a decree by fraud or collusion or by any other improper means, then a remedy is open to the judgment-creditor who has suffered from those circumstances, as provided for in sub-s. (2) of S. 73. The dominating factor with regard to this point is this: that the Court concerned with the distribution of the assets is doing something in connection with execution proceedings, the distribution of assets is only one of the acts in the execution proceedings and the Court is functioning in an administrative and not in a judicial capacity, and no procedure is provided under the provisions of S. 73 and no machinery exists for the holding of an enquiry of the kind involved in the ascertainment as to whether or not the decree is not a bona fide or proper decree. AIR (Vol 22) 1935 Cal 290: 39 CWN 490: 61 CLJ 165: 62 Cal 715: 155 Ind Cas 480 (FB).

[Overrules AIR (Vol 1) 1914 Cal 575: 22 Ind Cas 407; (1885) 11 Cal 42 and (1912) 16 CLJ 582: 17 CWN 326: 16 Ind Cas 795].

——S. 73 (2) — Scope of — Absence of decree in support of Government claim — Executing Court, if can go into merits of the claim.

Section 73 (2) does not confer any jurisdiction on the executing Court to entertain a claim on behalf of the Government in the absence of any decree in support of it. The sub-section only saves the rights of the Government independent of the section, such as they might be and merely has reference to the right of priority which can be ordinarily claimed in respect of debts due to the Crown. Consequently, where the Government has not obtained any decree for the premium and arrears of rent claimed by it, the executing Court has no jurisdiction to go into the merits of the claim. AIR (Vol 22) 1935 Lah 319: 156 Ind Cas 826.

——S. 73 — Question of satisfaction or non-satisfaction.

When S. 73 speaks of a person not having obtained satisfaction of his decree, the insertion of these words after the reference to the application having been made before the receipt of assets clearly suggests that the question of satisfaction or non-satisfaction may have to be determined with reference to some date later than the application for rateable distribution. AIR (Vol 21) 1934 Mad 426: 58 Mad 59: 1934 MWN 532: 66 MLJ 699: 39 LW 768: 151 Ind Cas 170.

——S. 73 — Application under — Court has no jurisdiction to enquire and decide that the decree was null and void. 1934 MWN 591.

——S. 73 — Validity of decree.

In acting under S. 73, the Court acts in an administrative capacity. It will not in dealing with a matter in its administrative capacity, enquire into the validity of any decree and any order to that effect will be entirely without jurisdiction. AIR (Vol 21) 1934 Pat 545: 1 BR 63: 152 Ind Cas 482.

——S. 73 — Power of transferee Court.

The Court to which a decree is transferred for rateable distribution of assets is not competent to enquire whether the decree is collusive or not. AIR (Vol 18) 1931 All 92: 53 All 125: 1930 ALJ 1552: 131 Ind Cas 244.

——S. 73 — Ministerial Act.

An order under S. 73 is not a ministerial and non-judicial act. AIR 1926 Pat 497 and 40 Mad 84 dissented from. 6 Rang 582: 113 Ind Cas 815: AIR (Vol 15) 1928 Rang 163 (DB).

——S. 73 — Enquiry — Stage for.

S. 73 does not provide for an enquiry being made by the Court when passing an order for a rateable distribution and the Judge is not bound to make any enquiry as to whom the property belongs before making the rateable distribution.

113 Ind Cas 815: 6 Rang 582: AIR (Vol 15) 1928 Rang 163 (DB).

——S. 73 — In the case of proceedings under S. 295 of the Old Code a Court cannot enquire into the validity of the decrees sought to be executed. 39 MLT 609: 104 Ind Cas 735: AIR (Vol 14) 1927 Mad 944.

——S. 73 — Rateable distribution is a ministerial act.

The act of distribution under S. 73 is a ministerial act and therefore where the first decree-holder objects to rateable distribution on the ground that second decree-holder's decree was collusive and urges for judicial decision on the point:

Held, that his prayer should be disallowed. 5 Pat 445: 98 Ind Cas 759: AIR (Vol 13) 1926 Pat 497 (DB).

——S. 73 — Court should not go into bona fides of the decree.

Where the Court is concerned with distributing assets under S. 73 it has no power to go behind the decrees which are presented by the various decree-holders asking for rateable distribution and to look into their bona fides. 11 C. 42 Diss.: 75 Ind Cas 749: 19 NLR 172: AIR (Vol 11) 1924 Nag 39.

——S. 73 — Fraud — Remedy is under S. 73 (2).

The Court distributing assets under S. 73, cannot have greater power to go behind the decree, and should not deal with the question whether the decree is fraudulent. The remedy of the opponent raising the plea of fraud lies under S. 73 (2). 65 Ind Cas 600: 46 Bom 635: 24 Bom LR 1: AIR (Vol 9) 1922 Bom 31 (FB).

——S. 73 — Rival decree holders — Right of one decree holder to impeach decree of rival decree-holder — Fraud and collusion — Suit for declaration and injunction before distribution of assets.

In the absence of fraud on court or collusion as between the decree-holder and judgment-debtor it is not open to one decree-holder to attack a decree obtained by another decree-holder against the same judgment-debtor seeking rateable distribution as not creating a valid debt and entitling the decree holder to share in the distribution of the assets under S. 73 C. P. C. The mere fact the decree was obtained 'ex parte' or on perjured evidence is not enough to vitiate it. The action of the Court under S. 73 is materially different from that of a court in insolvency proceedings. A rival decree-holder need not wait for the distribution of the assets before bringing a suit for a declaration that the decree of one of the decree holders was obtained by fraud and collusion and that he was not entitled to share in the rateable distribution. 43 Mad 381: 38 MLJ 108: 27 MLT 66: (1920) MWN 92: 11 LW 81: 55 Ind Cas 452: AIR (Vol 7) 1920 Mad 605 (DB).

——S. 73 — Enquiry — Rival claims.

The inquiry by the Court under this section is non-judicial. A Court under this section cannot inquire into the 'Bona fides' or otherwise of a decree brought to its notice. 'Quaere'; whether an executing Court can inquire into the validity of a decree under any circumstances. AIR (Vol 5) 1918 Mad 825: 40 Mad 341: 21 MLT 225: (1917) MWN 280: 5 LW 538: 32 MLJ 553: 38 Ind Cas 117 (DB).

——S. 73 — Enquiry — Rival claims — Bona fides — Applications for rateable distribution.

Under S. 73, C. P. C. when rival decree-holders apply for rateable distribution of assets it is competent to the Court to investigate whether any of the decree-holders is a 'bona fide' decree-holder or is a 'benamidar' for the judgment-debtor. (1913) 17 CWN 326: 16 CLJ 582: 16 Ind Cas 795 (DB). (Also see (1912) 23 MLJ 699: 12 MLT 660: 17 Ind Cas 940).

——S. 73 — Rival decree-holders — Collusion — Effect.

The Court will not grant rateable distribution if collusion or corrupt bargain is proved. A decree-holder can show that a decree obtained by another decree-holder was obtained by collusion with the judgment-debtor. (1912) 23 MLJ 699: 12 MLT 660: 17 Ind Cas 940 (DB).

——S. 73 — Enquiry into rival claims.

The Court is competent under S. 73 to investigate the title of a rival decree holder whether 'bona fide' or 'benamidar' for judgment-debtor when they apply for rateable distribution of assets. (1912) 16 CLJ 582: 17 CWN 326: 16 Ind Cas 795 (DB).

10. Execution.

——S. 73 — Only Court holding assets can order rateable distribution.

It is only the Court which holds the assets that can order the rateable distribution. Court cannot, either of its own motion, or at the bidding of another Court, transfer the 'darkhast' or a suit pending before it, unless an order for transfer is duly passed either by the District Court or by the High Court. AIR (Vol 26) 1939 Bom 468: 41 Bom LR 997: 186 Ind Cas 372.

——S. 73 — Application prior to receipt of assets — Dismissal of execution petition before rateable distribution is actually made.

The dismissal of an execution petition after the application for rateable distribution does not affect the right to share in the distribution. The fact that parties allow their own pending execution to be dismissed for default before the rateable distribution was actually made is immaterial. AIR (Vol 24) 1937 Pat 92: 17 PLT 855: 3 BR 307: 167 Ind Cas 613.

——S. 73, O. 21, Rr. 11, 17 — Whether application for execution — Amendment.

A mere application for rateable distribution is not a proper application for execution of the decree within the meaning of O. XXI, R. 11. But under O. XXI, R. 17 the Court may allow the defect to be remedied and may fix a time within which it may be remedied. AIR (Vol 20) 1933 Oudh 75: 9 OWN 1079: 142 Ind Cas 238.

——S. 73 — Execution petition formally dismissed on giving time to judgment-debtor — Right to rateable distribution.

Permission to set-off granted to a decree-holder under O. XXI, R. 72, Civil P. C., can only be subject to the right of other decree-holders to rateable distribution given by S. 73.

The rule according to which in an ordinary case where no question of rateable distribution can arise and a set-off has been allowed, the date of the sale is to be regarded as the date on which the assets are realised cannot apply to a case where there is a valid claim to rateable distribution. In a case like this the assets cannot be deemed to have been realised by the Court until the amount for which set-off could be allowed is determined and the balance is actually deposited in Court by the decree-holder. An application for execution made before the balance amount is so deposited must be deemed to have been made before assets are realised by the Court for the purposes of S. 73.

Where time is given to a judgment-debtor and an application for execution is formally dismissed on this ground, the giving of time merely postpones the issue of process against a judgment-debtor. The order does not in any way destroy or suspend the right of the decree-holder to apply for execution. It does not validly or legally dispose of the execution petition which must be

deemed to be pending for the purposes of S. 73. AIR (Vol 23) 1936 Mad 437: 1936 MWN 223: 43 LW 703: 70 MLJ 683: 163 Ind Cas 209.

——**S. 73. O. XXI, R. 72 — Execution sale — Purchase by decree-holder — Sale by another decree-holder — Validity of second sale — Application by second decree-holder purchaser for rateable distribution, competency of — Set-off by previous decree-holder, effect of.**

Where a decree-holder A purchased his judgment-debtor's property in court-sale setting off the purchase money with the leave of the Court against the decree amount and subsequently another decree-holder B sold the same property and on coming to know of the previous sale, B applied to the Court for rateable distribution against A.

Held, (i) that on account of A's prior sale, B's sale was inoperative and B's decree remained unsatisfied;

(ii) that the set-off by A was subject to B's claim for rateable distribution;

(iii) that the Court had, therefore, power to order A to refund into Court the amount payable to B under the provisions of S. 73. AIR (Vol 18) 1931 Pat 405: 12 PLT 639: 11 Pat 250: 134 Ind Cas 616.

——S. 73 and O. 44, R. 1 and O. 33, R. 11 — Rateable distribution — Pauper appellant directed to pay costs to Govt. — It is a money decree in favour of Collector — Collector must apply for execution — Merely asking the Court to reserve costs from out of sale proceeds is not enough. AIR (Vol 17) 1930 Rang 342: 8 Rang 294: 127 Ind Cas 606 (DB).

——S. 73 — Petition wanting in particulars may be enough under S. 73.

The purpose of Section 73 is that there should be an equitable distribution of assets between those creditors who have been diligent enough to obtain decrees and put in execution applications before the time such assets have been received. Court should rather look to the substance than to the form of the application in order to administer the equity which the law provides. An application for an order of attachment of a particular fund obtained out of a sale under an attachment in another suit was filed but there were certain defects in the application. Certain particulars which were required under O. 21, R. 11, for a formal application under that rule were wanting. The executing Court issued attachment order upon the petition.

Held: that the application was sufficient for the purpose of rateable distribution: AIR 1928 Mad 129 (2), Reversed. AIR (Vol 16) 1929 Mad 703: 57 MLJ 97: 52 Mad 760: 30 MLW 110: 1929 MWN 611: 118 Ind Cas 72 (FB).

——S. 73 — Application after receipt of assets.

Application for execution of a decree made after the receipt of assets into the Court does not entitle the decree-holder to a rateable share under S. 73. AIR (Vol 16) 1929 Lah 645: 118 Ind Cas 908.

——S. 73 — Is not a form of execution.

An application, praying only for rateable distribution is not a valid application for execution. C. P. Code does not recognize an application for rateable distribution as such. A decree-holder, to obtain rateable distribution under Section 73, must make an application for execution praying for execution of his decree in one of the ways mentioned in O. 21, R. 11, before the receipt of assets by the Court. AIR (Vol 16) 1929 Nag 148: 25 NLR 94: 116 Ind Cas 655: 12 NLJ 64 (DB).

——S. 73 — Application must state the mode of execution.

An application which does not specify the way in which the assistance of the Court sought for executing the decree according to O. 21, R. 11 is not an application for execution according to law, even though it may be application, which can be considered as a step-in-aid of execution so as to save limitation. A creditor, claiming rateable distribution on the strength of a money decree, must himself ask for attachment and sale of the property or for execution of his decree by one of the modes specified in O. 21, R. 11: AIR (Vol 16) 1929 Nag 148: 25 NLR 94: 116 Ind Cas 655: 12 NLJ 64 (DB).

——S. 73 — Attachment of property after judgment is not sufficient to share in the rateable distribution, but a formal application is necessary before the assets come into Court's possession. AIR (Vo 13) 1926 Cal 249: 90 Ind Cas 527 (DB).

——S. 73 — Stay of execution — No further application necessary.

Execution of decree of inferior Court stopped by superior Court — Decree-holder is entitled to rateable distribution without further application under AIR (Vol 12) 1925 Cal 966: 87 Ind Cas 783: 29 CWN 575 (DB).

——S. 73 — Execution applied for before realisation is enough.

Presentation after realisation of assets is no ground for refusing an application for rateable distribution, provided that execution of decree has been applied for, before realisation of assets. AIR (Vol 12) 1925 Mad 587: 87 Ind Cas 390: 21 MLW 518: 1925 MWN 173: 48 MLJ 459.

——S. 73 — Before a person is entitled to rateable distribution under Section 73 an application for execution must be made. Where no regular applications for execution have been made and the prayer is only for rateable distribution of the assets, no rateable distribution can be ordered. AIR (Vol 12) 1925 Nag 382: 87 Ind Cas 1025.

——S. 73 — Rateable distribution — Conditions necessary — Decree-holder must apply in form prescribed in O. 21, R. 11 (2) to Court holding assets, before they are received. AIR (Vol 8) 1921 Nag 5: 17 NLR 143: 64 Ind Cas 53.

——S. 73 — Application can be made during sale.

An application for rateable distribution made when the sale is going on is made before the receipt of assets within S. 73 and hence such application is maintainable. AIR (Vol 8) 1921 Pat 401: 1921 PHCC 204: 57 Ind Cas 421 (DB).

——S. 73 and O. 21, R. 72 — Rateable distribution — Permission to bid and order to set off decree debt, whether subject to rights of other decree holders.

Where a Court permits a decree-holder to bid at an auction to set off the purchase money against his decretal amount the rights of the rival decree holders under Section 73 are not disturbed and they have a right to the distribution. AIR (Vol 7) 1920 Mad 731: 12 LW 328: 59 Ind Cas 86.

——S. 73 — Application for execution — Order of attachment before judgment.

A person, by simply obtaining an order for attachment before judgment is not entitled to rateable distribution. The section applies only when application for execution has been made before realisation of assets. AIR (Vol 3) 1916 Cal 371: 21 CLJ 614: 30 Ind Cas 38 (DB).

——S. 73 — Dismissal of execution.

A decree-holder is not entitled to rateable distribution if the application for execution is dismissed or time barred or the decree is satisfied.

AIR (Vol 3) 1916 Cal 264: 21 CLJ 624: 30 Ind Cas 49 (DB).

——**S. 73 and O. 21, R. 90 — Dismissal of execution — Right to apply to set aside sale and also for rateable distribution.**

Dismissal for non-prosecution of a decree-holder's application for execution does not affect his right to a share in rateable distribution under Section 73; he is therefore entitled to apply under O. 21, R. 90 to set aside the sale. AIR (Vol 2) 1915 Cal 16: 18 CWN 1311: 24 Ind Cas 83 (DB).

——**S. 73 — Object of.**

The object of Section 73 is (1) to prevent unnecessary multiplicity of execution proceedings and to obviate the necessity of each and every decree-holder separately attaching and selling the property, and (2) to secure an equitable administration of the property by putting all the decree-holders upon the same footing and making the property rateably divisible among them. (1910) 13 OC 291: 8 Ind Cas 372 (DB).

——**S. 73, and O. 21, Rr. 10 and 11 — Application for execution — Form of.**

Obiter — An application which does not comply with requirements of O. 21, R. 11 in form and substance is not an application for execution within S. 73 (1911) 34 Mad 25: 8 MLT 226: (1910) MWN 688: 7 Ind Cas 856 (DB).

——**S. 73 — Dismissal of execution — No right to distribution.**

If the plaintiff's execution application is struck off, he has no right to claim rateable distribution under Section 295 (1882). (1910) 7 MLT 110: 5 Ind Cas 820 (DB).

——**S. 73 — Dismissal of execution application.**

A creditor whose application for execution is finally struck off, cannot claim rateable distribution, in assets of the judgment-debtors' property realised under the decrees of other creditors. (1910) 5 Ind Cas 145 (Mad) (DB).

10A. Execution application.

See N. 10.

10B. Insolvency of judgment-debtor.

See N. 13.

10C. Limitation.

See N 20 and 21.

11. Mode of.

——S. 73 — Before any question can arise for rateable distribution under Section 73, the rule laid down by O. XXI, R. 18 must be first applied. AIR (Vol 24) 1937 All 422: 1937 ALJ 473: 1937 AWR 441: 169 Ind Cas 639.

——**S. 73, O. XXI, R. 2 — Payment made to decree-holder between date of application for rateable distribution and date of actual distribution should be taken into account — Analogy with Provincial Insolvency Act (V of 1920).**

Application for execution must be made before the receipt of the assets by the Court, and no decree-holder who has not made such an application will be entitled to rateable distribution. But at the same time, on general grounds, when rateable distribution is made, it should be made according to the amount due to each decree-holder at the time the distribution is made and any payment or satisfaction to any decree-holder between the date of his application for execution and rateable distribution and the date of actual distribution should be taken into account. If such payment is made, it is the duty of the decree-holder under O. XXI, R. 2, to certify the payment, and when such payment is certified, it must be taken into account at the time of the actual distribution of assets between the several decree-holders:

Held, that the analogy of the Insolvency Act may be rightly applied in this case because both rateable distribution under Section 73 and distribution of assets under the Prov. Insol. Act are made on the same principle, the assumption being that the assets of the debtor are insufficient to meet all the claims against him and therefore, the assets are proportionately distributed among the various creditors or decree-holders according to their claims or decrees. AIR (Vol 22) 1935 Nag 214: 31 NLR 423: 158 Ind Cas 347.

——**S. 73 — Decree-holder attaching three items against two judgment-debtors — Confirmation of sale — Another decree-holder against one of judgment-debtors — Rateable distribution — Calculation, basis of.**

The mere fact of the sale having taken place should not be treated as satisfying the decree-holders' decree to the extent of the possible sale proceeds; because, it is clear from R. 84 of O. XXI, that if the sale is not completed by the purchaser, the 25 per cent. deposit may be forfeited to the Government and this shows that that amount cannot be treated as necessarily available to the decree-holder. It may even be, that after the whole sale price has been deposited into Court, application may be pending for setting aside the sale by some persons interested in the property; therefore, during such periods the sale proceeds cannot be regarded as earmarked for the satisfaction of any particular decree. But after the sale had been confirmed and when the sale proceeds paid into Court are at any moment available to the particular decree-holder, he must be regarded as having obtained satisfaction of his decree to that extent.

A petitioner who was the decree-holder in a suit on the file of the Sub-Court had obtained a decree against two sets of defendants and in execution thereof brought to sale three items of properties, all the sales taking place on April 2, 1930, and got them confirmed. The respondent was the decree-holder in a later suit on the file of the Court of the District Munsif of another place against the owner of item No. 1 and half of item No. 2. His right to rateable distribution was not disputed, but the point raised was as to the basis on which the proportion as between the two rival decree-holders was to be fixed:

Held, that the petitioner should be held to have been satisfied to the extent of the proceeds realised by sale of the properties belonging to the other judgment-debtor. AIR (Vol 21) 1934 Mad 426: 1934 MWN 532: 39 MLW 768: 66 MLJ 699: 58 Mad 59: 151 Ind Cas 170.

——**S. 73 — Only unsatisfied portion of decree is to be taken into account.**

In a question of rateable distribution, only the unsatisfied portion of the decree ought to be taken into account. AIR (Vol 21) 1934 Mad 426: 39 MLW 768: 58 Mad 59: 1934 MWN 532: 66 MLJ 699: 151 Ind Cas 17.

——**S. 73 — Specific application — Decree-holder purchasing property — Balance after deducting decree amount paid in cash — Another decree-holder against same judgment-debtor — Deposit of full price of property.**

Under Section 73 it is not necessary for a decree-holder to make a specific application for rateable distribution. All that is necessary is that he should apply for execution and should not have received satisfaction of his decree.

A purchased B's property in execution of his decree. Before the sale C had filed an application for execution of a simple money-decree against B. A deducted the amount due to him

under the decree from the sale price and paid the balance in cash granting a certificate of satisfaction for the amount deducted. The Court passed an order confirming the sale in favour of A and directing that the sum he paid in cash should be given to C and that for the balance to which C was entitled by way of rateable distribution, a decree be passed entitling C to recover the amount by execution:

Held, that this order was wrong and as between the two decree-holders against the same judgment-debtor the executing Court had no authority to pass an order that one decree-holder should pay a certain amount to the other decree-holder, and that in the circumstances the only thing that could be done was to annul the sale and to direct the property to be sold again so that out of the sale proceeds all persons entitled to rateable distribution may be paid. AIR (Vol 20) 1933 All 337: 1933 ALJ 336: 145 Ind Cas 577.

——S. 73 — Property in hands of Receiver.

Where the property to be sold is held by a Receiver appointed by the Court, leave of the Court is not necessary before filing an application for rateable distribution. AIR (Vol 19) 1932 Bom 622: 34 Bom LR 1405: 141 Ind Cas 389 (2).

——S. 73 — Two brothers of joint Hindu family — Decrees against both jointly and against one personally — Mode of distributing indicated.

The decree-holders, against one of the brothers forming a Hindu joint family alone, are entitled to rateable distribution only in respect of his share in the property that was sold. In such a case the principle that should be followed by the Court is to take the sale proceeds and dividing it into two halves, distribute one half belonging to one of the brothers having no personal decrees against him amongst all the decree-holders who have obtained decrees against both the brothers and the sale proceeds representing the other's share amongst all the decree-holders who have obtained decree not only against both the brothers but also against the latter alone proportionately; in other words the decree-holders who have obtained decrees against both the brothers will get proportionately not only in the half share of the former, but also once over again in the share of the latter's sale proceeds according to the total amount made up of the decrees obtained against him whether singly or jointly with his brother. AIR (Vol 15) 1928 Mad 362: 27 MLW 804: 109 Ind Cas 557: 54 MLJ 278.

——S. 73 — Procedure — Principle.

Principle is "first come first served". AIR (Vol 15) 1928 Mad 129: 107 Ind Cas 298 (DB).

11A. Notice.

See N. 14.

12. Persons entitled.

——S. 73 — Application — Sale of property privately to decree-holder who had attached it — Claim for rateable distribution.

A decree-holder applying for rateable distribution cannot assert his claim against another decree-holder who had attached the property in his darkhast and had thereafter purchased it privately from the judgment-debtor in satisfaction of his decree after the application for rateable distribution. AIR (Vol 30) 1943 Bom 261: 45 Bom LR 449: ILR (1943) Bom 513: 208 Ind Cas 407.

——Ss. 73, 47 — Creditor who had attachment before judgment obtaining decree and succeeding debtor as heir — Decree obtained by another creditor against such heir as representative of debtor and property in his hands sold in execution — Claim for rateable distribution.

A had obtained an attachment before judgment and got a decree against B. Subsequently on death of B, A succeeded to him as his heir. C, another creditor of B, obtained a decree against A, as heir and legal representative of B and in execution sold a property belonging to B. A who had also put in an application for execution applied for rateable distribution in the sale proceeds:

Held, that though A's execution application was still pending, no order could issue thereon because he could not have execution against himself. The ground on which execution is denied is that A being the same hand to receive and to pay the debt due to him must be deemed to have been paid from and out of the assets in his hands and, therefore, it must be deemed to have been satisfied. The question whether the decree had been satisfied was one which had to be gone into. If B had left assets, other than the property which was sold, sufficient to satisfy the decree debt of A, A's claim must be disallowed. But if the only asset that he left was the property which was sold, so much of the property that would be necessary to satisfy A's debt must be deemed to have been appropriated for his debt & only the balance will be available for payment to C. Though S. 73, Civil P. C., might not apply because the decree must be held to have been satisfied and, therefore, execution could not issue, still A was entitled to urge his claim under S. 47, Civil P. C., being a party to the decree and prevent C from appropriating the whole of the sale proceeds for satisfaction of his debt. Since A chose only to ask for a rateable distribution, his claim to this limited extent was perfectly justified. But before a rateable distribution could be ordered, an enquiry must be held as to whether B left any other estate besides the property that had been sold, so that if it was found that there were other assets of the judgment-debtor which would cover the value of A's debt, to that extent it must be deemed to be satisfied and only for the balance he could claim rateable distribution; if there were no other assets of the judgment-debtor, A must be allowed to participate in the sale proceeds along with C. AIR (Vol 29) 1942 Mad 260: 54 MLW 688: (1941) 2 MLJ 1024: ILR (1942) Mad 360: 199 Ind Cas 105.

——S. 73 — Money decree obtained by A against D in 1936 — D Government servant getting Rs. 130 a month — Rs. 60 per month attached in execution — B obtaining decree against D in 1938 — B, held entitled to rateable distribution in Rs. 60.

One A obtained two simple money-decrees against one D, a Government servant in 1936. His salary was Rs. 130 a month. Under proviso (i) to S. 60, Civil P. C., one-half of this salary was exempt from attachment and Rs. 60 a month was actually attached each month. One B obtained his decree against the same judgment-debtor in 1938, and asked for rateable distribution in the Rs. 60 which A was receiving. In between these two dates, the Civil P. C. (Second Amendment) Act of 1907 was passed, according to which only Rs. 15 of the judgment-debtor's salary could be attached. The question was whether B could ask for rateable distribution in any sum exceeding Rs. 15:

Held, that B was entitled to rateable distribution in the Rs. 60 which A was receiving. AIR (Vol 28) 1941 Nag 239: 1941 NLJ 331: 195 Ind Cas 609.

——S. 73 — Decree against grandfather, son and grandson — Another decree against grandfather and son only — Grandfather and son adjudicated insolvents — Both decree-holders held entitled to rateable distribution in the interest of grandson.

Where a money decree is passed against a grandfather who is joint with his son and grandson it must be taken to be a decree passed against the

son and the grandson to the extent of their interests in the family property as they are liable to that extent for his lawful debts.

Consequently, a creditor who has a decree against the grandfather, son and grandson and another creditor who has a decree against the grandfather and son only are entitled to rateable distribution under S. 73, when the grandfather and the son are adjudicated insolvents and the interest of the grandson is attached by one of the creditors before the same has been realized by the Official Assignee or the Official Receiver. AIR (Vol 27) 1940 Mad 525: 51 LW 357: 1940 MWN 286: (1940) 1 MLJ 553: 194 Ind Cas 803.

——S. 73 and O. XXXIV, R. 4 — Holder of mortgage decree cannot claim rateable distribution even for costs.

A mortgage decree passed under the provisions of O. XXXIV, which directs that the amount due to the decree-holder shall first be paid out of the sale proceeds of the mortgaged property is not a personal decree at first instance even as regards costs and hence the holder of such a decree cannot claim rateable distribution. AIR (Vol 26) 1939 Lah 303: 42 PLR 249.

——S. 73 — Decree in favour of one against three — Another decree in favour of another against two of them — Property sold in execution of latter's decree — Former decree-holder, whether entitled to rateable distribution.

For the purpose of rateable distribution it makes no difference in law that the parties are two in one case and three in the other so long as the same share of the two parties, who are common in both decrees, is sought to be attached. Where, therefore, a decree-holder has a decree against three persons and another decree-holder gets a decree against two of them and property is sold in execution of his decree, the first decree-holder is entitled to rateable distribution in the sale proceeds. AIR (Vol 25) 1938 Lah 801: 181 Ind Cas 22.

——S. 73 — A holder of a decree obtained in a suit brought after 1937, has a right under S. 73 to come in for a share in the rateable distribution of salary attached under a decree. AIR (Vol 25) 1938 Sind 144: 176 Ind Cas 682.

——S. 73 — The fact that the decree-holder claimed the entire amount to himself does not deprive him of his right to a share if that is all that he was entitled to under the law. (1937) 1937 MWN 480.

——S. 73 — Persons entitled when can impeach private alienation.

Persons entitled to rateable distribution have the right to impeach the private alienation only if the attachment under which they make a claim is subsisting, (1936) 163 Ind Cas 587: 39 CWN 1076.

——S. 73 — Decree-holder permitted to set-off — Court ignorant of attachment by another in another Court — Such prior decree-holder if entitled to rateable distribution.

Where the Sub-Court passed orders permitting the decree-holder to bid at an auction sale and allowed him to set-off the purchase money against his decretal amount in ignorance of the existence of another attachment in another Court and on sale of the property, the latter claimed rateable distribution under S. 73:

Held, that the prior attaching decree-holder not being a party to the application allowing set-off, he was not bound by that order and he was entitled to rateable distribution, and as no actual payments had been made, the order could be rectified. AIR (Vol 22) 1935 Mad 904: 162 Ind Cas 221.

——S. 73, O. XXI, R. 72 — Other decree-holders applying for execution after sale but within 15 days thereof, whether entitled to rateable distribution.

Under O. XXI, R. 72, where the purchase price is either equal to or less than the decree amount, the right of the decree-holder who has been granted permission to set-off the purchase money against the decree amount is controlled only to this extent, namely, that he is bound to bring into Court such sums alone as are due to those decree-holders whose applications for execution were pending on the date of the sale. Decree-holders who come in later, that is, after the date of the sale but before the expiry of the 15th day cannot claim rateable distribution in such a case. AIR (Vol 22) 1935 Mad 893: 1935 MWN 792: 42 LW 564: 59 Mad 342: 159 Ind Cas 228.

——S. 73 — Payment order to one decree-holder — Attachment and decree in another's favour before payment — Both, if entitled to rateable distribution.

Section 73 does not take into account at all whether payment orders have been passed for the different decree-holders who have decrees against the same judgment-debtor. All that the section considers necessary is that assets should be held by a Court and that more persons than one have made applications to the Court for the execution of decrees. The mere fact that the Court has ordered payment if an application was made and when the money was received in favour of one of the decree-holders is not a consideration which should bar the rights of the plaintiff to rateable distribution. One decree-holder is not a party to the execution proceedings of a rival decree-holder and, therefore, orders passed in such execution proceedings will in no way bind him. The principle of the section is that as long as the assets are still held by a Court, there should be rateable distribution. AIR (Vol 21) 1934 All 652: 3 AWR 606: 151 Ind Cas 266.

——S. 73 — Application before appropriating moneys towards decree is proper.

Where it is admitted that the third judgment-creditor applied for execution before any order was passed transferring or appropriating the fund or any portion thereof to the decree obtained by the first judgment-creditor, the third judgment-creditor is entitled to rateable distribution along with the other two. AIR (Vol 17) 1930 Mad 4.

——S. 73 — Application after receipt of assets.

Application for execution of a decree made after the receipt of assets into the Court does not entitle the decree-holder to a rateable share under S. 73. AIR (Vol 16) 1929 Lah 645: 118 Ind Cas 908.

——S. 73 — Rival claimants.

A instituted a suit and obtained attachment before judgment of the debtor's properties. The properties were sold and money was deposited in Court. While A's suit was pending, B filed a suit against the same debtor. He attached before judgment, the money deposited in Court. B obtained a decree and applied in A's suit for the payment of his decretal amount from the money in deposit. A then obtained a decree and applied for the payment of the money.

Held per Sadasiva Aiyar, J.—Till A applied for execution of his decree, the money in deposit was not assets realised in execution of decree. When B applied for execution, no order was passed transferring the deposit from A's credit to B's credit. Therefore A and B were both entitled to rateable distribution. **42 Mad 692**, held overruled by 60 Ind Cas 302: AIR 1921 Mad 218: 44 Mad 100 (FB).

Per Coutts-Trotter, J.—When B applied for execution and payment from the deposit, he im-

pliedly prayed for a transfer of the deposit to his credit and therefore he was entitled to be paid in full. 42 Mad 692, Foll. and held not overruled by 60 Ind Cas 302: AIR 1921 Mad 218: 44 Mad 100 (FB). AIR (Vol 8) 1921 Mad 481: 14 MLW 582: 1921 MWN 817: 70 Ind Cas 20 (DB).

——S. 73 — **Priority.**

All decree-holders who have applied for execution to the executing Court before the receipt of assets are entitled to rateable distribution. AIR (Vol 8) 1921 Mad 218: 44 Mad 100: 39 MLJ 608: (1921) MWN 14: 12 LW 744 (FB).

——**S. 73 — Rival decree-holders.**

One of two decree-holders against a common judgment-debtor got permission to bid at the auction sale and to set off his claim against the purchase-money, and purchased one item of the property but did not deposit the purchase-money. Another item was sold to a stranger who deposited the purchase-money whereupon the other decree-holder applied for rateable distribution. Held, that he was entitled to rateable distribution in respect of both the purchases as the permission to set off granted to the other decree-holder did not affect the right to such distribution. AIR (Vol 7) 1920 Mad 731: 59 Ind Cas 86: 12 LW 328.

——**S. 73 — Right to apply — Mortgagee decree-holder — No personal decree against mortgagor — Rateable distribution.**

A mortgagee of a judgment-debtor who has obtained no decree against the latter, and has not made any application under S. 73 of the C. P. C., cannot claim the assets realised by the sale of the judgment-debtor's property in execution of a decree held by another creditor. AIR (Vol 6) 1919 Low Bur 124: 12 Bur LT 43: 51 Ind Cas 580.

——**S. 73 — Rival decree-holders — Objection by judgment-debtor.**

When there are two decree-holders of one judgment-debtor and the objection of the judgment-debtor that the property was non-transferable, against one is disallowed and against the other it is allowed, the latter is entitled to rateable distribution of the sale proceeds on execution by the former. AIR (Vol 3) 1916 Cal 264: 21 CLJ 624: 30 Ind Cas 49 (DB).

——**S. 73 — Right to rateable distribution — Attaching decree-holder.**

As between two attaching decree-holders one executing his own decree and the other executing the attached decree, the one who had applied for execution of the attached decree was entitled to rateable distribution since in effect he was executing his own decree. (1913) MWN 1021. 14 MLT 533: 21 Ind Cas 611 (DB).

——**S. 73 — Right to apply — Attaching creditor.**

S. 73 does not include an application for rateable distribution by an attaching creditor of the judgment-debtor in a suit. (1909) 5 MLT 126: 4 Ind Cas 1102 (DB).

——**S. 73, O. 21, R. 89 (Ss. 295, 310-A of old Code) — "For payment to decree-holder" — Rights of other attaching creditors to money realised under S. 310-A — Rateable distribution.**

Attaching creditors, other than the decree-holder in execution of whose decree the property was sold, are not entitled to rateable distribution of the money deposited under S. 310-A for payment to decree-holder. (1903) 30 C 262 (264).

——**S. 73 (S. 295, Old Code) — Execution of decree — Rateable distribution of assets — Hindu law — Joint family — Effect of attachment of joint family property in keeping alive the remedy of the decree-holder.**

A decree-holder who held a decree against one member of a joint Hindu family consisting of two brothers in execution of his decree attached the judgment-debtor's interest in a portion of the joint family property. Subsequent to the attachment and before sale, the judgment-debtor died. Upon the rights and interests of the judgment-debtor in the attached property being brought to sale, certain persons who held decrees against the same judgment-debtor or his representatives, but had not attached any of the joint family property in his life-time, applied under S. 295 of the Code of Civil Procedure to be allowed to share rateably in the assets realized by the sale. Their applications were granted; but on appeal in a suit by the decree-holder who had attached in the lifetime of the judgment-debtors, it was held that the attachment enured only for the benefit of the decree-holder who had made it, and that the non-attaching decree-holders were not entitled by virtue of S. 295 of the Code to share in the assets realized by sale under such attachment. 1901 AWN 4: 23 A. 106 (112, 113) (DB).

13. Priority.

——S. 73 — Under S. 73, the buyer decree-holder holding a charge over the property sold in execution is entitled to priority over all the decree-holders whose attachments of the property were effected subsequent to the date of the payment of the earnest money. AIR (Vol 29) 1942 Sind 120: ILR (1942) Kar 200: 203 Ind Cas 252.

——**S. 73 — Lessor, if can claim rent for period during which goods were in his premises as part of costs of realization out of sale proceeds.**

Where the goods attached by the creditors have continued to remain in possession of the Nazir in the premises which were in the occupation of the judgment-debtors as lessees, and the lease has not been terminated, the relationship between the lessor and the judgment-debtors as lessor and lessees continues unaffected and there is no privity either of contract or of estate between the lessor and the Nazir. The lessor, however, is entitled to claim rent for the period during which the attached goods were kept on the premises as part of the costs of the realization to be deducted from the sale proceeds before distribution to the judgment-creditors is made under S. 73. AIR (Vol 27) 1940 Sind 17: 187 Ind Cas 55.

——**S. 73 (1) — Crown's priority — Crown and private individual executing their decree against same judgment-debtor — Crown has priority.**

When the Crown and a private individual both execute their decrees against the same judgment-debtor and seek to be satisfied out of the same fund, the rules as to rateable distribution laid down in S. 73 (1) do not apply and the decree in favour of the Crown has priority. In such cases it is not necessary for the Crown or its representative to attach the fund before claiming payment.

Held that the order of the Court that the Crown had the prior right for the satisfaction of the amount of the court-fees due from the judgment-debtor on the failure of his pauper appeal and directing payment to the Nazir out of the sale proceeds deposited in the Court in execution taken out by the decree-holder, was proper. AIR (Vol 26) 1939 Lah 488: 42 PLR 96: ILR (1940) Lah 124: 186 Ind Cas 590.

——**S. 73 — Unsecured creditors — Crown's priority — Collector acting under S. 46 (2), Income Tax Act and S. 45, Lower Burma Land and Revenue Act (II of 1876) — Claim to attached property.**

The Court holding the assets is bound to recognise the claim of the Collector acting under the Income Tax Act, S. 46 (2), and the Lower Burma Land and Revenue Act, S. 45 that the

Crown has priority over unsecured creditors in the payment of debts. This is a well-known principle of law applied both in England and in India. The claim of the Collector cannot be deemed to fall under S. 73, Civil P.C. which applies only to Civil Courts and although the Collector is empowered to exercise all the powers conferred on a Court executing a decree by the Civil P.C., he does not thereby become a Civil Court. There can be no rateable distribution between such decree-holders as come within the scope of S. 73, Civil P.C., and the Collector. AIR (Vol 24) 1937 Rang 380: 1937 Rang LR 344: 172 Ind Cas 422.

——S. 73 — Court-fee — Crown debt.

Pauper suit — Order directing payment of court-fee by defendant — In execution, the claim of the Government has priority as a Crown debt and the Government is entitled to have its claim satisfied in preference to the decree-holder's claim. AIR (Vol 23) 1936 Mad 602: 1936 MWN 76: 70 MLJ 601: 43 MLW 725: 59 M 872: 162 Ind Cas 868.

——S. 73 — Crown Right — If restricted by O. XXXIII, R. 10.

Order XXXIII, R. 10 does not in any way limit or restrict the general right of priority which the Crown has in respect of debts due to it. AIR (V 23) 1936 Mad 602: 1936 MWN 76: 70 MLJ 601: 59 Mad 872: 43 MLW 735: 162 Ind Cas 868.

——Ss. 73, 63 — Attachment by one creditor before preliminary decree in administration suit — Priority over other creditors.

A creditor who has obtained an attachment on the property of the judgment-debtor before the passing of a preliminary decree in an administration suit stands on the same footing as other creditors and is not entitled to any priority.

Attachments by the High Court and the Small Cause Courts stand on the same footing. The fact that the Small Cause Court decree has not been transferred to the High Court where the execution is pending is of no consequence. In other words, S. 73 should be read subject to S. 63. AIR (Vol 21) 1934 Cal 559: 61 Cal 140: 152 Ind Cas 69.

——S. 73 (2) — Refunding of excess — Suit for, it maintainable.

Just as a person claiming rateable distribution can compel any person to refund the assets that he has received to which he was not entitled, similarly the person who is entitled to priority can also successfully maintain a suit for refund of the assets against a person who was not entitled to receive the assets until the decree-holder entitled to priority had been paid off. AIR (V 21) 1934 Lah 478: 150 Ind Cas 964.

——S. 73 — Decree on mortgage in terms of award, whether money decree.

Where a decree on a mortgage passed on the basis of an award in a reference without the intervention of the Court directed that the mortgagee would be entitled to realise the mortgage amount by attachment and sale of the property if the amount was not paid within a specified period and added that the mortgaged house would remain mortgaged as before:

Held, that the decree was a mortgage decree and as such entitled to priority over the claims of rival money decree-holders in the proceedings for rateable distribution. AIR (V 20) 1933 Lah 48: 33 PLR 975: 14 Lah 243: 142 Ind Cas 759.

——S. 73 — Priority of Crown debts.

Where the right of the Crown and that of the subject meet at one and the same time, the right of the Crown is in general preferred, the rule being 'detur digniori'.

Where the rights of two attaching creditors and the Government against the same judgment-debtor were brought into existence at one and the same time & by the same decree, and the assets came to the hands of the Court before either of the creditors had applied for execution.:

Held, that the Crown had a preferential right to payment, though its attachment was later in date. AIR (V 20) 1933 Sind 368: 27 SLR 444: 147 Ind Cas 863.

——S. 73 — Money in hands of custody Court attached by different creditors — Decrees should be satisfied not pro rata, but in order of time, sending the moneys to the first attaching Court first, the balance to the second and so on. 29 Bom LR 689: 106 Ind Cas 184: AIR (V 14) 1927 Bom 405.

—— S. 73 — The moneys in the hands of the custody Court are not moneys which are realised within the meaning of S. 73 and therefore no pro rata distribution of such moneys can take place among the attaching creditors at that stage. 29 Bom LR 689: 106 Ind Cas 184: AIR (Vol 14) 1927 Bom 405.

——S. 73 — Order for rateable distribution made — Subsequent insolvency does not vest moneys in the Official Receiver.

The exception to S. 51 (1) applies not only to the amount credited in favour of the attaching decree-holder but also to amount rateably distributed to the other decree-holders, under S. 73. From the time of the order of rateable distribution, the money must be treated as belonging not to the judgment-debtor but to the decree-holders in whose favour the order was passed. The Official Receiver therefore could no more recover the money from the Court which passed the order than from the decree-holder, nor can be claim the money for the benefit of the general body of creditors. 68 Ind Cas 512: 15 MLW 37: 1922 MWN 51: 30 MLT (HC) 67: AIR (Vol 9) 1922 Mad 31: 42 MLJ 361 (DB).

——S. 73 — Priority of attachment does not create right to preferential treatment.

Where a fund in Court has been attached by several creditors of the judgment-debtor, none of the attaching creditors is entitled to preferential treatment by reason of the priority of his attachment. 33 CLJ 7: 62 Ind Cas 167: AIR (V 8) 1921 Cal 801 (DB).

——S. 73 — All decree-holders who have applied for execution to the executing Court before the receipt of assets are entitled to rateable distribution. 44 Mad 100 : 39 MLJ 608 : (1921) MWN 14 : 12 LW 744 : AIR (Vol 8) 1921 Mad 218 (DB).

——S. 73 — No priority apart from attachment.

The explanation to S. 64 gives no priority to claims under S. 73 apart from the attachment in connection with which they were made, and under which they are enforceable. 66 Ind Cas 642: 8 OLJ 358 : AIR (Vol 8) 1921 Oudh 176 (DB).

——S. 73 and O. 21, R. 52 — Fund in court — Attachment — Distribution — Priority.

A decree-holder who has attached a fund in court belonging to the judgment-debtor should not be made to wait for other creditors, who have not obtained a decree. The decree-holder who first attaches the fund has to be paid first out of the fund in priority. 38 M. 221, not foll. A fund in court requires no realisation and the moment it is attached it can be paid to the attaching creditor. 42 Mad 692 : 26 MLT 82 : (1919) MWN 623 : 50 Ind Cas 925: AIR (Vol 6) 1919 Mad 66 (DB).

(Dissented from in 44 Mad 100: 39 MLJ 608: (1921) MWN 14: 12 LW 744: AIR (Vol 8) 1921 Mad 218 (FB).)

——S. 73 — A decree against the judgment-debtor for assets of his father gives no priority over the decrees against him personally. (1917) MWN 859: 42 Ind Cas 897: AIR (V 5) 1918 Mad 512 (DB).

——S. 73 — Priority — Attachment whether confers preferential treatment.

Per Mookerjee, J. — The applications for execution must be made before the receipt of assets under S. 73(1). The date of receipt of assets is the date of the sale of the property. The creditors are not entitled to preferential treatment by reason of priority of attachment. The Court will apply the rules of justice, equity and good conscience in the determination of the relative claims of the creditors and will rateably distribute the assets amongst them if the fund is insufficient. 44 Cal 1072: 25 CLJ 595: 21 CWN 887: 41 Ind Cas 516: AIR (Vol 4) 1917 Cal 13 (DB).

——S. 73 and O. 21, R. 52 — Fund in Court — Attachment — Priority — Rateable distribution.

An applicant for execution of his decree does not acquire any priority by virtue of his attachment and the fund in the Court must be distributed on the principle followed by the court in the administration of the assets of a deceased person or an insolvent (i.e.) rateably amongst the creditors who have put in claims thereto. S. 73 applies where a judgment-creditor makes an application in the prescribed form under O. 21, R. 10 to the court by which assets of the judgment-debtor are held, for the execution of his decree before the receipt of those assets by the court. 38 Mad 221: 29 Ind Cas 239: AIR (Vol 3) 1916 Mad 792.

14. Procedure.

——Ss. 73, 63 — Two Courts of same grade attaching same property of judgment-debtor — Sale by one — Creditor in other, if can claim rateable distribution without applying for execution in Court holding assets.

Section 73 is to be read together with S. 63. Where the property of a judgment-debtor has been attached by two Courts of the same grade but the property has been sold by one of them, the proceeds so received shall be deemed to have been received by it on behalf of all the Courts in which there have been attachments in execution of the decrees, prior to the actual receipt of the assets and the decree-holders in all such Courts are entitled to rateable distribution under S. 73. In such cases no application for execution is necessary to the Court which held the assets before their receipts. AIR (V 25) 1938 Lah 754: 41 PLR 91: 179 Ind Cas 376.

——S. 73 — Error in procedure adopted, if can deprive party of his substantive rights.

An error in regard to the procedure adopted cannot deprive a party of his substantive rights. Where a person having a charge over a property by virtue of a decree attaches it, though the step is superfluous, he cannot be deemed to have waived his right to treat the decree as one creating a charge. AIR (V 22) 1935 Mad 713: 69 MLJ 121: 1935 MWN 800: 42 MLW 205: 158 Ind Cas 201.

——S. 73 — The applications of rival decree-holders for execution must be made before the receipt of assets by the Court; but the assets can only be deemed to have been received by the Court when the sale actually takes place, even where the decree-holder was, prior to the sale, permitted to set-off the purchase-money against the amount due. So an application for rateable distribution is in time if made before the date of sale even where permission has been granted to the decree-holder to set-off. AIR (Vol 18) 1931 Bom 252: 33 Bom LR 503: 133 Ind Cas 737.

——S. 73 — Fund in Court — Transfer of — Application for transfer of fund should accompany certificate of registrar — Practice.

An applicant on the original side of the Calcutta High Court for the transfer of a fund to which the provisions of S. 73 (1) prov. (c) C. P. C. may possibly apply, should be required to produce in addition to the certificate of the Accountant-General a certificate of the Registrar. 19 CWN 345: 31 Ind Cas 616: AIR (V 2) 1915 Cal 788.

——S. 73 — Rival decree-holders — Rateable distribution — Notice of an application.

Notice of an application for rateable distribution should go to the rival decree-holders whose interests may be affected thereby. (1910) 13 OC 282: 8 Ind Cas 368 (DB).

——Ss. 73, 115 (S. 295 old Code) — Distribution of assets — Rateable distribution — Realization — Assets, if to be attached.

Under S. 295 of the (old) Code of Civil Procedure, the decree-holder applying for rateable distribution must apply for execution of his decree to the Court by which the assets are held, and he must do so prior to their realisation. The section does not require that such decree-holder must also apply for attachment of the assets. The decree-holders who attach the surplus sale proceeds subsequent to the realization of the assets are not entitled to have any share in the assets. (1909) 9 CLJ 210 (214) (DB).

——S. 73 (S. 295 old Code) — Rateable distribution — Requisites for an application for — Notice of application to other decree-holders not necessary.

It is nowhere provided by law either that an application for rateable distribution of assets realized in execution of a decree cannot be made in the course of execution proceedings taken by the applicant himself but must be made in the course of execution proceedings initiated by some other decree-holder, or that notice of such an application having been made must of necessity be given to the other decree-holders. (1904) 1 ALJ 519 : 27 A 132 (135) (DB).

14A. Receipt of assets.

See N. 4.

15. Remedy.

See also N. 17 and 21.

——S. 73 — Application to Collector to recall amounts paid is futile and S. 14, Limitation Act, cannot save limitation.

The application to the Collector by the plaintiff to recall the sale proceeds that had been returned to the Civil Court and paid out by the Civil Court to the defendants is futile and S. 14, Limitation Act, cannot save limitation. AIR (Vol 31) 1944 Nag 313 : 1944 NLJ 391 : ILR (1945) Nag 427.

——S. 73 — Application for rateable distribution by other creditors — Sale confirmed without disposing of such application — Remedy of other creditors.

A decree-holder purchased land of the judgment-debtor in execution of his decree and he made no deposit in connection with the sale. He set off the sale money against his debt. Prior to the sale three applications for rateable distribution had been put in by other creditors. The sale was eventually confirmed without the applications for rateable distribution having been disposed of :

Held, that any remedy open to the other creditors for rateable distribution was by a separate suit under S. 73. AIR (Vol 27) 1940 Pesh 36: 1940 Pesh LJ 36 : 190 Ind Cas 158.

——S. 73 — An order under S. 73 is final and not appealable and if the order of the first Court is wrong, the aggrieved party has his remedy by instituting a suit against other decree-holder for getting a share in the assets. AIR (Vol 23) 1936 All 626 : 1936 AWR 489 : 1936 ALJ 559 : 162 Ind Cas 349.

——S. 73 — Right to — Rateable distribution — Attachment before judgment by four plffs. — Distribution among three of them — Remedy of the fourth decree-holder.

S. 73 does not apply where no execution applications were made before the receipt of assets but only attachments before judgments had been effected. Where four plffs. applied for attachment before judgment and three of them drew the money from Court before judgment it is open to the other to enforce refund of his share by proper action. (1909) 13 CWN 1177 : 3 Ind Cas 839 (DB).

16. Restitution.

See also Civil P. C., S. 144

——S. 73 — Creditor claiming rateable distribution cannot at time of refunding excess amount plead that sale was void.

A party cannot both approbate and reprobate. He cannot at the same time blow hot and cold. He cannot say at one time that the transaction is valid and thereby obtain some advantage to which he could only be entitled on the footing that it is valid, and at another say it is void for the purpose of securing some further advantage.

Where the creditor has received a certain amount from the sale proceeds by way of rateable distribution, he cannot in a suit to refund excess amount received by him plead that the sale was void and retain the benefit at the same time. AIR (Vol 30) 1943 Nag 7 : 1942 NLJ 462 : ILR (1942) Nag 685 : 202 Ind Cas 512.

——S. 73 — Rateable distribution ordered — No restitution.

Once inferior Court orders satisfaction or pays out amount in ignorance of decree of superior Court against same judgment-debtor, superior Court cannot order restitution or rectify error and make assets available for rateable distribution among decree-holders of superior Court. AIR (Vol 17) 1930 Mad 699 : 123 Ind Cas 193.

——S. 73 —Procedure.

An order for rateable distribution in a contest between rival decree-holders is not an order under S. 47 and is not a decree within the provisions of S. 144. Powers under S. 151, C. P. Code, should be exercised when necessary for the ends of justice, i.e., when this is the only legal method by which dues will be obtained. AIR (Vol 9) 1922 Mad 99 : 42 MLJ 473 : 67 Ind Cas 546 : 1922 MWN 184 : 15 MLW 421 : 30 MLT (HC) 178 (DB).

17. Revision.

——S. 73 — Applicant having remedy of suit under S. 73, cl. (2) —No revision is called for unless it is shown that it is a case of such a violation of jurisdiction that interference is called for. AIR (Vol 27) 1940 Nag 302 : 1940 NLJ 340 : ILR (1942) Nag 139 : 190 Ind Cas 749.

——Ss. 73, 115 — An order passed by a Court under S. 73, though in nature an administrative one, is yet a judicial order so as to be subject to revision under S. 115.

It is not and should not be an invariable rule that revisions should not be entertained whenever there is another remedy open to the party, for there is no warrant for this either in S. 115 or in any other provision of the Civil P. C. Hence an order under S. 73 is revisable under S. 115 even though the applicant has got a remedy by way of suit under S. 73 (2). AIR (Vol 27) 1940 Oudh 237: 1940 OWN 132 : 15 Luck 332 : 1940 AWR 63 : 185 Ind Cas 889.

——S. 73 — Remedy of suit under S. 73 (2), Civil P. C., open to party — Revision under S. 115 is not open. AIR (Vol 23) 1936 Oudh 185 : 12 Luck 52 : 1936 OWN 262 : 160 Ind Cas 814.

——Ss. 73, 115 — S. 73 (2), scope of — Assets paid to person not entitled to receive same — Suit for refund — Revision.

Sub-section (2) to S. 73, Civil P. C., lays down that where all, or any of the assets liable to be rateably distributed under this section are paid to any person not entitled to receive the same, any person so entitled may sue such person to compel to refund the assets. It is, therefore, open to him to file a regular suit to compel his rival decree-holders to refund the assets which they have wrongfully realised. As this remedy is open to him, the High Court should not exercise its revisional jurisdiction vested in it under S. 115 in his favour. AIR (Vol 23) 1936 Oudh 132 : 1936 OWN 116 : 12 Luck 19 : 160 Ind Cas 36.

——S. 73 — Taking wrong view of S. 73.

Taking a wrong view of S. 73 in an application for rateable distribution does not amount to declining to exercise jurisdiction. Consequently, no revision is competent against the order so passed. AIR (Vol 22) 1935 Pat. 201 (2) : 1 BR 611 : 156 Ind Cas 409.

——Ss. 73, 115 — Order directing rateable distribution — Revision.

An order under S. 73 is not a ministerial order but a judicial order and when another remedy is open to an aggrieved party, the High Court will not exercise special powers of revision. The High Court will not interfere when the aggrieved party can have the dispute adjusted by instituting a suit. AIR (Vol 20) 1933 Sind 329 : 27 SLR 190 : 149 Ind Cas 700.

——S. 73 — Practice in Lahore High Court.

The High Court of Lahore does not as a rule interfere in revision with orders under S. 73. AIR (Vol 19) 1932 Lah 96 : 33 PLR 89 : 134 Ind Cas 195.

——S. 73 —In proper case the High Court not only may, but should interfere by way of revision even though the parties might have under the law a right of finally adjusting their difference in a regular suit under S. 73. AIR (Vol 15) 1928 Mad 362 : 27 MLW 804 : 109 Ind Cas 557 : 54 MLJ 278.

——S. 73 — Order under is not merely ministerial order and is revisable.

An order under S. 73 is not a ministerial and non-judicial act of a Judge which could not be interfered with by the High Court in revision. AIR 1926 Pat 407 and 40 Mad 841, Diss. from. AIR (Vol 15) 1928 Rang 163: 6 Rang 582: 113 Ind Cas 815 (DB).

——S. 73 — If the order of the Court is obviously wrong, the High Court may interfere in revision. But where the matter is not obvious e.g., where the question turns on the meaning of the words "receipt of assets" in a case where the decree-holder has been allowed to bid and set off, revision should not be allowed. AIR (Vol 14) 1927 Mad 1030 : 1927 MWN 795 : 106 Ind Cas 208 (DB).

——S. 73 — Courts will be very slow to interfere in revision against orders under S. 73, and they will only interfere if there is any obvious mistake and the result of the regular suit is certain. AIR (Vol 14) 1927 Mad 944 : 39 MLT 609 : 104 Ind Cas 735.

——S. 73 — Remedy of suit available.

The special remedy by way of suit under S. 73 does not prevent a Court from interfering under S. 115 where there is a manifest error in the order under S. 73, and setting that error aright as otherwise the parties will be driven to unnecessary litigation. AIR (Vol 13) 1926 Mad 179 : 22 MLW 744 : 1926 MWN 27 : 91 Ind Cas 11 : 49 MLJ 753.

——S. 73 — Revision lies against an order rejecting an application for rateable distribution, though a remedy by suit is open to the applicant under the provisions of S. 73 itself. AIR (Vol 13) 1926 Nag 380 : 95 Ind Cas 205.

——**S. 73 — Rateable distribution is a ministerial act.**

The act of distribution under S. 73 is a ministerial act. AIR (V 13) 1926 Pat 497 : 5 Pat 445 : 98 Ind Cas 445 (DB).

——S. 73 — Order rejecting application under S. 73 is revisable. 36 Bom 156 Diss. from. AIR (V 9) 1922 Cal 19 : 70 Ind Cas 539 : 26 CWN 169.

——**S. 73 — Interference in revision.**

The High Court will not interfere in revision with orders disallowing or allowing claim for rateable distribution except in very exceptional circumstances. (1921) 60 Ind Cas 371 (Lah).

——**Ss. 73 (2) & 115 — Erroneous distribution — Revision — Suit.**

Petition under S. 115 is not the best way to settle questions coming under S. 73 where money is paid to third parties after the application and they are not parties to the application. Regular suit is the proper way. AIR (V 2) 1915 Mad 547 : (1914) MWN 738 : 25 Ind Cas 592 (DB).

——**S. 73 (2) — Revision — Suit.**

An order deciding the right of a decree-holder to rateable distribution is not revisable whether it is executed or not. The remedy is by suit. (1912) 171 PWR 1912 : 176 PLR 1912 : 17 Ind Cas 254.

——**Ss. 73 & 115 — Right to rateable distribution — Improper refusal — Revision.**

An application for rateable distribution by a decree-holder cannot be refused on the ground that there is other property of the debtor, which may be made available for the satisfaction of his claims. A refusal to order rateable distribution on the said ground can be revised by the High Court. Where there is no doubt as to the rights of parties, the High Court will interfere to save multiplicity of proceedings and will not oblige a party to file a regular suit. (1909) 32 Mad 334 : 5 MLT 125 : 19 MLJ 307 : 4 Ind Cas 509.

——S. 73 — Under S. 622 (of old Code) High Court can interfere with an order passed under S. 295 of the Code (old). (1909) 9 CLJ 210 (DB).

——**S. 73 (Ss. 295, 244 of old Code) — Appeal or revision.**

An order under S. 295 (old Civil P. C.) passed between persons not parties to the decree but between decree-holders of two totally different decrees, is not appealable but is liable to be set aside in revision under S. 622 C. P. C. (old). (1908) 36 Cal 130 (DB).

18. Right of encumbrancer.

——**S. 73 — One or more of the creditors a secured creditor.**

It is clearly contemplated by S. 73 that an order for rateable distribution can be made even when one or more of the decree-holders is a secured decree-holder and special provisions are embodied in the section for the purpose of dealing with their claims. AIR (V 23) 1936 Pesh 52 : 160 Ind Cas 892.

——**S. 73, proviso (c) — Decree for the first time creating a charge.**

The words 'a decree ordering its sale (the sale of immoveable property) for the discharge of an encumbrance thereon' in S. 73, proviso (c), are quite general and apply where the charge exists independent of and prior to the decree as also where it is created by the decree itself. A decree which for the first time creates a charge is not excluded from the operation of the proviso. AIR (V 22) 1935 Mad 713 : 69 MLJ 121 : 1935 MWN 300 : 42 LW 205 : 158 Ind Cas 201.

——**S. 73 — Application when to be made.**

An application for rateable distribution under S. 73 (1) (c) should be filed either before or at the time when the Court sells the property to the highest bidder. AIR (V 19) 1932 Bom 622 : 34 Bom LR 1405 : 141 Ind Cas 389 (2).

——S. 73 — Where the decree-holder and the mortgagee happen to be the same person and, the decree debt and the mortgage-debt are not two distinct and different debts, S. 73, Provisos (a) and (b) are not applicable. AIR (V 17) 1930 Mad 138 : 31 MLW 38 : 1929 MWN 917 : 122 Ind Cas 366 (DB).

——**S. 73 — Right of incumbrancer.**

Surplus assets after auction-sale — Subsequent incumbrancer is not entitled to them without mortgagor's consent either under S. 73 or under O. 34, R. 13. AIR (V 14) 1927 All 467 : 49 All 636 : 25 ALJ 390 : 101 Ind Cas 505 (DB).

——Under S. 73 where any property liable to be sold in execution of a decree is subject to a mortgage or charge, the Court may, with the consent of the mortgagee or incumbrancer, order that the property be sold free from the mortgage or charge, giving to the mortgagee or incumbrancer the same interest in the proceeds of the sale as he had in the property sold. But not so in the case of a private alienation where there is absolutely no necessity to refer to the prior incumbrancer. AIR (V 11) 1924 Lah 132 : 76 Ind Cas 529 : 5 Lah LJ 279 (DB).

——**S. 73 — Mortgagee having money decree can get relief under the section.**

Proviso (b) to clause (1), S. 73 applies to a mortgagee whose charge is valid against the executing decree-holder and such mortgagee can apply for rateable distribution in the proceeds of a sale held in execution of a decree in favour of the executing decree-holder where the mortgagee holds a money-decree against the judgment-debtor apart from the mortgage. AIR (V 11) 1924 Pat 434 : 74 Ind Cas 140 (DB).

——S. 73 — The third category in cl. (c) refers only to encumbrancers entitled to precedence over money decree-holders mentioned in fourth category. AIR (V 8) 1921 Cal 801 : 33 CLJ 7 : 62 Ind Cas 167 (DB).

——**S. 73 — Sale free of encumbrance — Interest attaches to sale proceeds — Such interest is to be enforced by suit.**

Where property liable to be sold in execution of a decree is sold free from mortgage under S. 73 (1) of the Code of Civil Procedure the mortgagee has that same interest in the proceeds of the sale as he had in the property sold. But to enforce his interest he must proceed by way of suit, and he cannot obtain an order for payment of the amount alleged to be due on the mortgage until he had obtained a decree. AIR (V 7) 1920 Low Bur 107 : 13 Bur LT 210 : 64 Ind Cas 417 : 10 LBR 398.

——**S. 73 and O. 34, R. 14 — Mortgage decree — Interest due on mortgage — Rateable distribution.**

Where a mortgagee under a mortgage executed during attachment denied rateable distribution under S. 73 in respect of a simple money-decree for interest due on his mortgage:

Held that the disability imposed by O. 34, R. 13 of the Code did not apply and he was entitled to a rateable distribution. AIR (V 6) 1919 Oudh 351 : 20 OC 150 : 6 OLJ 558 : 1 UPLR (JC) 67 : 52 Ind Cas 645 (DB).

——**S. 73 (1) (b) and O. 21, R. 66 (4) — Sale in execution free of mortgage — Procedure — Distribution of assets.**

Property subject to a usufructuary mortgage may be attached and sold in execution of a decree against the mortgagor. Unless the mortgagee consents, the decree-holder has no right to bring the property itself to sale and all he can sell is the residual right of the mortgagor, that is, the right to recover the property on payment of the mortgage money. If either the fact of the mortgage or the amount of the mortage money be disputed, the Court is to make a summary enquiry under O. 21, R. 66 (4) and to state the result of the enquiry in the proclamation of sale. AIR (V 6) 1919 Upp Bur 18 : (1919) 3 UBR 139 : 51 Ind Cas 750.

——S. 73 (1) (b) — Rights of mortgagee.

A mortgagee not obtaining a decree or charge cannot obtain by an order in execution or by a miscellaneous application any part of the sale proceeds of the mortgaged property and a suit will lie against him for refund of any such money paid to him. AIR (V 2) 1915 Low Bur 100 : 26 Ind Cas 273.

——S. 73 (1) (b) — Rights of mortgagee — Interest.

If under S. 295 (b) of the C. P. C., 1882, property is sold free of mortgage the plaintiff is entitled to recover interest on the sale proceeds and there is no duty on him to draw the amount out of Court and apply it in part satisfaction of the claim. (1911) 10 Ind Cas 552 (Mad) (DB).

18-A. Rival decree-holders.

See N. 12.

19. Same judgment-debtor.

(a) Same judgment-debtor, meaning of.
(b) Same person in different capacities.
(c) Legal representative.
(d) Joint Hindu family.
(e) Same judgment-debtor — Illustrative cases.
(f) Not same judgment-debtor — Illustrative cases.

——S. 73 — "Passed."

The Legislature added the word "passed" in the new S. 73 in order to make it clear that the words "against the same judgment-debtor" had reference to the decrees themselves, and not to the various applications for execution contemplated by the section. AIR (V 28) 1941 All 110 : (1941) ALJ 137 : ILR (1941) All 77 : 1941 AWR 96 : 194 Ind Cas 276 (FB).

——S. 73 — The undoubted requirement of S. 73, a requirement which must be satisfied before a person is entitled to a rateable distribution, is that the two decrees must have been passed against the same judgment-debtor. AIR (V 17) 1930 Cal 454 : 34 CWN 294.

——S. 73 — Same judgment-debtor — Necessary.

It is essential for an application under S. 73, C. P. C. that the decrees should have been passed against the same judgment-debtor. AIR (V 2) 1915 Cal 658 : 42 Cal 1 : 19 CWN 1202 : 27 Ind Cas 644 (DB).

(a) Same judgment-debtor, meaning of.

——S. 73 — The expression "the same judgment-debtor" must be liberally construed so as to carry out the object of S. 73 and the ends of justice. AIR (V 23) 1936 Mad 40 : 1935 MWN 960 : 69 MLJ 711 : 42 MLW 835 : 59 Mad 93 : 159 Ind Cas 501 (FB).

——S. 73 (S. 295, old Code) — "Same judgment-debtor".

"Same" does not mean identical. If the judgment-debtors or some of them are the same in the two decrees and if any property belonging to the common judgment-debtors under the two decrees, had been sold, S. 295 will be applicable. If A holds a decree against X and Y and Z, and B holds a decree against only two of them, B is entitled to rateable distribution out of the assets realized by the sale of the properties of X and Y so far as those moneys represent the share of his own judgment-debtors. (1903) 7 CWN 414 : 30 C 583 (586, 587) (FB).

[(1886) 12 Cal 294, overruled.]

(b) Same person in different capacities.

——S. 73 and O. 21, R. 49 — "Same judgment-debtor" — Meaning of — Separate creditor decree-holder and partnership creditor decree-holder — **Right to rateable distribution — Partnership Act, S. 49.**

The words "same judgment-debtor" in S. 73, C. P. Code, must be interpreted so as to give effect as far as possible to the principles embodied in O. 21, R. 49, C. P. Code, and S. 49 of the Partnership Act. Those words indicate not only an identity of the individual but also an identity of the interest or character or capacity of the individual. The individual may be the same, but if he has different interests or characters or capacities in different decrees, then the decree is not against "the same judgment-debtor".

Thus, when a separate creditor decree-holder attaches and sells the separate property of his judgment-debtor who happens to be a partner in a firm and the sale proceeds are paid into Court and become assets held by the Court the partnership creditor decree-holder, even if he applied for execution of his decree against that firm or the partners in that firm as such before receipt of such assets, will not be entitled to participate in the rateable distribution of those assets, because his application was not against the "same judgment-debtor" within the meaning of S. 73 of the Code. In the converse case, namely, when a partnership creditor decree-holder gets the assets representing partnership property into Court the separate creditor decree-holder against any of the partners who applied for execution before receipt of assets cannot claim rateable distribution of those assets. AIR (V 36) 1949 Cal 396 : ILR (1945) 1 Cal 153.

——S. 73 — Decree against firm — Partner served individually under O. XXX, R. 6 — Another decree passed individually against him.

Where a partner is served and appears in suit to defend it against the firm (under O. XXX, R. 6) the decree could be executed against him personally under O. XXI, R. 50 (1) and, therefore, he would be the same judgment-debtor in that decree and also in another decree obtained against him personally for the purposes of rateable distribution under S. 73, Civil P. C. AIR (V 30) 1943 Bom 156 : ILR (1943) Bom 306 : 45 Bom LR 181 : 207 Ind Cas 221.

——S. 73 — Decree against firm — Other holder of decree against partners executing his decree against partners individually — Common judgment-debtors — Decree-holder against firm, whether can apply.

A decree against a firm is, in effect, a decree against the partners individually. Consequently, where two decrees are passed in favour of two persons, one against the firm and other against the partners individually, a decree-holder against the firm can apply under S. 73 for rateable distribution in execution proceedings started by the other decree-holder against the partners individually as the partners of the firm are common judgment-debtors. AIR (V 25) 1938 Cal 316 : 42 CWN 310 : 177 Ind Cas 812.

——S. 73 — **Two decrees against same person but in different capacities.**

A decree passed against a person in his individual capacity and another decree passed against a firm of which such person is a partner, are not decrees against the same judgment-debtor within the meaning of S. 73. AIR (V 24) 1937 Lah 937 : ILR (1937) Lah 637 : 40 PLR 419 : 175 Ind Cas 334.

——S. 73 — **Legal representative — Different capacities.**

Quaere — Whether decree passed against the same person in different capacities one personally and the other as legal representative are decrees passed against the same judgment-debtor. AIR (V 17) 1930 Cal 454 : 34 CWN 294.

——S. 73 — **Judgment-debtor is to be the same.**

A obtained a money-decree against N in respect of money which he had lent to N's husband in his life-time. N having died L was substituted as her legal representative. R got a rent-decree against L in respect of certain lands and R's decree was enforced first by sale. Thereupon A applied for rateable distribution.

Held, A's application for rateable distribution could not be granted as the requirement of S. 73 was that the two decrees must have been passed against the same judgment-debtor. AIR (V 17) 1930 Cal 454 : 34 CWN 294.

(c) Legal representative.

——S. 73 (1) — **Words "same judgment-debtor" in S. 73 (1) — Meaning.**

The expression, "same judgment-debtor" in S. 73 (1), Civil P. C., means the same person in law and in fact and does not include the legal representatives of the judgment-debtor. AIR (V 31) 1944 Sind 81 : ILR (1943) Kar 426 : 212 Ind Cas 134.

——S. 73 — **A owing separate debts to X and Y — X obtaining decree against A and after A's death trying to execute decree against A's property in hands of his legal representatives — Y obtaining decree after A's death against A's legal representatives recoverable from A's estate.**

Where a person owed separate money debts to two or more persons, one of whom has obtained a decree against him in his life-time and on his death this decree is being executed against the legal representatives of the debtor by sale of his property in the hands of such representatives and the other creditor has, after the death of the debtor, obtained a decree against the same legal representatives for recovery of the debt due to him by the deceased, recoverable from the estate of the deceased in their hands the decrees are "against the same judgment-debtor" within the meaning of S. 73, Civil P. C., so as to entitle one of such decree-holders to claim rateable distribution of the proceeds of the property of the deceased which has been attached and sold in execution of the decree of the other. AIR (V 30) 1943 Lah 148 : 45 PLR 239 : ILR (1943) Lah 497 : 209 Ind Cas 149 (FB).

——S. 73 — **Decree by X against Y — Decree by A on Y's death against Y's son Z personally and against Y's assets in hands of his sons, on pro-note executed by Y and Z — S. 73, held applied.**

Per Iqbal Ahmad and Verma, JJ. Bajpai J. dissenting.—The expression "'passed against the same judgment-debtor" in S. 73 must be liberally construed. The object of S. 73 being to provide for rateable distribution of assets upon which two or more decree-holders have equal claims, the words "passed against the same judgment-debtor" must be interpreted as referring more to the property which a judgment-debtor represents than to the person against whom execution has been sought.

Where therefore a decree for certain amount has been obtained by X against Y on a pro-note executed by Y and on the death of Y one A obtains a money decree against Y's son Z personally and against the assets of Y in the hands of Z and C, the sons of Y on the basis of a promissory note executed by Y and Z, the decrees obtained by X and A are against the same judgment-debtor and S. 73 applies.

Per Bajpai, J.—The personality, the character and the capacity of the judgment-debtor should not be ignored and undue preference should not be given to the property from which tne assets are realized. The decree-holders must have obtained their decrees against the same persons and it may become a matter of no importance that by reason of the death of the judgment-debtor in one decree the property that can be seized in execution in both the decrees happens to be the same. If the two decrees are not against the same person, S. 73 would not be applicable. AIR (Vol 28) 1941 All 110: 1941 ALJ 137: ILR (1941) All 77: 1941 AWR 96: 194 Ind Cas 276 (FB).

——S. 73 — **Decree against person individually and decree as representative of deceased.**

It would not be unduly stretching the language of S. 73 to say that the expression "the same judgment-debtor" denotes identity of individuality and identity of character, and that two decrees obtained against the same individual, but in different capacities may be regarded as not obtained against the same judgment-debtor. Therefore, a decree against a person individually & a decree against that person as representative of a deceased person cannot be held to be a decree against the same judgment-debtor within the meaning of S. 73 so as to entitle the holders of the two decrees to rateable distribution. AIR (Vol 28) 1941 Bom 327 : ILR (1941) Bom 544 : 43 Bom LR 699 : 196 Ind Cas 595.

——S. 73 — **Property attached after death of judgment-debtor in execution of decre obtained during his lifetime — Another decree against legal representatives of deceased.**

Where, in execution of a decree passed against a judgment-debtor during his lifetime, his property is attached after his death, another decree obtained subsequently against his legal representatives cannot be said to have been passed against the same judgment-debtor within the meaning of S. 73, and the latter decree-holder is not, therefore, entitled to rateable distribution. AIR (Vol 27) 1940 Rang 243 : 1940 Rang LR 492 : 191 Ind Cas 361.

——S. 73 — **One decree against person and another against his legal representative after his death — Decrees founded on liability of deceased.**

Section 73 provides for one particular case in order to entitle the decree-holders to apply for rateable distribution and that is that the decrees must be against the same judgment-debtor. The Courts have no jurisdiction to expand the provisions of the section.

A decree passed against a person and another decree passed after his death against his legal representative, cannot be said to be decrees against the same judgment-debtor even though both the decrees are ultimately founded on a liability resting on the deceased. AIR (Vol 24) 1937 Bom 461 : 39 Bom LR 815 : ILR (1937) Bom 795 : 172 Ind Cas 92.

——S. 73 — **One decree as heir of deceased person — Another decree in personal capacity.**

If one decree is obtained against a man as heir of a deceased person and another decree against

him in his personal capacity, the two decrees are against the same judgment-debtor within the meaning of S. 73, Civil P. C. AIR (Vol 23) 1936 Cal 210: 40 CWN 570: 63 Cal 923: 162 Ind Cas 702.

——**S. 73 — Decree against a person and decree against his legal representatives after his death.**

A obtained a decree against X and after the death of X took out proceedings in execution against the two sons of X. B obtained decrees against the two sons of X as legal representatives of X in respect of debts contracted by X:

Held, that the decrees were obtained against the same judgment-debtor within the meaning of S. 73 and B was entitled to claim rateable distribution of the assets realised in execution of the decree obtained by A.

The expression 'the same judgment-debtor' in S. 73 must be liberally construed so as to carry out the object of S. 73 and the ends of justice. AIR (Vol 23) 1936 Mad 40: 1935 MWN 960; 69 MLJ 711: 42 MLW 835: 59 Mad 93: 159 Ind Cas 501 (FB).

——**Ss. 73, 146 — Decree against party — Another decree against his sons — Executing Court, whether can under S. 146, change decree against father into decree against sons.**

Where a decree was obtained against the father and another party obtained another decree against his sons the two decrees are not passed against the same judgment-debtor.

In the above case the executing Court cannot go behind the decree and by involving S. 146, it cannot change a decree passed against the father into a decree against his legal representatives. For purposes of rateable distribution, the executing Court must take the decrees as they stand. AIR (Vol 22) 1935 Cal 738: 40 CWN 26: 159 Ind Cas 575.

——**S. 73 — Decree against Hindu father — Sons who are under pious obligation to pay.**

Quaere:— Whether the words 'the same judgment-debtor' in S. 73, Civil P. C., would include the case of the sons of a Hindu father who are under a pious obligation to pay their father's debt when a decree has been obtained against the father alone. AIR (Vol 22) 1935 Mad 399: 935 MWN 294: 41 MLW 490: 156 Ind Cas 631.

——**S. 73 — Holder of decree against A, whether entitled to rateable distribution after A's death against holder of decree against A's legal representative.**

It is an undoubted requirement of S. 73, a requirement which must be satisfied before a person is entitled to rateable distribution, that the two decrees must have been passed against the same judgment-debtor.

A obtained a money-decree against N in respect of money which he had lent to N's husband in his lifetime. On the death of N, L was substituted as her legal representative. B obtained a rent decree against L and certain properties were sold. A applied for rateable distribution:

Held, that A was not entitled to rateable distribution as the two decrees were not against 'the same judgment-debtor'.

Quaere. — Whether decrees against a defendant personally and against the same defendant in a representative capacity are decrees "against the same judgment-debtor". AIR (Vol 17) 1930 Cal 454: 34 CWN 294: 130 Ind Cas 227.

——**S. 73 — Assets — Same judgment-debtor — Rents realised by receiver — Decree against one of the heirs.**

Rents realised by a receiver can be the subject of rateable distribution.

But where a decree that is executed by appointment of a receiver is one against the three heirs of a deceased debtor as representing his estate, a decree-holder against one of the heirs in his personal capacity cannot claim rateable distribution. AIR (Vol 6) 1919 Oudh 326: 20 OC 194: 52 Ind Cas 305 (DB).

——**S. 73 and O. 21, R. 2 — Decree against estate of deceased — Represented by same representatives — Effect of.**

Two decrees were obtained against the estate of the deceased testator, each obtained against two out of three executors. One of those two executors was common to two suits. Each decree was prima facie capable of execution against the estate. Held, that the decree-holders were entitled to rateable distribution of the assets under S. 73 of the C. P. C. AIR (Vol 5) 1918 Cal 281: 27 CLJ 100 : 43 Ind Cas 452 (DB).

——S. 73 is inapplicable to the case of a judgment-debtor unless he occupies the same character in both decrees; so when there is a decree against a judgment-debtor personally and another as heir, he is not the same judgment-debtor. AIR (Vol 1) 1914 Low Bur 191: 7 Bur LT 67: 24 Ind Cas 476.

——**S. 73 (S. 295 old Code) — "Same judgment-debtor".**

The fact that two decrees are to be realized out of the family property is not decisive of the question against whom the decree is made. Where a decree is obtained against one person and another decree against his legal representatives, the decrees are not against the "same judgment-debtor". (1910) 33 M 465 (466): 5 Ind Cas 917.

——**S. 73 (S. 295 old Code) — Rateable distribution — Decree against representative — Same person.**

A decree against a person which is sought to be executed after his death against his representative and a decree against the representative himself for a debt of the deceased after his death are not decrees against the same judgment-debtor within the meaning of S. 295, C. P. C., and when moneys are realised in execution by the former decree-holder, the latter will not be given rateable distribution of the proceeds so realised. (1901) 3 Bom LR 407: 25 B 494 (498, 499) (DB).

(d) Joint Hindu family.

——**S. 73 — "Same judgment-debtor" — Construction — Decree against Hindu father and sons — Second decree against father alone — Assets realised by sale of joint family property in execution of first decree — Right of holder of second decree to rateable distribution in entire assets.**

Where one creditor has obtained a decree for money against a Hindu father and his undivided sons and another creditor has obtained a decree for money against the father alone but not against the sons and assets are realised by attachment and sale of the joint family property of the father and his sons in execution of the first decree, the holder of the second decree is entitled to rateable distribution under S. 73, C. P. Code, not only in the assets representing the father's share of the sale proceeds but in the entire assets, when his decree is passed against the father as manager of the joint family or when his sons are under a pious obligation to pay off their father's debts. AIR (Vol 34) 1947 Bom 18: 48 Bom LR 571: 228 Ind Cas 530 : ILR (1947) Bom 120 (FB).

——**S. 73 — Decree against father as manager and decree against father and son.**

A decree against a father as manager of a joint Hindu family and a decree against a father and son constituting the joint family are not decrees against the same judgment-debtor. AIR (Vol 28) 1941 Bom 324: ILR (1941) Bom 540: 43 Bom LR 695: 196 Ind Cas 644.

——S. 73 — Decree-holder against sons, if can claim rateable distribution in sale proceeds in execution of decree against father.

A decree obtained against the father of a joint family and a decree obtained against his sons, after his death upon a pro-note executed by them in respect of a debt of their father are not decrees against "the same judgment-debtor".

Consequently, the holder of a decree against the sons is not entitled to get rateable distribution under S. 73 in the sale proceeds of the family estate in execution of the decree against the father and the Court cannot invoke any inherent power outside the provisions of S. 73. AIR (Vol 26) 1939 All 545: 1939 AWR 427: 184 Ind Cas 589

——S. 73 — Decree against father — Another decree against father and sons — Assets realised from joint family property.

Where there is a decree against the father and there is also a decree against the father and sons and where it is admitted that the property from which the assets are realised by the sale was the property of the joint family of which the father and sons are undivided members, the judgment-debtors must be held to be the same for the purpose of S. 73. Once there is a decree against the father, the creditor is entitled to enforce the said decree against all the joint family property including the shares of the sons until the sons choose to take exception to it either in execution or by way of a suit that the said debt is one which they are not liable to pay under the Hindu law. So long as the decree stands and the property sold is joint family property, no question as to the binding nature of the debt arises in the consideration of the question whether the judgment-debts are the same. AIR (Vol 24) 1937 Mad 504: (1938) 1 MLJ 325: 1937 MWN 239: 47 MLW 501: 170 Ind Cas 883.

——S. 73 — Decree against Hindu father alone and decree against father and son.

A decree obtained against a Hindu father alone and a decree obtained against the father and his son cannot be deemed to be decrees against the same judgment-debtor for the purpose of S. 73 where the son has not even been made a party to the execution proceedings and there is nothing to show that the decree obtained against the father was a debt binding on the son. AIR (Vol 24) 1937 Mad 253: 1936 MWN 1212: (1937) 1 MLJ 180: 45 MLW 203: 167 Ind Cas 503 (1).

——S. 73 — Provincial Insolvency Act (V of 1920), S. 28 — Son's interests sold by holder of decree against sons — Right of holder of decree against father and sons to claim rateable distribution.

A decree obtained against a Hindu father and a decree against the father and his sons are decrees against the same judgment-debtor for the purposes of S. 73.

Though it may be permissible for a person who has obtained a decree against a Hindu father and his sons to sell the father's interest without the leave of the Insolvency Court if the father becomes insolvent, yet so far as the sons' interests are concerned, they cannot be deemed to be the property of the insolvent nor can the Official Receiver, if the sons' interests have been attached before judgment, have any power of disposal over their interest, and it is, therefore, competent to the decree-holder to attach and sell the sons' interest without the leave of the Insolvency Court even though he had attached before judgment the entire family property. A person who has attached before judgment the entire family property and obtained a decree against the father and sons is, therefore, entitled on the adjudication of the father to claim rateable distribution in respect of the proceeds of a sale of the sons' interests as against the holder of a decree against the sons who has brought their interests to sale. AIR (Vol 23) 1936 Mad 948 : 71 MLJ 541 : 44 MLW 615 : 1936 MWN 1142: 165 Ind Cas 664 (2).

——S. 73 — Decree against A personally and as family manager — Decree against A and his brother B as members of joint family — Whether decrees against 'same judgment-debtor' — Estoppel — Blowing hot and cold.

A decree was obtained against A who was the manager of a joint Hindu family personally and as family manager for payment out of the family properties. A decree was obtained by another creditor against A and his brother B 'eo nomine' as members of the family and as against the family properties and proceeds were realised by sale of the family properties:

Held, that the decrees were obtained against "the same judgment-debtor" within the meaning of S. 73, and the first decree-holder was entitled to rateable distribution of the sale proceeds.

Held, also that it was not open to the second decree-holder to impeach the first decree in the absence of any fraud or collusion between the first decree-holder and A when B had not chosen to contest the same, on the ground that A and B were divided.

Held, further, that as the second decree-holder had himself sold the properties as joint family properties, he was precluded from asserting as against the first decree-holder that when he instituted his suit A and B were not members of a joint family. AIR (Vol 23) 1936 Mad 123: 43 MLW 624: 1936 MWN 343: 160 Ind Cas 559.

——S. 73 (S. 295, old Code) — Same judgment-debtor — Sale of several items — Payment of sale proceeds.

Where one judgment-creditor obtained a decree against father and son and in execution attached 4 items of ancestral properties and the latter were sold, and before the sale proceeds of 2 items had been paid into Court, and after the sale proceeds of the other two items have been paid another judgment-creditor who had obtained a decree against the father only applied under S. 295 for rateable distribution.

Held (1) that the judgment-debtors in both the cases were the same within the meaning of S. 295 and (2) that the assets could be said to have been realised only when the whole of the proceeds of all the items were paid in Court and, therefore, the second judgment-debtor was entitled to rateable distribution of the sale proceeds of all items. (1903) 26 M 179 (182).

(e) Same judgment-debtor — Illustrative cases.

——S. 73 — (Bhopal Act, S. 78) — Person having several decrees against him, some being jointly with others — Holders of individual decrees, if entitled to rateable distribution in execution of joint decrees.

If there are several decrees against one person, some of which are individually against him while others are against him jointly with other persons, the holders of individual decrees are entitled to a rateable distribution in execution of joint decrees to the extent of that person's interest in the property realized. For the purposes of S. 73 such a person falls within the meaning of "same judgment-debtor." (1940) 189 Ind Cas 585 (Bhopal)

——S. 73 — Applicability — Decree against the same judgment debtor and another, also comes within the section.

Where the decree is passed against the same judgment-debtor, it does not matter if it is passed against him and others as well. There is nothing in S. 73 to show that a decree should be passed against one and the same judgment-debtor and against no others, before rateable distribution can be ordered and the words "and no others" cannot be read into the section. AIR (Vol 17) 1930 Sind 300: 128 Ind Cas 686.

——S 73 — Creditor of one of joint debtors can claim with creditors of both.

Where A obtained a decree against B and C and in execution attached the property of both, and, D who held a decree against C alone, applied for rateable distribution of the assets,

Held, that D was entitled to claim rateable distribution in such of the assets held by the Court as could be found to belong to the share of C. AIR (Vol 13) 1926 Bom 150: 28 Bom LR 78: 93 Ind Cas 222 (DB).

——S. 73 — Several judgment-debtors — Some common in more than one decree — Rateable distribution — How awarded.

Where there are several defts. in one decree and some of them only in another, rateable distribution is to be allowed so far as the interests of those in both decrees are concerned. 7 Bur LT 67: 24 Ind Cas 476: AIR (Vol 1) 1914 Low Bur 191.

——S. 73 — Same judgment-debtor.

Where the judgment debtors against whom one decree holder has obtained decree are all judgment debtors under the decrees held by another, there is no bar to rateable distribution under S. 73 of the C. P. C. (1911) 14 CLJ 50: 15 CWN 872: 10 Ind Cas 527 (DB).

——S. 73 (S. 295, old Code) — Decree for money — Rateable distribution — Suit for refund of assets wrongly distributed.

D held a simple money-decree against S. P held a decree under S. 90, T. P. Act, against S personally and as representative of one R, the original decree for sale having been passed against S and R jointly. D realized in execution of his decree a sum of Rs. 1,100 by sale of property belonging to S alone.

Held, that P was entitled to a rateable distribution of the asset under S. 295, C. P. C. (1904) 27 A 158 : 1904 AWN 200 : 1 ALJ 562 (564) (DB).

——S. 73 — If A holds a decree against X and Y and Z and B holds a decree against only two of them, B is entitled to rateable distribution out of the assets realised by the sale of the properties of X and Y so far as those moneys represent the share of his own judgment-debtors. (1903) 7 CWN 414 : 30 Cal 583 (FB).

[(1886) 12 Cal 294, overruled.]

(f) Not same judgment-debtor — Illustrative cases.

——S. 73 — Deposit of decree amount by surety to save security — Deposit, if subject of rateable distribution.

An application by the plaintiff for attachment before judgment of the defendant's property was not proceeded with on a surety's furnishing security for the amount in suit. Subsequently the surety for the purposes of saving the security deposited the amount for which decree was passed in the suit. Another decree-holder who had, in the meantime, obtained a decree against defendant judgment-debtor applied for rateable distribution:

Held, that the liability of the surety was coextensive with that of the judgment-debtor and that the surety must be deemed to be a judgment-debtor of the first decree-holder alone. Hence assets obtained in execution of this decree from the surety of the judgment-debtor could not be rateably distributed to the holder of another decree against the same judgment-debtor as the surety was not the judgment-debtor of such decree-holder. AIR (V 29) 1942 Oudh 491 : 1942 OWN 593 : 203 Ind Cas 671.

——S. 73 — Surety.

Decretal amount recovered from surety — Another decree-holder of same judgment-debtor who has obtained a decree subsequently is not entitled to claim rateable distribution as the assets are not obtained in execution against the latter's judgment-debtor. AIR (V 27) 1940 Nag 79 : 1939 NLJ 534 : 186 Ind Cas 583.

——S. 73 (S. 295, old Code) — Rateable distribution — "Against the judgment-debtor" — Application for rateable distribution by attaching creditor of decree-holder.

An application for rateable distribution by an attaching creditor of the judgment-creditor in a suit does not fall within S. 295, C. P. C. (1900) 18 MLJ 562 (DB).

20. Scope and object.

——S. 73 — Section 73 was enacted to prevent only the multiplicity of proceedings and confers no right on the judgment-debtor to reach the property of the debtor which he could never have reached. The right of the decree-holder against the judgment-debtor is controlled by S. 60. Hence, where a decree-holder brings into Court assets realised in execution under S. 60 (1) as it stood before its amendment in 1937, such of the assets realised in excess of what is permitted by the amendment can be rateably distributed under S. 73 only among those decree-holders whose suits were filed before June 1, 1937 when the amendment came into operation. AIR (V 32) 1945 Bom 76.

——S. 73 — The effect of S. 73 is that any alienation made by the judgment-debtor after the attachment is void as against the creditor who has applied for rateable distribution in time. AIR (V 30) 1943 Mad 165 : (1942) 2 MLJ 607 : 55 LW 733 : 1942 MWN 682 : ILR (1943) Mad 175 : 207 Ind Cas 223.

——S. 73 — Section 60 does not control S. 73. Under S. 73 it does not matter how the assets reach the Court's hands. Once they get there they must be rateably distributed. The proviso to S. 60 is after all designed to protect certain judgment-debtors and not to give one decree-holder priority over another. AIR (V 28) 1941 Nag 239 : 1941 NLJ 331 : 195 Ind Cas 609.

——S. 73 — It does not clothe decree-holder with right which he does not possess.

Section 73 enacts a mere rule of procedure and not a rule of substantive law. It merely enacts a rule by which decree-holders, in specified cases, can resort to a cheap and speedy procedure for the realization of their decrees. It does not, however, clothe a decree-holder with a right which he does not possess. It does not enlarge the rights given to a decree-holder by his decree, nor does it cut down the rights to which a decree-holder may be entitled by the decree in his favour. Section 73 cannot, therefore, be invoked to entitle a decree-holder to satisfy his decree from assets which he could not touch if S. 73 was not on the statute book. Conversely, the provisions of S. 73 cannot be utilized to deprive a decree-holder from satisfying his decree from assets which he would have been otherwise entitled to follow in execution. AIR (V 28) 1941 All 110 : (1941) ALJ 137 :

ILR (1941) All 77 : 1941 AWR 96 : 194 Ind Cas 276 (FB).

[Overrules AIR (V 26) 1939 All 545 : 1939 AWR 427: 184 Ind Cas 589.]

——S. 73 — The object underlying the enactment of S. 73 was to prevent multiplicity of execution proceedings while at the same time ensuring equitable distribution of assets between various decree-holders who had the right to have their decrees satisfied out of these assets. AIR (V 28) 1941 All 110 : 1941 ALJ 137 : ILR (1941) All 77 : 1941 AWR 96 : 194 Ind Cas 276 (FB).

——S. 73 — Where the question involved affects, not only the decree-holder inter se but it affects also the judgment-debtor who contends that he had produced the money in Court for a specific purpose and must be handed over to the particular decree-holder, the order for rateable distribution falls under S. 47 read with S. 73. It is, therefore, appealable. AIR (V 26) 1939 Bom 468 : 41 Bom LR 997 : 186 Ind Cas 372.

——S. 73, O. XXI, R. 48 (2) — Calcutta High Court Rules, Rr. 37, 38 — Attachments of salaries — Protection.

Order XXI, R. 48 cannot override the substantive provision in S. 73 and, therefore, rateable distribution applies to attachments of salary which is attachable even though it is already under attachment by reason of O. XXI, R. 48.

A certificate from the Registrar must be attached to an application for payment out and unless the certificate shows blank no application for payment out ex parte can be made under R. 37 of the Calcutta High Court Rules. Where it is not blank, the applicant must apply for rateable distribution under R. 38. In such case, notice, unless dispensed with by the Court, must be given to all persons whose names appear in the Registrar's certificate. It is only when this is done that the applications for attachment made by those other persons can be challenged. The Registrar's certificate is intended to show subsisting attachments. The fact that there has been a particular decree which has been transferred to another Court does not affect the matter for the purpose of the certificate, and for the purpose of rateable distribution it remains a subsisting application for attachment. AIR (V 26) 1939 Cal 485 : ILR (1939) 1 Cal 40 : 43 CWN 169 : 183 Ind Cas 444.

——S. 73 — Section 73 is to be read with S. 63. AIR (V 25) 1938 Lah 754 : 41 PLR 91 : 179 Ind Cas 376.

——S. 73 — Agreement for rateable distribution — Whether can be enforced between two persons one of whom is not bound by it.

An agreement for rateable distribution cannot be enforced between two persons when one of them is not bound by it.

A held a simple money-decree against three persons. B held a decree for sale based on a mortgage against these three persons and two others. C also held a decree for sale against the five persons. A attached the interests of his three judgment-debtors. The agents of A and B made a statement that sale proceedings be carried out in A's execution and rateable distribution be made in the other two. B applied that the property be sold under his decree. On the Court holding that the parties were bound by the agreement, he made another application praying that directions be given under S. 73 of the Civil P. C. that the amount due under the sale decree of the applicant be realised first of all from the sale proceeds of the property:

Held, that C was not bound by the agreement & if it is not binding on one of the mortgagee-decree-holders, it would not be enforceable against the other also. The proper interpretation of the agreement was that while the sale was to take place in execution of A's decree, B was to have the rights allowed to him under S. 73 of the Civil P. C. which deals with rateable distribution amongst several decree-holders and the intention being that the property was to be sold free from B's mortgage, he would be entitled to the same interest in the proceeds of the sale as he had in the property sold. AIR (V 24) 1937 Oudh 270 : 1937 OWN 127 : 166 Ind Cas 714.

——S. 73 — Construction of.

Section 73 should not be narrowly construed so as to defeat the ends of justice. AIR (V 22) 1935 Mad 399 : 1935 MWN 294 : 41 LW 490 : 156 Ind Cas 631.

——Ss. 73, 146 — S. 146, if enlarges scope of S. 73.

Section 146 cannot enlarge the scope of S. 73, as it is expressly made subject to the other provisions of the Code. AIR (V 22) 1935 Cal 738 : 40 CWN 26 : 159 Ind Cas 575.

——S. 73 — Recording of satisfaction of decree is no bar to rateable distribution.

Section 73 is applicable not only where sale is made by the Court but also to cases in which execution of a decree is transferred to the Collector and sale is made by him.

The fact that satisfaction of the decree has been recorded is no ground for not allowing rateable distribution. AIR (V 20) 1933 All 666 : 1939 ALJ 1102 : 147 Ind Cas 949.

——S. 73 — Decree against several judgment-debtors — Money paid by one to a decree-holder who has no claim.

Under S. 73, in the case of decrees against several persons, money realized from judgment-debtors who are common to both decrees is alone available for distribution among the decree-holders. Section 73 does not permit rateable distribution of money paid by one judgment-debtor to a decree-holder who has no claim against him. AIR (V 20) 1933 Pat 277 : 14 PLT 287 : 145 Ind Cas 362.

——S. 73 — Bombay High Court Rules (Original Side) Rr. 318, 326 — Prothonotary's negative register — Entry in — Effect.

The effect of an application to make an entry in the negative register kept by the prothonotary of the Bombay High Court is the same as that of an application for execution of the decree, and when it is made before sale, it entitles the applicant to share in the rateable distribution of the decree under which the property is sold. AIR (V 19) 1932 Bom 622 : 34 Bom LR 1405 : 141 Ind Cas 389 (2).

——S. 73 — O. XXI, Rr. 72 and 85 — Effect of — Set-off.

If there are persons by the time of the sale who would be entitled to some rights under S. 73 to claim rateable distribution, the order under O. XXI, R. 72 must be taken subject only to the operation of S. 73 and the decree-holder bidder cannot claim to set-off his decree against the amount of the bid and refuse to pay the amount due to the other decree-holders claiming to be entitled under S. 73. In the absence of such persons, the order to set-off completely works out as a payment on the date of the sale in case where the amount of the bid is less or equivalent to the amount of the decree. In such cases, there is no effect to be given to the words "subject to the provisions of S. 73" in O. 21, R. 72. AIR (V 18)

1931 Mad 103 : 1930 MWN 568 : 130 Ind Cas 458.

——S. 73 — Scope — Object of the section to avoid multiplicity of execution proceedings and equitable administration of debtor's property.

The insertion of the word "passed" does not make any change in the law prior to C. P. C., 1908. "The object of the section is two-fold. The first 'object is to prevent unnecessary multiplicity of execution proceeding, to obviate in a case where there are many decree-holders each competent to execute his decree by attachment and sale of a particular property the necessity of each and every one separately attaching and separately getting the property. The other object is to secure an equitable administration of the property by placing all the decree-holders in the position upon the same footing and making the property rateably divisible among them instead of allowing one to exclude all the others merely because he happened to be the first who had attached and sold the property. Principle enunciated in the Full Bench decision in the case of 'Ganesh Das Bagria v. Shiva Lakshman Bhakat', 30 C 583 is not affected by the alteration of the law. AIR (V 11) 1924 Cal 801 : 78 Ind Cas 731 : 51 Cal 761 : 39 CLJ 439 : 28 CWN 704 (DB).

——S. 73 — Hypothecation of moveables without possession is included in the provisos to the section. AIR (V 11) 1924 Cal 990 : 80 Ind Cas 20.

——S. 73 — Nature of order under.

An order under S. 295 (old Code) is an order in a suit and as such excluded from the operation of Art. 13, Sch. II, Limitation Act. (1901) 3 Bom LR 713 : 23 All 313 : 5 CWN 649 (PC).

——S. 73 (S. 295, old Code) — Object — Interpretation.

This section is not to be read absolutely literally. Its object is to prevent multiplicity of execution proceedings and to secure an equitable administration of the property; it cannot enlarge the rights of decree-holders or place at their disposal property which they could not have themselves attached. (1901) 1901 AWN 4: 23 A 106 (110) (DB).

21. Suit.

——S. 73 — Suit by a decree-holder to recover his share of the amount received by the Court for rateable distribution comes under S. 73 (2) and is governed by Art. 62, Lim. Act. AIR (V 31) 1944 Nag 313 : 1944 NLJ 391 : ILR (1945) Nag 427.

——S. 73 — Suit for refund — Other creditors also impleaded as defendants — Suit dismissed — Appellate Court while decreeing suit cannot pass decrees in favour of defendant-creditors when limitation for suit by them under S. 73 (2) has expired.

Where a suit for refund under S. 73 (2) to which the other creditors who had applied for rateable distribution were impleaded as defendants was dismissed by the lower Court, the Appellate Court, while allowing the plaintiff's appeal and decreeing his suit, cannot pass a decree in favour of the defendant creditors when the period of limitation for the suit by them under S. 73 (2) has expired as it would affect a vested right which has come into existence by virtue of the law of limitation. The remedy of the defendant creditors is by way of suit under S. 73 (2) if they felt aggrieved by the order of the executing Court. AIR (V 29) 1942 Mad 748 : 55 LW 627 : (1943) 1 MLJ 504 : 206 Ind Cas 466.

——S. 73 — A suit under S. 73 (2), Civil Procedure Code, may be brought within 3 years of the actual distribution. (1937) MWN 480.

——S. 73 (1) (2) — Application for rateable distribution dismissed — Suit under sub-s. (2) — Plaintiff's right to interest.

Where a decree-holder, on his failure under S. 73 (1), files suit under S. 73 (2), he is entitled to interest prior to the institution of the suit, as he claims to be placed in the position in which he would have been had the Court which had dealt with his application for rateable distribution not made a mistake. (1937) MWN 465.

——S. 73 — Suit for declaration and injunction — Essentials of.

Unless it is ascertained, or definitely alleged on substantial grounds that the assets realized or to be realized in execution of decrees of rival decree-holders would be insufficent to discharge in full the claims of all the decree-holders under S. 73, no decree-holder has a right to maintain a suit to have the decree of his rival declared void on the ground that it was fraudulently obtained and to ask the Court to grant injunction permanently restraining the defendant from executing his decree against the common judgment-debtor or his property. AIR (V 20) 1933 Nag 214: 145 Ind Cas 206.

——S. 73 — Claim to surplus is only in a separate suit.

In a case where there was a contest as to the disposal of the surplus, a contest which had not been determined in the suit or in the execution proceedings, the Court should refer the claimant to a civil Suit. 49 All 636: 25 ALJ 390: 101 Ind Cas 505: AIR (V 14) 1927 All 467 (DB).

——S. 73 — Suit maintainable — Revision if barred.

The special remedy by way of suit under S. 73 does not prevent a court from interfering under S. 115 where there is a manifest error in the order under S. 73 and setting that error aright as otherwise the parties will be driven to unnecessary litigation. 22 MLW 744: 1926 MWN 27: 91 Ind Cas 11: AIR (V 13) 1926 Mad 179: 49 MLJ 753.

——S. 73 — Aggrieved decree-holder — Remedy is by suit.

Even though the person aggrieved is the decree-holder, the remedy is by way of suit and not one under S. 47, C. P. Code or by revision. 32 MLT 155: AIR (V 11) 1924 Mad 97 (DB).

——S. 73 — Fraud — Remedy is under S. 73 (2).

The Court distributing assets under S. 73 cannot have greater power to go behind the decree and should not deal with the question whether the decree is fraudulent. The remedy of the opponent raising the plea of fraud lies under S. 73(2), by way of a suit. 65 Ind Cas 600: 46 Bom 635: 24 Bom LR 1: AIR (V 9) 1922 Bom 31 (FB).

——S. 73 (2) — Suit by one decree holder for refund of moneys awarded to others before actual distribution — If lies.

A suit by a decree holder for refund of sums improperly awarded to other decree holders of the same judgment-debtor, before they have been actually paid, is premature and does not lie. Where plffs. and defts. obtained decrees against the estate of F, and the judgment debtors in the plff.'s decree represented only 3/4ths of the estate of F, Held, only three-fourths of the amount recovered in execution of deft.'s decree is liable to rateable distribution. 16 ALJ 530: 46 Ind Cas 101: AIR (V 5) 1918 All 327 (DB).

——S. 73 (2) — Money paid to wrong person — Suit.

A suit lies to recover money paid to a wrong person under a valid judgment or equitable distribution under S. 73, C. P. C. 39 All 322: 15 ALJ 295: 39 Ind Cas 532: AIR (Vol 4) 1917 All 276 (DB).

——Ss. 73(2) and 115 — Erroneous distribution — Revision — Suit.

Petition under S. 115 is not the best way to settle questions coming under S. 73 where money is paid to third parties after the application and they are not parties to the application. Regular suit is the proper way. (1914) MWN 738: 25 Ind Cas 592: AIR (Vol 2) 1915 Mad 547 (DB).

——S. 73 (2) — Suit for money — Limitation — Limitation Act, Sch. 1, Arts. 62 and 120.

A suit to recover money paid to a deft. under S. 73 of the C. P. C. is a suit for money paid to him for plff.'s use and must be brought within three years from the date of payment and not within six years under Art. 120. 39 Mad 62: 16 MLT 509: 27 MLJ 640: 1 LW 952: 26 Ind Cas 219: AIR (Vol 2) 1915 Mad 405 (DB).

——S. 73 (Ss. 295, 293 of old Code) — Transfer of decree — Certificate of execution or non-execution, absence of — Application to the original Court for rateable distribution — Simultaneous execution — Power of the original Court — Assets, suit for refund of.

A decree may be executed simultaneously in more than one Court. When decree has been transferred by a Court which passed it to another Court for execution the original Court does not thereby completely lose all jurisdiction in respect of execution thereof. The original Court can entertain an application under S. 295, C. P. C., for rateable distribution at the instance of the decree-holder even without any formal re-transfer or a certificate from the scond Court under S. 223, C. P. C. Upon such application being made, the Court to which the decree has been transferred should be called upon to certify under S. 223, C. P. C., what portion, if any, of the decree has been satisfied, and upon obtaining such certificate, the assets may be rateably distributed. (1905) 1 CLJ 315 (318) (DB).

——S. 73 — (S. 295 of old Code) — Rateable distribution, order for — Suit for declaration — Decree collusive — Rateable distribution not allowable, maintainability of.

After an order for rateable distribution of sale proceeds has been made under S. 295, C. P. C., and before the funds have been actually distributed, it is open to one of the decree-holders to maintain a suit for a declaration that the decree of a rival decree-holder is collusive, and that he is not entitled to share in the sale proceeds by way of rateable distribution. (1904) 3 CLJ 385 (385, 386) (DB).

——S. 73 Cl. 2 (S. 295 of old Code) — Suit for refund of money distributed — Limitation Act (XV of 1877), Sch. II, Art. 13.

(1) An order for distribution under S. 295, C. P. C., is an order in a suit and as such excluded from the operation of Art. 13 of Sch. II of the Limitation Act. (2) If money is distributed under S. 295, C. P. C., a suit may be brought for refund of the money and re-adjustment of the right of the parties. (3) A suit for refund of money paid to the defendant under an order of Court made under S. 295, C. P. C., is not one to set aside an order of distribution and is not governed by Art. 13 of the Limitation Act. (1901) 3 Bom LR 713: 23 A 313: 5 CWN 649 (652) (PC).

22. Transfer of decree.

See N. 7.

——S. 74 — Irregularity in procedure — Effect of jurisdiction and want of jurisdiction — Distinction.

Sales in execution of decrees cannot be treated as void on the ground of mere irregularities of procedure in obtaining the decrees or in the execution of them. But a court has no jurisdiction to sell the property of persons who were not parties to the record. As against such persons the decree and sales purporting to be made would be a nullity and might be disregarded without any proceeding to set them aside. (Marshall 647 (1864), foll.). A suit which purported to be brought against one N, deceased, by his legal representative A, by his guardian, his uncle AN was decreed, the judge accepting without question and without applying his mind to the statement that A was the legal representative of N, and AN was his guardian. N's properties were sold in execution of this decree.

Held, that the estate of N was not represented in law or in fact in the suit and therefore the sale of his property was without jurisdiction and null and void, and that the share of A himself in N's estate was not bound. (1905) 9 CWN 201: 7 Bom LR 1 :32 C 296: 2 ALJ 71: 1 CLJ 584: 32 IA 23 (33, 36) (PC).

——S. 75.

See also Civil P. C., O. 26.

——S. 75 — Suit by beneficiary for accounts against trustee — Court, if can issue commission to ascertain value of moveables in possession of trustee.

In a suit for accounts by the beneficiary against the trustee, S. 75 does not authorize the Court to issue a commission to ascertain the value of the moveables in the possession of the trustee as the beneficiary is entitled to recover them back in specie under the provisions of S. 11, Specific Relief Act. The decree ought to be a decree for delivery of the moveables enforceable under O. 21, R. 31, Civil Procedure Code, but in accordance with O. 20, R. 10 of that Code the decree has to state the amount of money to be paid by the defendant as an alternative if delivery cannot be had. AIR (V. 27) 1940 Cal 337: ILR (1940) 1 Cal 372: 71 CLJ 215: 44 CWN 304: 190 Ind Cas 295.

——Ss. 75, 100 — Evidence of Commissioner and his report — Judge, if can reject it.

The report and the evidence of the Commissioner himself is nothing more than evidence in the case which the Judge is entitled to accept or reject. The fact that he does not accept such evidence or report does not make it incumbent on him to call for a further Commissioner's report and his failure to do so is not an error of law when both parties had given evidence on the point. AIR (Vol 25) 1938 Pat 569: 17 Pat 358: 19 PLT 731: 5 BR 241: 179 Ind Cas 566.

——S. 75 — Commissioner and arbitrator — Distinction — Rights of parties.

The essential difference between a Commissioner appointed to effect a partition and an arbitrator is that the former is an officer selected and appointed by the Court in whose selection the parties have not as of right, any choice, whereas the latter is a person selected by the parties in whose selection the Court has no choice. In the other former case the parties express no consent to be bound by the decision of the Commissioner who is appointed by the Court under the provision of S. 75 and O. 26, R. 13 of the C.P. Code, and whose decision the parties may challenge before the Court passing a final decree. In the latter case they express such consent and cannot challenge the arbitrator's decision on questions of fact or law except on the limited grounds contained in the 2nd Sch. of the Code. 95 Ind Cas 321: 7 PLT 739: 1926 PHCC 161: AIR (Vol 14) 1927 Pat 135 (DB).

——S. 75 — Commission to two persons — Legality of.

The issue of a commission to render proper account of improvements to two persons, is irregular and of doubtful legality. AIR (V 16) 1929 Mad 661 : 118 Ind Cas 296 (DB).

——S. 75 — Powers to issue.

Section 75 does not give the Court power to issue a commission to examine anybody anywhere and before any private person whether or not any suit has been instituted. For instance, this section would not give the Court power where there was no pending suit to direct a private citizen to appear, before, say a Panchayat of some particular caste to give evidence on some caste dispute. Nor could the Court require a private citizen in a similar case to appear before the Club Committee or any other private domestic tribunal; nor for the matter of that before, say a Government departmental commission. This section must be qualified by the rules in the First Schedule, subject of course to such further rules as may be found in the High Court Rules. AIR (V 9) 1922 Bom 444 : 75 Ind Cas 221 : 24 Bom LR 853 : 47 Bom 250.

——S. 75 — Scope of commission.

Section 75 defines clearly the circumstances under which a commission may be issued and it does not authorise a Court to delegate to the Commissioner the trial of any material issue which it is bound to try. AIR (V 9) 1922 Lah 47 : 68 Ind Cas 802 : 3 Lah 209 (DB).

——S. 75 — Successive commissions — Legality of.

C. P. Code does not contemplate the issue of a succession of commissions to value improvements all covering the same ground, the filing of a succession of reports all being treated alike as evidence, and the final sitting of them and selection by the Court of so much from this mass of matter as it thinks fit to adopt. AIR (V 16) 1929 Mad 661 : 118 Ind Cas 296 (DB).

——S. 75 — What is not referrable — The question whether one of the parties is personally engaged in agricultural labour cannot be referred to the Commissioner. AIR (V 15) 1928 Bom 145 : 30 Bom LR 131 : 109 Ind Cas 133.

——S. 75 — What is referrable.

Where the Court, upon the materials on the record was unable to come to any decision and it ordered a party to submit certain papers before a Commissioner and directed the Commissioner to state in his report whether what had been submitted was adequate and also whether the party should not be ordered to pay money compensation for what had not been supplied.

Held, that, as after the Commissioner had submitted his report the matter would necessarily be considered by the Court there was no objection to the Commissioner having been asked to decide the above-mentioned points. AIR (V 13) 1926 Cal 57 : 89 Ind Cas 24 (DB).

——S. 75 — Whole case.

Judge has no power to make over the whole case to the commissioners and to delegate his functions in the matter of taking evidence and determining issues to them. AIR (V 13) 1926 Lah 145 : 89 Ind Cas 333 (DB).

——S. 75 — Judicial functions of Court — Not to be delegated.

The judicial functions of a Court cannot be delegated to a commissioner and the powers of Court to issue a commission is strictly defined in S. 75. (1912) 15 CLJ. 17 : 17 CWN 369 : 13 Ind Cas 440 (DB).

——S. 75 (b) — A Commissioner can be appointed by a Court with special directions to make a particular enquiry into the particular facts of a case. AIR (V 23) 1936 Oudh 192: 1935 OWN 1388.

——S. 75 (b) — Commission for local investigation — Delegation of trial of material issue — Legality — Parties not objecting — Duty of Court.

A commission for local investigation is issued for the purpose of elucidating any matter in dispute, that is to say, presumably to throw light upon that matter and assist the Court to form a decision thereon and the Court cannot delegate to the commissioner the trial of any material issue which the Court itself is bound to try. Where commission for local investigation was issued and the point which required local enquiry was stated to be "whether the lands in suit are re-formed lands of jote N. 72 or accretions thereto" and the commissioner, in submitting his report complying with the reference, gave a finding that the disputed lands were accretion and the trial Court allowed the finding to prevail as no objection was taken to it,

Held, that it was not within the competence of commissioner to come to the conclusion whether the land was accretion or not but was for the Court to decide with the aid of such materials as the commissioner was able to place before him, and that merely no objection was taken to the finding by commissioner was not sufficient for the Court to adopt it. AIR (V 17) 1930 Cal 764 (DB).

——S. 76.

See Civil P. C., O. 26, Rr. 1 and 4.

——S. 76 (S. 386, old Code) — Exhaustive character of — Commission, issue of, for examination of, witnesses.

S. 386, C. P. C,. is exhaustive of the cases in which a Court can direct the issue of commission to examine a witness. (1904) 14 MLJ 329 : 28 M 28 (31) (DB).

——S. 79.

See also Civil P. C., S. 80 and O. 27.

——(As adapted by A.L.O., 1937) — Notice of suit in case of Provincial Government — Service on Collector — Sufficiency and validity.

Section 79, C. P. Code, as adopted by the Adaptation Laws Order, 1937, applied to all claims by or against the Crown, whether the suit could be brought under S. 179 of the Constitution Act, 1935, or not. It contained the general provision prescribing the manner of bringing suits by or against the Crown. Section 80, as adopted makes no distinction between a suit instituted against the Secretary of State under S. 79 (c), as adapted and one under S. 179 of the Constitution Act. In either the notice under S. 80 must be served on a Secretary to the Central Government, the Political Secretary and a Secretary to the Provincial Government. A notice served on the Collector of the District concerned in the case of a Provincial Government is not a valid notice. AIR (V 37) 1950 Pat 557 (DB).

——Ss. 79 and 80 (as amended on the passing of Government of India Act, 1935) — Suit against Secretary of State after notice — Subsequent amendment by substituting the Governor-General in Council as defendant — No fresh notice under S. 80 — Maintainability of suit.

A notice of suit under S. 80, C. P. Code, was given on behalf of a dismissed chief signaller to the various authorities, if the reliefs claimed therein were not granted within two months. A suit was filed against the Secretary of State for India represented by the Collector of Tanjore. On an objection that after the passing of the Government of India Act, 1935, the Governor-General in Council and not the Secretary of State was the proper party, the plaintiff asked for and obtained permission to amend his plaint. But he did not serve a fresh notice under S. 80, C. P. Code. On a question as to the maintainability of the suit without fresh notice,

Held, that as the notice relied on stated that the suit would be filed against the Secretary of State for relief against him and there was no reference in it to the Governor-General in Council, the suit as amended was unsustainable. The fact that the officials on whom the notice is actually to be served are the same makes no difference. Section 80, C. P. Code, is express and explicit and admits of no implications or exceptions and it imposes a statutory and unqualified obligation on the Court. AIR (V 33) 1946 Mad 366 : (1946) 1 MLJ 267 : ILR (1947) Mad 36 : 227 Ind Cas 538 : 1946 FLJ 16 : 1946 MWN 224 (DB).

——S. 79 — Appeal preferred on April 27, 1937, describing respondent as "Secretary of State for India in Council" — Mere addition of words "for India in Council", misdescription not justifying dismissal of appeal.

A suit against the Secretary of State for India in Council was dismissed on March 31, 1927. On April 27, 1937, a memorandum of appeal was presented in which the respondent was again described as "the Secretary of State for India in Council through the Collector". The appeal was dismissed on the ground that the respondent, as described, no longer existed in the eye of the law when the appeal was presented:

Held, that although the description of the respondent as "the Secretary of State for India in Council" was inconsistent with the provisions of S. 179, Government of India Act, 1935, yet the mere addition of the words "for India in Council" did not justify the dismissal of the appeal as at the worst it could only be construed as a misdescription of the respondent for which serious consequences of dismissal should not follow. AIR (V 26) 1939 Lah 298 : 41 PLR 134 : 183 Ind Cas 59.

——S. 79 — Secretary of State doing act under colour of Municipal law — Whether can be sued in Municipal Courts.

Quaere — Whether the Secretary of State can be sued in Municipal Courts in respect of acts done under the colour of a Municipal law. AIR (V 25) 1938 All 158 : 1938 RD 274 : (1937) ALJ 1396 : ILR (1938) All 114 : 1938 AWR 126 : 174 Ind Cas 505.

——S. 79 — The liability of Secretary of State.

If a Deputy Collector does a wrongful act in the performance of his statutory duties caused by the error or delinquency of the subordinate staff under the Collector and no benefit has been caused to Government by the act, the Secretary of State for India in Council is not liable for the act of the Deputy Collector. AIR (V 21) 1934 Cal 128.

——S. 79 — Suit against State Railway — Secretary of State, if necessary party.

In a suit against a State Railway unless the Secretary of State is impleaded, the railway is not liable. AIR (V 20) 1930 Pat 630.

——S. 79 — Appeal — Competency.

Where the Government acquired a plot of land for the District Board and the District Board appealed against the decision allowing compensation to the owners of the plot,

Held, that the appeals were filed by a person not competent to appeal. AIR (V 16) 1929 Lah 10 : 111 Ind Cas 477 : 9 Lah 667 : 10 LLJ 330 : 29 PLR 268 (DB).

——S. 79 — Applicability to.

Section 79 applies to appeal also. AIR (V 16) 1929 Lah 10 : 111 Ind Cas 477 : 9 Lah 667 : 10 LLJ 330 : 29 PLR 268 (DB).

——S. 79 — Suit on contract against Government — Liability.

When a statute lays down certain mandatory provisions in regard to the framing of contracts between the Secretary of State and a private individual, it is no answer to say that because the provisions were ignored on particular occasions and payments were made on contracts which were not in conformity with the statute, that that should be taken as a precedent which will be binding upon the Secretary of State in every case. Contracts to be binding upon the Secretary of State, must be made in strict conformity with the provisions laid down in the statute. If they are not so made, they are not valid as against him. AIR (V 15) 1928 Cal 74: 107 Ind Cas 360: 54 Cal 969.

——S. 79 — Sheriff — Liability for acts of subordinates.

The head of a Government department is not liable for wrongful acts of officials in the department, unless it can be shown that the act complained of, was substantially the act of the head of the Department himself.

Where the acts done by the bailiff were not substantially the acts of the Sheriff himself, the Sheriff could not be sued in his official capacity for such acts. AIR (V 14) 1927 Bom 521 : 51 Bom 479 : 29 Bom LR 1071 : 104 Ind Cas 685 (DB).

——S. 79 — Suit against public servant — Personal liability.

Because one can bring a suit against a public officer in respect of acts done by him in his official capacity, it does not follow that one can sue that officer by his official name, just as if he was a "corporation sole". The Sheriff of Bombay is personally liable for the actions and defaults of his bailiffs and servants, and anybody complaining of his default should sue him personally and not by the name of his office. (English case-law referred to). AIR (V 14) 1927 Bom 521 : 51 Bom 749 : 29 Bom LR 1071 : 104 Ind Cas 685 (DB).

——S. 79 — Suit against State Railway.

Railways Act of 1890 contains no clear indication that a suit against State Railway can be brought against the Manager, on the contrary the definition of Railway Administration, in the case of a Railway administered by the Government, as including the Government, suggests that a suit like this should be brought against the Government. AIR (V 11) 1924 Bom 306 : 48 Bom 297 : 26 Bom LR 71 : 80 Ind Cas 531.

——S. 79 — Wrongful acts of subordinate — Liability of head of department.

Obiter — The head of a Government department is not liable for wrongful acts of officials in the Department, unless it can be shown that the act complained of, was substantially the act of the head of the Department himself. AIR (V 14) 1927 Bom 521 : 104 Ind Cas 685 : 29 Bom LR 1071 : 51 Bom 749 (DB).

——S. 79 — Powers of Advocate-General.

Section 79, C. P. C., recognises the powers conferred by S. 111 of the East India Company's Act, 1813. Hence the position of Advocate-General in Bombay Presidency, is similar to that of the Attorney-General in England and his powers are not restricted to S. 91, C. P. C., but cover many other cases which cannot be called public nuisance at all. (1910) 12 Bom LR 274 : 5 Ind Cas 213.

——S. 79 (S. 416, old Code) — Secretary of State, suit against.

S. 416, C. P. C., does not enlarge or in any way affect the extent of the claims or liabilities enforceable by or against the Secretary of State for India in Council which must always depend on the provisions of 21 and 22 Vic., C 106. It only

provides a means of affecting the revenues of India in cases where these revenues could have been affected when in the hands of the East India Company. No power is given by that section to Government to bind or otherwise affect the revenues. It gives no cause of action but only declares the mode of procedure when a cause of action has arisen. (1904) 6 Bom LR 191 (146) (DB).

——S. 79 — Governor in Council and Secretary of State, Suit against.

Per Batty, J:— No action can lie in this country against the Governor and Members of his Council for acts done in their public capacity, but an action will lie against the Secretary of State for India in Council, although his liability can only be traced through the Governor and Members of his Council. The exemption conferred on the Governor and Council at Bombay by 4 Geo. IV, c. 71 is local and not absolute and does not affect any liability to suit on the part of the Secretary of State for India in Council in respect of any acts of the executive Government or Members thereof for which the East Indian Company then might have been or the Secretary of State for India in Council might now be liable.

Per Jacob, J.: — The Governor of Bombay in Council and the Secretary of State for India in Council in his statutory capacity, as transferee of the liability of the East India Company cannot be put on the same level with great Officers of State, who cannot be sued because they are servants of the Crown. (1904) 6 Bom LR 131 (174, 230) (FB).

——S. 79 — The liability of the Secretary of State for India in Council to be sued is co-extensive with the liability to which the East India Company was subject at the date of 21-22 Vic. C. 106. The doctrine as to the irresponsibility of the Crown for the negligence or misconduct of its officers does not apply in the case of the East India Company, which is liable for the acts of its servants in the same way as an ordinary principal is liable for the acts of his agent. (1904) 6 Bom LR 131 (147) (DB).

—S. 80.

1. **Acts in contemplation.**
2. **Applicability.**
3. **"Cause of action".**

   See N. 6.
4. **Liquidator.**
5. **Necessary party.**

   See also Civil P. C., S. 79.
6. **Notice.**
7. **Official capacity.**
8. **Official Receiver.**

   See also Civil P. C., O. 40, R. 1.
9. **Plaint.**
10. **Pro forma party.**
11. **Public Officer.**

    See also Civil P. C., S. 2 (17).
12. **Railway.**
13. **Receiver.**
14. **Scope and object.**
15. **"Two months".**

    See also N. 6.
16. **Waiver.**

1. Acts in contemplation.

——S. 80 — Scope — "Act purporting to be done" in official capacity — Future or threatened acts, if excluded.

Quaere: Whether future or threatened acts are outside the scope of S. 80. AIR (Vol 37) 1950 Pat 527 (DB)

——S. 80 — Suit for injunction restraining defendant from committing acts in future.

S. 80, C. P. Code, applies not only to suits which relate to mandatory injunctions in respect of acts which had already been performed but also to suits in which prohibitory injunctions in respect of threatened acts are asked for. AIR (Vol 33) 1946 Lah 247: ILR (1947) Lah 22: 225 Ind Cas 414 (SB).

——S. 80 — Notice, if necessary when there is only a threat of action.

Section 80 is applicable to any form of suit and notice is necessary even if there is only a threat of action to be taken by the public servant concerned. AIR (Vol 24) 1937 Lah 380: 39 PLR 720: 173 Ind Cas 365.

——S. 80 — Suit against Official Assignee for injunction against sale and partition.

Where the Official Assignee published notices to sell certain properties and a suit was instituted against him and others without giving notice under S. 80, for partition and for an injunction restraining the Official Assignee from selling the properties:

Held, that the suit was one, not merely based on the fact that a certain title or certain rights had devolved on the official Assignee, but was a suit in respect of an act threatened by the Official Assignee and, therefore, notice under S. 80 was necessary.

Held, further, that the subsequent abandonment of the plea for an injunction could not validate the suit which should properly be regarded as never having been brought at the time when the plaintiff filed the suit. AIR (Vol 20) 1933 Sind 4: 140 Ind Cas 265.

——S. 80 — Suit for injunction — Notice, necessity of.

A suit failing within the provisions of S. 80, Civil P. C., cannot be maintained without the notice contemplated by the section even though it is one for injunction. AIR (Vol 19) 1932 Cal 163: 58 Cal 1288: 135 Ind Cas 300.

——S. 80 — 'For any act purporting to be done' — Act merely contemplated or threatened.

The words 'in respect of any act purporting to be done by such public officer in his official capacity' in S. 80 refer to a past act not to any action merely contemplated or threatened.

Where the suit was confined to obtaining payment of a share in respect of future collections and not in respect of the monies, if any, collected in the past by the Receiver:

Held, that S. 80 did not apply, and the suit was not bad for want of notice to the Receiver. (1932) 136 Ind Cas 777: 34 LW 993: 1932 MWN 299.

——S. 80 — Threatened act of public officer — Suit regarding same — Need for notice.

The father and uncle of the plaintiffs were adjudicated insolvents and the Official Receiver commenced to sell their property. The plaintiffs having sued for a declaration that the Official Receiver had no power to sell the joint family property,

Held, that notice under S. 80 was necessary. The section would apply whether the property is sold or threatened to be sold by the Receiver. (1930) 31 Pun LR 865 (DB).

——S. 80 — Injunction against threatened act — Notice.

Per Kemp, J.:— No suit may be instituted against the Secretary of State until the expiration of the two months notice required by the section. The terms of the section are imperative and make no exception in the case of suits for an injunction and a Court of law is not entitled to graft on to the plain wording of the section a qualifying clause excepting suits for an injunction, a kind of relief which

must have been in the contemplation of the framers of the Code when the section was drafted and redrafted.

Nor does it make any difference that the injury apprehended is immediate or irreparable. A suit in respect of something which a public officer is going to do not in respect of something he has done, but in respect of the further acts threatened, lies without notice. No notice is necessary in a suit for injunction to prevent a threatened act against the public officer. AIR (Vol 11) 1924 Bom 1: 26 Bom LR 1: 48 Bom 87: 90 Ind Cas 13 (DB).

——S. 80 — Injunction — Notice of suit — Public officer — Irreparable damage.

The notice prescribed by S. 80 of the C. P. C. is essential in all suits against the Secretary of State or against a public officer in respect of any act purported to be done by the said public officer in his official capacity, even though the relief claimed is an injunction and irreparable injury is likely to be caused if a rule 'nisi' for an injunction is not at once granted and though the act complained of is a threat to do a future injury provided the threat is conveyed through an act, such as speech, writing, etc. AIR (Vol 7) 1920 Mad 723: 39 MLJ 151: 28 MLT 163: 12 LW 193: (1920) MWN 495: 58 Ind Cas 885 (DB).

——S. 80 — Injunction — Notice.

The right of suit which is expressly granted by the legislature under S. 80 of the C. P. C. cannot in reason be deferred until its exercise has become illusory by insisting on strict observance of the rule regarding notice. A suit under S. 80 can be filed before the expiry of the period of notice where the agents of the Secretary of State during the currency of the notice threaten to destroy the property which is the very subject matter of the intended suit. The object of S. 80, C. P. C., is to enable the Secretary of State who necessarily acts through agents, time and opportunity to reconsider his legal position when that position is challenged by persons alleging that official order has been illegally made to their prejudice. AIR (Vol 3) 1916 Bom 296: 40 Bom 392: 18 Bom LR 243: 34 Ind Cas 535 (DB).

——S. 80 — Injunction — Notice.

Where there is serious and imminent injury requiring immediate injunction, a court can entertain the suit and issue the injunction without a previous notice. The repetition of the word "against" in S. 424 (S. 80 new Code) shows that the 'act' described in the section relates only to the public officers and not to the Secretary of State. (1911) 35 Bom 362: 13 Bom LR 273: 10 Ind Cas 639 (DB).

——S. 80 — Injunction — Notice unnecessary.

Under S. 80 (S. 424 old Code) a notice is not necessary in a suit against a public officer for an injunction restraining him from doing a threatened act. (1909) 3 SLR 175: 4 Ind Cas 1156 (DB).

2. Applicability.

——S. 80 — Applicability — Agreement to refer dispute to arbitration — Application to file — Notice under S. 80 — Necessity — Arbitration Act, Ss. 20 (2) and 41 (a).

S. 80, C. P. Code, applies only to suits. The section has to be strictly construed; it does not apply to an application under S. 20(2) of the Arbitration Act to file in Court an agreement to refer disputes to arbitration. No notice under S. 80 is therefore necessary in respect of such an application. AIR (Vol 34) 1947 Sind 147: ILR (1946) Kar 463.

——S. 80 — Section 80 applies to any kind of suit, whatever relief sought, including suit for injunction — Court-martial of accused on various charges started — Suit by accused to restrain members of Court-martial from proceeding with trial — Notice under S. 80 not given — Suit, held was not maintainable.

A Brigadier, under the authority given to him by the Commander-in-Chief, convened a General Court-martial consisting of seven military officers to try the accused on various charges. After the trial had begun, the accused brought a suit against the members of the Court-martial to restrain them from proceeding with the trial and contended that a notice under S. 80 was not necessary to be served before filing the suit as he was claiming an injunction in respect of the acts to be performed in future only & not in respect of past acts, that S. 80 did not apply as the members were not holding the Court-martial in their official capacity, that inasmuch as S. 80 was intended to protect public officers from individual liability, it could not apply when no relief was claimed against the members in their public capacity but was claimed in their private capacity:

Held, (i) that S. 80 applies to any kind of suit, whatever the relief sought, including a suit for injunction. It applies to suits which relate to mandatory injunctions in respect of acts which have already been performed as well as suits in which prohibitory injunction in respect of threatened acts are asked for. Since protection was by statute intended by the Legislature to be given to the Crown or its public officers to make amends for the act if they would care so to do or for taking legal advice before deciding their course of action in regard to an action which had already been taken or to a contemplated action, it could not be taken away simply because a plaintiff considered that he would suffer an irreparable injury or because he chose to add a prayer for an injunction in his suit:

(ii) that the relief sought was not in respect of acts to be done in future only but also in respect of past acts as the Court-martial had already assembled and begun the trial of the plaintiffs. The future acts to be performed by the members of the Court martial could not be attacked without assailing the validity of the acts which had already been performed by them;

(iii) that the Brigadier could not refuse to convene a General Court-martial and the members of the Court-martial who were also military officers could not refuse to function as a Court-martial under the Army Act when ordered so to do by a competent authority. As these acts were purported to be done by the defendants in their official capacity, they would fall within S. 80;

(iv) that the relief claimed was not in the private capacity against the members of the Court-martial but was in their public capacity;

(v) that the provision of notice under S. 80 applied to the suit and the suit was not maintainable in the absence of such notice. AIR (Vol 33) 1946 Lah 247.

——S. 80—A notice under S. 80 is not necessary for a suit under O. 21, R. 63, as it is a continuation of the claim proceedings under O. 21, R. 58. AIR (Vol 30) 1943 Mad 341: (1943) 1 MLJ 251: 1943 MWN 181: 211 Ind Cas 113.

——S. 80 — Suit under S. 14, Madras Survey and Boundaries Act (IV of 1897).

Section 80 is applicable to a suit brought under S. 14, Madras Survey and Boundaries Act. AIR (Vol 30) 1943 Mad 284: (1943) 1 MLJ 53: 56 LW 50: 1944 MWN 56: 210 Ind Cas 418.

——S. 80 — Distinction between suits in contract and those not in contract.

No distinction can be made with regard to the applicability of S. 80 between suits in contract and suits not in contract. AIR (Vol 21) 1934 PC 96: 11 OWN 463: 38 CWN 517: 66 MLJ 506: 1934 MWN

381: 39 LW 504: 1934 ALJ 406: 59 CLJ 252: 36 Bom LR 544: 61 Cal 470: 3 AWR 561: 61 IA 171: 148 Ind Cas 482.

——**S. 80 — Bombay City Land Revenue Act (II of 1876) S. 14 — Suit brought pursuant to undertaking under S. 14 within thirty days of Collector's decision — Notice of suit, if necessary.**

Section 80 does not apply to a suit brought pursuant to an undertaking given under S. 14, Bombay City Land Revenue Act, within thirty days from the Collector's decision. AIR (Vol 21) 1934 Bom 162: 36 Bon. LR 297: 154 Ind Cas 861.

——S. 80 — A proceeding that does not commence with a plaint cannot be held to be a suit. The fact is that a proceeding would not necessarily make it a suit. AIR (Vol 19) 1932 Lah 374: 33 PLR 508: 13 Lah 672: 137 Ind Cas 266.

——**S. 80, Sch. II, para. 17 — Application to file agreement to refer, whether suit.**

An application under para. 17 of the Second Schedule asking the Court to file an agreement to refer a dispute to arbitration is not a suit within the meaning of S. 80, Civil P. C. AIR (Vol 19) 1932 Lah 374: 33 PLR 508: 13 Lah 672: 137 Ind Cas 266.

——**S. 80 — Declaratory suits.**

S. 80 applies even to a suit which is brought for a mere declaratory decree. AIR (Vol 17) 1930 Lah 708: 125 Ind Cas 625 (DB).

——**S. 80 — Suit for injunction — Notice.**

A suit in which 'inter alia' an injunction is prayed is still "a suit" within the words of the section which imposes a statutory and unqualified obligation in respect of the notice contemplated under the section, and the section applies to a suit for injunction even where the delay of two months contemplated by the section is likely to result in immediate inquiry to the plaintiff. AIR (Vol 15) 1928 Sind 76: 22 SLR 63: 105 Ind Cas 729.

——**S. 80 — Injunction.**

The Bombay view that in suits to restrain by injunction the commission of some official act prejudicial to the plaintiff, if the immediate result of the act would be to inflict irremediable harm, S. 80 does not compel the plaintiff to wait for two months before bringing his suit is overruled by the Privy Council and the section is applicable to all forms of action and to all kinds of relief without exception. AIR (Vol 14) 1927 Bom 649: 29 Bom LR 1427: 105 Ind Cas 756 (DB).

——**S. 80 — Suit against future act.**

Per Ramesam, J.— In respect of acts of public servants done in their official capacity the section applies only in the case of past acts completed or begun but incomplete and not to threatened acts.

Per Reilly, J.— The words "in respect of any act purporting to be done" cover only a past act and do not include a future act. AIR (Vol 14) 1927 Mad 166: 51 MLJ 671: 50 Mad 239: 24 MLW 730: 99 Ind Cas 284 (DB).

——**S. 80 — Suits under S. 104H of the Bengal Tenancy Act.**

Notice under S. 80 of the C. P. C. is necessary for suits under S. 104 H. of the Bengal Tenancy Act by plffs. as tenure-holders against the Secretary of State as landlord. (1913) 18 CLJ 566: 22 Ind Cas 36 (DB).

——**S. 80 — Tort — Notice.**

The principle that "no notice under S. 80 is required in a suit 'ex-contractio'" should not be applied to actions which are more of a tortious nature on the ground that these actions are for certain purposes treated as actions ex-contractio. (1910) 34 Bom 583: 12 Bom LR 615: 7 Ind Cas 679 (DB).

3. "Cause of action".

See also N. 6.

——**Ss. 80 and 115 — Suit against Provincial Government after notice under S. 80 — Prayer for amendment of plaint introducing new cause of action inconsistent with the original one — If can be allowed — Interference in revision with order allowing amendment — Principles.**

A suit against the Provincial Government (after the necessary notice under S. 80, C. P. Code), as originally framed was for a declaration that the acquisition by the Government of certain ground and premises belonging to the plaintiff was illegal, 'mala fide', unreasonable, 'ultra vires' and without jurisdiction and for granting a permanent injunction restraining the defendant from proceeding with the said acquisition or from taking possession of the said property.

Pending the suit, an application was made to amend the plaint by the addition of a new paragraph to the effect that since the institution for the use of which the original acquisition had been intended had ceased to exist as an entity on account of its dissolution there was no further necessity for the acquisition at all and therefore the defendant should not take any further steps in relation to the said acquisition. The amendment was allowed. In revision, on a contention that as the amendment introduced a new cause of action, it could not be allowed without the imperative prerequisite of a notice under S. 80, C. P. Code.

Held, that as the amendment allowed had introduced a fresh cause of action which was outside the scope of the suit as originally framed and inconsistent with the allegation made earlier, the trial Judge was not justified in allowing the amendment as admittedly no previous notice had been served on the Government informing them of this new cause of action.

Held, further, that as the lower Court had acted with material irregularity in the exercise of jurisdiction, the High Court had the power to interfere in revision and set right the matter. AIR (Vol 36) 1949 Mad 214: (1948) 2 MLJ 423: 1948 MWN 704: 61 LW 781.

——**S. 80 — Suit against several defendants — Suit dismissed against Secretary of State — Competency of suit against others.**

Where a suit to establish the plaintiff's right to resume certain inams, to declare that the Secretary of State has no right to enfranchise them and to recover possession from the other defendants is dismissed as againt the Secretary of State for want of a proper notice to him as required by S. 80, the suit becomes incompetent as against other defendants also as the claim to possession depends on the plaintiff's right of resumption. AIR (Vol 18) 1931 Mad 175: 59 MLJ 923.

——**S. 80 — Meaning of.**

Although the cause of action in S. 80 should not be taken in a narrow sense, the object of the section being merely to inform the defendant substantially of the ground for complaint, yet the section requires the cause of action to be stated with some precision. AIR (Vol 15) 1928 Cal 74: 54 Cal 969: 107 Ind Cas 360.

——**S. 80 — Notice.**

Where the cause of action has not arisen at the time of the notice, the notice is invalid. AIR (Vol 15) 1928 Cal 74: 54 Cal 969: 107 Ind Cas 360.

——**S. 80 — Injunction — Past cause of action.**

The section requires notice of a suit for injunction when the cause of action for the injunction is an act detrimental to the plff.'s interests and already done by the Public Officer. (1912) 6 SLR 250: 19 Ind Cas 838 (DB).

——S. 80 — Cause of action — Notice.

Notice by a plff. under the section cannot constitute a cause of action. The right to sue can accrue when the order of the Collector interfering with the plff.'s right is passed. (1912) 6 SLR 210: 19 Ind Cas 565 (DB).

4. Liquidator.

——S. 80 —Registrar under Co-operative Societies Act.

A liquidator appointed by Registrar under S. 42, Co-operative Societies Act, whose appointment is regulated by rules framed by Punjab Government is a "public officer" and in a suit against him, a notice under S. 80, Civil P. C., is essential. AIR (Vol 29) 1942 Lah 287: 44 PLR 540: ILR (1943) Lah 389: 203 Ind Cas 363.

——S. 80 — Liquidator appointed under Bihar and Orissa Co-operative Societies Act (VI of 1935) — Plaintiff's suit against him claiming that he being agriculturist, his house could not be attached — Notice under S. 80, if essential.

Section 80, Civil P. C., bars the institution of a suit unless notice has been given only when the suit is against a public officer and is in respect of any act done or purporting to be done by the public officer in his official capacity. The mere fact that the public officer concerned is a defendant in the suit is not sufficient to determine whether a notice is required under S. 80. For instance, when an Official Assignee or a Receiver is impleaded in a suit to realise a charge on the property of the insolvent which is vested in him, and no act or omission on the part of the Receiver is alleged, notice is not necessary where no relief is claimed against the liquidator of a co-operative society, the object of the plaintiff in the suit being to obtain a decision as to whether his house is liable to be attached. He being an agriculturist, no notice under S. 80 is required, assuming that the liquidator appointed under the Bihar and Orissa Co-operative Societies Act is a public servant within the meaning of the section. AIR (Vol 28) 1941 Pat 438: 7 BR 585: 22 PLT 465: 193 Ind Cas 142.

——S. 30 — A liquidator appointed by the Registrar of Co-operative Societies is not a public servant. AIR (Vol 27) 1940 Mad 831: 52 LW 131: (1940) 2 MLJ 241: 1940 MWN 782: ILR (1940) Mad 929: 194 Ind Cas 769.

——Ss. 80, 2 (17) (h) — Liquidator appointed under S. 42, Co-operative Societies Act (II of 1912), by order of Registrar.

Under Cl. (h) of S. 2 (17), a 'public officer' includes every officer in the service or pay of the Govt. Where the Liquidator is the manager of the Co-operative Central Bank, and is paid a salary by that institution, and has been appointed a Liquidator under S. 42 (1) of the Co-operative Societies Act (II of 1912) by order of the Registrar of the Co-operative Societies and has the powers mentioned in S. 42 (2) of that Act and as Liquidator, he is not paid any allowance, his duties being 'quasi-judicial' duties having authority to summon and enforce the attendance of witnesses and to compel the production of documents in the same way as the Civil Court and he is appointed by Govt. and performs public duties, he is an officer in the service of Govt. when acting as Liquidator and is, therefore, a "public officer" as defined in the Civil P. C. No suit can, therefore, be brought against him without previous notice in respect of any act purporting to be done by him in his official capacity even if the relief claimed is merely a declaration or injunction. AIR (Vol 26) 1939 Nag 232: 1939 NLJ 215: 182 Ind Cas 514.

——S. 80 — A liquidator is a public officer within the meaning of S. 2 (17) and hence S. 80 will apply to him. AIR (Vol 21) 1934 Nag 201: 17 NLJ 47: 3 NLR 240: 148 Ind Cas 714.

——S. 80 — Official Liquidator is an Official of the Court having powers conferred upon him under Ss. 216 and 217 of the Companies Act and as such he is a public servant and to such a public officer notice under S. 80, is necessary. AIR (Vol 21) 1934 Oudh 158 (2): 11 OWN 398: 9 Luck 577: 148 Ind Cas 448.

5. Necessary Party.

See also Civil P. C., S. 79.

——S. 80 — Scope — If superseded by O. 27-A — Absence of notice and failure to implead Government — If cured by notice under O. 27-A.

O. 27-A, C. P. Code, which has been inserted in the C. P. Code, and which provides for machinery by which the state may intervene in any suit in which a substantial question of Constitutional law is involved is not intended to supersede S. 80, C. P. Code. The failure to implead the state in a suit where the state is a necessary party and to give the notice prescribed by S. 80, cannot and will not be cured because the Advocate-General gets a notice under O. 27-A, C. P. Code, and can apply to make the State a party. AIR (Vol 37) 1950 Pat 527 (DB).

——S. 80 — Suit for a declaration that structure stood on the land of plaintiff and for the issue of a permanent injunction restraining the municipality from removing the structure — Government is not a necessary party to suit.

The Municipality served upon the plaintiff a notice to remove within seven days certain structures which, it was said, encroached upon "Municipal lands". The plaintiff denied that there was any encroachment and filed a suit for a declaration that the structures stood on his own land and for the issue of a permanent injunction restraining the Municipality from removing the structures on the land. The Municipality pleaded that the Govt. was a necessary party. The trial Court found for the plaintiff and gave a decree as prayed. The Appellate Court agreed with the trial Court in holding that the structures which the Municipality wished to demolish stood entirely on plaintiff's own land :

Held, (i) that the finding of the trial Court and the Appellate Court that there was, in fact, no encroachment was one of fact and was conclusive ;

(ii) that as there was no encroachment, the Municipality had no right to issue the notice and still less right to take steps against the plaintiff. The Govt. was not concerned with the issue of the notice or the threat which the Municipality made. The responsibility entirely rested with the Municipality. The granting of relief which the plaintiff asked for in the plaint would affect no right vested in the Govt. Therefore, Govt. was not a necessary party to the suit and could not be brought into the action. AIR (Vol 32) 1945 Mad 224: (1945) 1 MLJ 22: 1945 MWN 179: 58 MLW 87 (3).

——S. 80 — Decision of a Commissioner under Ben. Waqf Act, 1934 — Suit for revocation or modification of the decision — Commissioner is not a necessary party — Although a notice under S. 70 of the Ben. Waqf Act is issued to him and he comes as an intervener under S. 71, the provisions of S. 80 of Civil P. C., are not applicable in his case. AIR (Vol 31) 1944 Cal 206: 48 CWN 157: 214 Ind Cas 160.

——S. 80 — Suit for declaration of title to certain property — Receiver made co-defendant — Allegation against Receiver of collusion — Defence of both defendants identical — Case, if can be severed.

It is quite true that if two or more causes of action are united in one suit and with regard to one of them the suit fails for want of notice under S. 80, Civil P. C., there is no reason why the entire suit should be dismissed. But if, in a suit against a person for declaration of title to certain property, the Receiver of that property is added as a party and there are definite allegations against him of collusion with that person in granting rent receipts, and setting up a claim to possession in the disputed property and the Receiver, moreover, does not take up a neutral attitude, and the defence of both the defendants in answer to the plaintiff's claim is identically the same, it is not possible to sever one part of the case from the other. AIR (Vol 27) 1940 Cal 1: 44 CW 74: 186 Ind Cas 584.

——S. 80 — Official Receiver — Suit for declaration that sale invalid and ineffective against plaintiffs — Official Receiver, if necessary party.

In a suit for a declaration that a sale of the house effected by the Official Receiver was invalid and would not affect the rights of the plaintiffs who claimed to be its owners, the Official Receiver is a necessary party and the suit is not maintainable against him without notice under S. 80. AIR (Vol 24) 1937 Lah 386: 39 PLR 726: 173 Ind Cas 220.

——S. 80 — Partition suit of property under manager of Encumbered Estates.

Where during the pendency of a suit for partition the rights of a zamindar vest in the Manager, Encumbered Estates, the act of the Manager in so assuming the right is not such an act as would lay upon the plaintiff seeking partition the obligation of first giving notice under S. 80, though the manager is to be made a party, he is not more than a formal party. AIR (Vol 20) 1933 Sind 1: 142 Ind Cas 501.

——S. 80 — Notice — Suit for possession involving the cancelling of the Govt. Order.

Secretary of State is not a necessary party to a suit against deft. who holds under an order of a Government Officer. (1910) MWN 443: 8 MLT 248: 6 Ind Cas 419 (DB).

6. Notice.

(a) Form.
(b) Plea of want of notice.
(c) Mode of service.
(d) Necessity.

——S. 80 — Notice to Government — Terms of — Validity.

The terms of S. 80, Civil Procedure Code, are explicit and mandatory and cannot be waived. It requires that the notice should state the name, the residence, etc., of the plaintiff, the cause of action, and the relief prayed for.

Where goods were sent through a railway but the delivery was not made and the plaintiff therefore sued the Government claiming damages after sending a notice to the Secretary, Governor-General of India in Council, Department of Railways, New Delhi, on an objection that the notice was not a proper one according to S. 80, Civil Procedure Code,

Held, under the circumstances, the notice under S. 80, Civil Procedure Code, was a proper one. AIR (Vol 38) 1951 Mad 416: 1950 MWN 787: (1950) 2 MLJ 656.

——S. 80 — Notice — Requirements of — Error in the matter of designation as Secretary of State — Effect — Notice received by authority empowered to receive notices addressed to the Governor-General in Council and acted upon — Sufficiency.

Where although the name of the Secretary of State was inadvertently given at the head of the notice, yet it was treated by the Governor-General in Council as notice to him and action was taken in the same way as if the notice had been addressed to the Governor-General in Council, it is sufficient compliance with the requirements of S. 80, C. P. Code, because the Governor-General in Council was in fact given notice. It must be held that the notice was given to the Governor-General in Council notwithstanding an error in the matter of designation. AIR (Vol 38) 1951 Mad 327: 1950 MWN 684: 63 LW 1173: (1950) 2 MLJ 506.

——S. 80 — Suit against Governor-General in Council — Notice stating that suit could be instituted against 'Secretary of State' for relief against him — Notice is not proper.

Section 80 is express and explicit and admits of no implications or exceptions. It imposes a statutory and unqualified obligation upon the Court. The section requires the plaintiff to state inter alia the relief which he claims.

The notice of suit instituted against the Secretary of State stated that a suit would be instituted against the Secretary of State for relief against him. On an objection to the frame of suit, the plaint was amended by substituting the Governor-General in Council in place of the Secretary of State as defendant. No fresh notice was served :

Held, that as the notice did not contain any reference to the Governor-General in Council, it could not be read as claiming any relief against him and therefore, the notice was not proper. AIR (Vol 33) 1946 Mad 366.

——S. 80 — Error in notice about subject-matter of suit is a substantial error which vitiates notice.

An error describing the subject-matter of the suit, namely, setting aside a revenue sale, as R. S. No. 722/4-b instead of R. S. No. 722/4-A is not a mere clerical error but a substantial error which vitiates the notice under S. 80, Civil P. C. AIR (Vol 33) 1946 Mad 73: 58 MLW 534: (1945) 2 MLJ 387: 1945 MWN 655.

——S. 80 — No waiver or estoppel — Notice defective — Effect.

Section 80 is imperative and there can be no question of waiver and no question of estoppel. It is very desirable that the objection should be taken at the earliest possible moment, but failure to do so will not deprive the section of its force. Where notice given is defective, and a notice given by only one of the two plaintiffs is defective, there is no compliance with the section and the Court has no jurisdiction in the matter. AIR (Vol 31) 1944 Mad 544: (1944) 2 MLJ 65: 57 MLW 436: 1944 MWN 475: ILR (1945) Mad 263: 218 Ind Cas 377.

——S. 80 — Notice stating existing cause of action and referring to possible further claim — Notice is not bad.

To state a future cause of action in the notice is not a compliance with S. 80, but where a cause of action exists of which notice is given, the notice is not rendered bad because it refers to a possible further claim which may arise before a suit can be brought. The object of S. 80 is to give to the public officer concerned notice of the

claim which is going to be made against him, and to give him reasonable time in which to consider his reactions. In construing the section, one must remember that the suit cannot be brought for two months after the date of the notice.

The cause of action which is to be stated in the notice, is the bundle of facts which go to make up the right in respect of which the plaintiff proposes to sue, and it is obvious that before the suit can be brought it may be that that bundle of facts will be added to or subtracted from. The notice is not invalidated because it refers to a possible additional claim consequential upon the cause of action specified therein, and states that if such additional claim arises the plaintiff will sue also in respect of it.

In a notice under S. 80 to the Secretary of State, the plaintiff alleged that the proposed suit was for a declaration that the assessment of rent filed by the Collector was illegal and for refund of any amount that the Collector will levy from the plaintiff. In the suit filed by the plaintiff, the plaintiff claimed refund of Rs. 7,369-8-0 which was paid by him under protest subsequent to the date of the notice under S. 80 :

Held, that the notice complied strictly with the requirements of S. 80, Civil P. C. AIR (Vol 30) 1943 Bom 138: 45 Bom LR 197: ILR (1943) Bom 128: 206 Ind Cas 570.

——S. 80 — Failure to give surname, caste, or occupation, held did not make notice defective.

It is not stated in S. 80 what kind of description ought to be given of the plaintiffs who desired to file a suit. It would be sufficient if the plaintiffs are described in such a manner that they could be easily identified, and if the fathers' names of all the proposed plaintiffs are given and their places of residence are given, the failure to give their surname caste, or occupation does not make the notice defective. AIR (Vol 29) 1942 Bom 161: 44 Bom LR 295: ILR (1942) Bom 357: 201 Ind Cas 420.

—S. 80 — S. 82 is confined to decrees passed in suits which are referred to in previous sections and which can only be instituted after service of notice under S. 80. AIR (Vol 29) 1942 Cal 569: 46 CWN 927: ILR (1942) 2 Cal 528: 203 Ind Cas 429.

——S. 80 — "Cause of action", scope of — Previous notice.

The words "cause of action" under S. 80, Civil P. C., should not be construed in a narrow sense as the object of the section is merely to inform the defendant substantially of the ground of complaint. Where the plaintiff had informed the Collector that a certain amount was wrongly realized from him as punitive tax and also that he was not liable to pay the extra amount which had again subsequently been assessed on him, the notice is good for the maintainability of the suit for the recovery of the extra amount which the plaintiff had paid subsequent to the notice and the legality of which he had challenged in the notice. AIR (Vol 28) 1941 Oudh 355: 16 Luck 421: 1941 OWN 63: 1941 AWR 82: 192 Ind Cas 545.

——Ss. 79, 80 — Notice served on Collector for suit against Secretary of State before coming into force of Government of India (Adaptation of Indian Laws) Order but suit filed subsequent to coming into force of such Order — Suit is saved by Paras. 9 and 11 of the Order.

Where a notice under S. 80 has been served on the Collector for instituting a suit against the Secretary of State, before coming into force of the Govt. of India (Adaptation of Indian Laws) Order, 1937, but the suit is instituted after the order came into force, the suit is saved by Paras. 9 and 11 of the Preamble to the Govt. of India (Adaptation of Indian Laws) Order, because as a result of the notice to the Collector the plaintiffs acquired a right to sue and the Secretary of State incurred a liability to be sued. AIR (Vol 27) 1940 Lah 455: 42 PLR 596: 191 Ind Cas 182.

——S. 80 — Municipality.

Sanction to build given by Municipality to person — Municipality subsequently superseded and sanction suspended — Notice by person to Secretary of State through Deputy Commissioner under S. 80, Civil P. C., and S. 49, Punjab Municipal Act — Deputy Commissioner also Administrator of Municipality :

Held, that the notice was valid and proper. AIR (Vol 27) 1940 Lah 451: 42 PLR 550: 192 Ind Cas 729.

——S. 80 — Notice by pleader.

——Notice by a pleader on behalf of his client under S. 80, C. P. Code, is not a mere private letter, as it is one which S. 80 requires in the case of an intended suit against a public officer in respect of any act purporting to be done by that public officer in his official capacity. 30 Bom LR 934 : 113 Ind Cas 519 : AIR (Vol 15) 1928 Bom 338 (DB).

——S. 80 (S. 424 old Code) — Notice — Suit for injunction.

A suit even though for injunction cannot be maintained against the Secretary of State without giving notice to him according to the provisions of S. 44, C. P. C. (1903) 27 B 424 : 5 Bom LR 431 (445) (DB).

——S. 80 (S. 424 old Code) — Notice, by two out of three plaintiffs — Notice in respect of one fasli and suit to recover money illegally levied for two faslis.

Where three joint owners of land sued to recover water rates illegally levied by Government for faslis 1302 and 1303, and notice of suit was given by only two out of three plaintiffs, and the notice omitted to state the imposition of the rate for fasli 1303 as a cause of action, as at the date of its being given, it had not been levied.

Held, that the notice was valid, as the object of the notice required by S. 424, C. P. C., is to give the defendant an opportunity to settle the claim, if so advised, without litigation, and that object is attained by two out of three plaintiffs giving the notice. Also the notice was not invalid as the imposition of the rate for fasli 1303 was not stated. Such imposition was not a fresh 'cause of action requiring a further notice'. We should construe the words liberally, the object of the section being merely to inform the defendant substantially of the ground of complaint. (1901) 11 MLJ 117 : 24 M 279 (282, 283) (DB).

(a) Form.

——S. 80 — Notice under — Validity — Clerical mistake in giving the number of the Railway receipt which forms the cause of action.

Whenever a plaintiff mentions one cause of action in the notice and sues on a different cause of action, he is bound to fail. Where in a suit by a person who was entitled to obtain delivery of a consignment on the basis of a railway receipt endorsed in his favour by the consignor, the notice under S. 80 gave the wrong number of the Railway receipt.

Held, that the requirements of S. 80 in regard to stating the cause of action had not been complied with. 1950 ALJ 595: 1950 AWR 657.

——S. 80 — Contents of notice.

Notice under S. 80, C.P. Code, need not be practically a copy of the plaint. It should be such as to give substantial information to the Government as to the basis of the claim and the relief which the plaintiff seeks. It is not incumbent upon the plaintiff to give in detail all the forms in which he would seek relief. (1950) 85 CLJ 364.

——S. 80 — Contents of notice — Notice not giving parentage of plaintiff and not stating exact amount as claimed subsequently in plaint — If invalid.

A notice of suit under S. 80, C.P. Code, need not mention the parentage of the plaintiff or the exact amount of the claim in the suit as essential conditions of its validity; the fact that the parentage of the plaintiff is not given or that the amount mentioned in it does not tally with the amount subsequently claimed in the plaint would not invalidate the notice as it cannot be said that the requirements of S. 80 are not legally complied with. AIR (Vol 36) 1949 Pat 268: 29 PLT 477 (DB).

——S. 80 — Contents of notice — Description of plaintiff — Business address and not place of residence given.

The object of serving notice under S. 80, C. P. Code, is to give the Government sufficient warning of the case which is going to be instituted against it so that the Government may, if it so wishes, settle the claim without litigation or afford restitution without recourse to a Court of law. A liberal construction should be put upon the section. The notice is sufficient if it substantially fulfils its object in informing the Government or the public officer of the nature of the suit to be filed. It must not be construed as if it is a pleading and it need not set out all the details or facts of the case which the plaintiff intends to prove.

Under the section, all that is needed is that the plaintiff must be described in such a manner that he can be identified without any difficulty so that the Government may deal with him, if so advised. It will be pushing technicality to absurd limits if the Court has to dismiss a suit because the plaintiff who is a businessman has given his business address and not his place of residence in the notice. (1948) 52 CWN 808.

——S. 80 — Notice under on behalf of one plaintiff — Suit, if can be instituted by him and another.

S. 80 of the C.P. Code according to its plain meaning requires that there should be "identity of person who issues the notice with the person who brings the suit". Hence where a notice as required by the section is given on behalf of only one person a suit cannot be instituted by that person and another on the strength of such notice. To hold otherwise would be to admit an implication or exception for which there is no justification. 74 IA 223: ILR (1948) Mad 214: 1947 ALJ 576: 60 LW 630: 1947 MWN 679: 49 Bom LR 794: 52 CWN 27: AIR (Vol. 34) 1947 PC 197: (1947) 2 MLJ 208.

——S. 80 — Contents of notice — Description of defendant — Exact style — If to be stated.

It is not necessary that the notice under S. 80, C.P. Code, should mention the exact style under which the defendant is to be impleaded. It is sufficient if it is clear against whom the suit is to be filed, and in the case of a suit against the Central Government the notice has to be delivered to or left at the office of the Secretary to that Government. 1946 PWN 137: 230 Ind Cas 274: 13 BR 421: AIR (Vol 34) 1947 Pat 81.

——S. 80 — Object — Full details of claim, if must be stated in notice.

The object of giving a notice of two months to Government which is prescribed in S. 80 of the Civil Procedure Code, is to give Government sufficient warning of a case which is about to be brought against it, so that Government may, if it so wishes, compromise the case, or afford restitution if it considers that restitution is due, without recourse being had to a Court of Law in which Govt. might be mulcted in costs. It is necessary to import a little common sense into notices under S. 80. The Court should look at the wording of a notice and interpret it in the light of common sense. The plaintiff is not bound to state in his notice in full detail the relief he would claim. When the object of the notice is achieved and there has not been any violation to the spirit and the intention of S. 80, notice is valid. AIR (Vol 25) 1938 Nag 415: ILR (1939) Nag 206: 179 Ind Cas 711.

——S. 80 — Stating cause of action — Money illegally assessed by Government purporting to act under S. 15, Police Act (V of 1861) — Notice under S. 80, on Secretary of State, held complied with S. 80.

To state a cause of action, it may be sufficient to give a legal description by which a particular cause of action is known, such as, 'damage for breach of contract' and 'damage for negligence'.

In an action, the plaintiffs claimed from the Secretary of State a sum of Rs. 2,500 which they contended had been illegally assessed upon them, Government purporting to act under S. 15, Police Act, as amended by the Act of 1922. The case made out in the plaint was that the Deputy Magistrate, purporting to act for the District Magistrate under sub-s. (4) of S. 15, had made the apportionment and issued the notice, whereas the section demanded an apportionment and notice by the Magistrate of the District.

By the notice which the plaintiffs gave under S. 80, they stated that "the Deputy Magisrate purporting to act for the District Magistrate has served a notice upon my client dated July 27, 1933, making a demand of Rs. 2,500-12-0 as an apportioned amount payable by him for up-keep of the additional Police force there." A later paragraph was to the effect that "my client asserts that the assessment of costs against him is illegal and ultra vires, and secondly, the sum assessed is too high":

Held, that there had been sufficient compliance with S. 80 and that the plaintiffs had sufficiently stated their cause of action. AIR (Vol 25) 1938 Pat 556: 17 Pat 345: 5 BR 116: 178 Ind Cas 571.

——S. 80 — Names of all plaintiffs — Whether should be mentioned in notice.

Section 80 is imperative and imposes a statutory and unqualified obligation upon the Court to see that its terms are complied with. The object of S. 80 is to give the Secretary of State for India an opportunity of settling the claim, if so advised, without litigation, or to enable him to have an opportunity to investigate the alleged cause of complaint and to make amends, if he thought fit, before he was impleaded in the suit. This object would be completely frustrated, if it was maintained that a notice, which contained the names, descriptions and places of residence of some only of the plaintiffs in the suit, was sufficient. The word 'plaintiff' in the singular must be construed in the plural. Consequently, the names of all the plaintiffs must be mentioned in notice of suit AIR (Vol 22) 1935 Bom 229: 37 Bom LR 341: 156 Ind Cas 591.

——S. 80, O. VII, R. 11 (d) — Suit by two plaintiffs — Notice given by one alone.

claim which is going to be made against him, and to give him reasonable time in which to consider his reactions. In construing the section, one must remember that the suit cannot be brought for two months after the date of the notice.

The cause of action which is to be stated in the notice, is the bundle of facts which go to make up the right in respect of which the plaintiff proposes to sue, and it is obvious that before the suit can be brought it may be that that bundle of facts will be added to or subtracted from. The notice is not invalidated because it refers to a possible additional claim consequential upon the cause of action specified therein, and states that if such additional claim arises the plaintiff will sue also in respect of it.

In a notice under S. 80 to the Secretary of State, the plaintiff alleged that the proposed suit was for a declaration that the assessment of rent filed by the Collector was illegal and for refund of any amount that the Collector will levy from the plaintiff. In the suit filed by the plaintiff, the plaintiff claimed refund of Rs. 7,369-8-0 which was paid by him under protest subsequent to the date of the notice under S. 80 :

Held, that the notice complied strictly with the requirements of S. 80, Civil P. C. AIR (Vol 30) 1943 Bom 138: 45 Bom LR 197: ILR (1943) Bom 128: 206 Ind Cas 570.

——S. 80 — Failure to give surname, caste, or occupation, held did not make notice defective.

It is not stated in S. 80 what kind of description ought to be given of the plaintiffs who desired to file a suit. It would be sufficient if the plaintiffs are described in such a manner that they could be easily identified, and if the fathers' names of all the proposed plaintiffs are given and their places of residence are given, the failure to give their surname caste, or occupation does not make the notice defective. AIR (Vol 29) 1942 Bom 161: 44 Bom LR 295: ILR (1942) Bom 357: 201 Ind Cas 420.

—S. 80 — S. 82 is confined to decrees passed in suits which are referred to in previous sections and which can only be instituted after service of notice under S. 80. AIR (Vol 29) 1942 Cal 569: 46 CWN 927: ILR (1942) 2 Cal 528: 203 Ind Cas 429.

——S. 80 — "Cause of action", scope of — Previous notice.

The words "cause of action" under S. 80, Civil P. C., should not be construed in a narrow sense as the object of the section is merely to inform the defendant substantially of the ground of complaint. Where the plaintiff had informed the Collector that a certain amount was wrongly realized from him as punitive tax and also that he was not liable to pay the extra amount which had again subsequently been assessed on him, the notice is good for the maintainability of the suit for the recovery of the extra amount which the plaintiff had paid subsequent to the notice and the legality of which he had challenged in the notice. AIR (Vol 28) 1941 Oudh 355: 16 Luck 421: 1941 OWN 63: 1941 AWR 82: 192 Ind Cas 545.

——Ss. 79, 80 — Notice served on Collector for suit against Secretary of State before coming into force of Government of India (Adaptation of Indian Laws) Order but suit filed subsequent to coming into force of such Order — Suit is saved by Paras. 9 and 11 of the Order.

Where a notice under S. 80 has been served on the Collector for instituting a suit against the Secretary of State, before coming into force of the Govt. of India (Adaptation of Indian Laws) Order, 1937, but the suit is instituted after the order came into force, the suit is saved by Paras. 9 and 11 of the Preamble to the Govt. of India (Adaptation of Indian Laws) Order, because as a result of the notice to the Collector the plaintiffs acquired a right to sue and the Secretary of State incurred a liability to be sued. AIR (Vol 27) 1940 Lah 455: 42 PLR 596: 191 Ind Cas 182.

——S. 80 — Municipality.

Sanction to build given by Municipality to person — Municipality subsequently superseded and sanction suspended — Notice by person to Secretary of State through Deputy Commissioner under S. 80, Civil P. C., and S. 49, Punjab Municipal Act — Deputy Commissioner also Administrator of Municipality :

Held, that the notice was valid and proper. AIR (Vol 27) 1940 Lah 451: 42 PLR 550: 192 Ind Cas 729.

——S. 80 — Notice by pleader.

——Notice by a pleader on behalf of his client under S. 80, C. P. Code, is not a mere private letter, as it is one which S. 80 requires in the case of an intended suit against a public officer in respect of any act purporting to be done by that public officer in his official capacity. 30 Bom LR 934 : 113 Ind Cas 519 : AIR (Vol 15) 1928 Bom 338 (DB).

——S. 80 (S. 424 old Code) — Notice — Suit for injunction.

A suit even though for injunction cannot be maintained against the Secretary of State without giving notice to him according to the provisions of S. 44, C. P. C. (1903) 27 B 424 : 5 Bom LR 431 (445) (DB).

——S. 80 (S. 424 old Code) — Notice, by two out of three plaintiffs — Notice in respect of one fasli and suit to recover money illegally levied for two faslis.

Where three joint owners of land sued to recover water rates illegally levied by Government for faslis 1302 and 1303, and notice of suit was given by only two out of three plaintiffs, and the notice omitted to state the imposition of the rate for fasli 1303 as a cause of action, as at the date of its being given, it had not been levied.

Held, that the notice was valid, as the object of the notice required by S. 424, C. P. C., is to give the defendant an opportunity to settle the claim, if so advised, without litigation, and that object is attained by two out of three plaintiffs giving the notice. Also the notice was not invalid as the imposition of the rate for fasli 1303 was not stated. Such imposition was not a fresh 'cause of action requiring a further notice'. We should construe the words liberally, the object of the section being merely to inform the defendant substantially of the ground of complaint. (1901) 11 MLJ 117 : 24 M 279 (282, 283) (DB).

(a) Form.

——S. 80 — Notice under — Validity — Clerical mistake in giving the number of the Railway receipt which forms the cause of action.

Whenever a plaintiff mentions one cause of action in the notice and sues on a different cause of action, he is bound to fail. Where in a suit by a person who was entitled to obtain delivery of a consignment on the basis of a railway receipt endorsed in his favour by the consignor, the notice under S. 80 gave the wrong number of the Railway receipt.

Held, that the requirements of S. 80 in regard to stating the cause of action had not been complied with. 1950 ALJ 595: 1950 AWR 657.

——S. 80 — Contents of notice.

Notice under S. 80, C.P. Code, need not be practically a copy of the plaint. It should be such as to give substantial information to the Government as to the basis of the claim and the relief which the plaintiff seeks. It is not incumbent upon the plaintiff to give in detail all the forms in which he would seek relief. (1950) 85 CLJ 364.

——S. 80 — Contents of notice — Notice not giving parentage of plaintiff and not stating exact amount as claimed subsequently in plaint — If invalid.

A notice of suit under S. 80, C.P. Code, need not mention the parentage of the plaintiff or the exact amount of the claim in the suit as essential conditions of its validity; the fact that the parentage of the plaintiff is not given or that the amount mentioned in it does not tally with the amount subsequently claimed in the plaint would not invalidate the notice as it cannot be said that the requirements of S. 80 are not legally complied with. AIR (Vol 36) 1949 Pat 268: 29 PLT 477 (DB).

——S. 80 — Contents of notice — Description of plaintiff — Business address and not place of residence given.

The object of serving notice under S. 80, C. P. Code, is to give the Government sufficient warning of the case which is going to be instituted against it so that the Government may, if it so wishes, settle the claim without litigation or afford restitution without recourse to a Court of law. A liberal construction should be put upon the section. The notice is sufficient if it substantially fulfils its object in informing the Government or the public officer of the nature of the suit to be filed. It must not be construed as if it is a pleading and it need not set out all the details or facts of the case which the plaintiff intends to prove.

Under the section, all that is needed is that the plaintiff must be described in such a manner that he can be identified without any difficulty so that the Government may deal with him, if so advised. It will be pushing technicality to absurd limits if the Court has to dismiss a suit because the plaintiff who is a businessman has given his business address and not his place of residence in the notice. (1948) 52 CWN 808.

——S. 80 — Notice under on behalf of one plaintiff — Suit, if can be instituted by him and another.

S. 80 of the C.P. Code according to its plain meaning requires that there should be "identity of person who issues the notice with the person who brings the suit". Hence where a notice as required by the section is given on behalf of only one person a suit cannot be instituted by that person and another on the strength of such notice. To hold otherwise would be to admit an implication or exception for which there is no justification. 74 IA 223: ILR (1948) Mad 214: 1947 ALJ 576: 60 LW 630: 1947 MWN 679: 49 Bom LR 794: 52 CWN 27: AIR (Vol. 34) 1947 PC 197: (1947) 2 MLJ 208.

——S. 80 — Contents of notice — Description of defendant — Exact style — If to be stated.

It is not necessary that the notice under S. 80, C.P. Code, should mention the exact style under which the defendant is to be impleaded. It is sufficient if it is clear against whom the suit is to be filed, and in the case of a suit against the Central Government the notice has to be delivered to or left at the office of the Secretary to that Government. 1946 PWN 137: 230 Ind Cas 274: 13 BR 421: AIR (Vol 34) 1947 Pat 81.

——S. 80 — Object — Full details of claim, if must be stated in notice.

The object of giving a notice of two months to Government which is prescribed in S. 80 of the Civil Procedure Code, is to give Government sufficient warning of a case which is about to be brought against it, so that Government may, if it so wishes, compromise the case, or afford restitution if it considers that restitution is due, without recourse being had to a Court of Law in which Govt. might be mulcted in costs. It is necessary to import a little common sense into notices under S. 80. The Court should look at the wording of a notice and interpret it in the light of common sense. The plaintiff is not bound to state in his notice in full detail the relief he would claim. When the object of the notice is achieved and there has not been any violation to the spirit and the intention of S. 80, notice is valid. AIR (Vol 25) 1938 Nag 415: ILR (1939) Nag 206: 179 Ind Cas 711.

——S. 80 — Stating cause of action — Money illegally assessed by Government purporting to act under S. 15, Police Act (V of 1861) — Notice under S. 80, on Secretary of State, held complied with S. 80.

To state a cause of action, it may be sufficient to give a legal description by which a particular cause of action is known, such as, 'damage for breach of contract' and 'damage for negligence'.

In an action, the plaintiffs claimed from the Secretary of State a sum of Rs. 2,500 which they contended had been illegally assessed upon them, Government purporting to act under S. 15, Police Act, as amended by the Act of 1922. The case made out in the plaint was that the Deputy Magistrate, purporting to act for the District Magistrate under sub-s. (4) of S. 15, had made the apportionment and issued the notice, whereas the section demanded an apportionment and notice by the Magistrate of the District.

By the notice which the plaintiffs gave under S. 80, they stated that "the Deputy Magisrate purporting to act for the District Magistrate has served a notice upon my client dated July 27, 1933, making a demand of Rs. 2,500-12-0 as an apportioned amount payable by him for up-keep of the additional Police force there." A later paragraph was to the effect that "my client asserts that the assessment of costs against him is illegal and ultra vires, and secondly, the sum assessed is too high":

Held, that there had been sufficient compliance with S. 80 and that the plaintiffs had sufficiently stated their cause of action. AIR (Vol 25) 1938 Pat 556: 17 Pat 345: 5 BR 116: 178 Ind Cas 571.

——S. 80 — Names of all plaintiffs — Whether should be mentioned in notice.

Section 80 is imperative and imposes a statutory and unqualified obligation upon the Court to see that its terms are complied with. The object of S. 80 is to give the Secretary of State for India an opportunity of settling the claim, if so advised, without litigation, or to enable him to have an opportunity to investigate the alleged cause of complaint and to make amends, if he thought fit, before he was impleaded in the suit. This object would be completely frustrated, if it was maintained that a notice, which contained the names, descriptions and places of residence of some only of the plaintiffs in the suit, was sufficient. The word 'plaintiff' in the singular must be construed in the plural. Consequently, the names of all the plaintiffs must be mentioned in notice of suit AIR (Vol 22) 1935 Bom 229: 37 Bom LR 341: 156 Ind Cas 591.

——S. 80, O. VII, R. 11 (d) — Suit by two plaintiffs — Notice given by one alone.

The provisions of S. 80 are mandatory and must be strictly complied with, and where there are more plaintiffs than one claiming relief, all of them must give the notice provided for in that section.

Where a suit against he Secretary of State for India was brought by two plaintiffs and it appeared that one of them alone had given notice under S. 80:

Held, that the suit was not maintainable, and even the plaintiff who had given the notice could not proceed with the suit as his relief could not be severed from that of the other plaintiff. AIR (Vol. 22) 1935 Mad 389: (1935) MWN 293: 41 MLW 591: 156 Ind Cas 333.

——S. 80 — Notice by one of two plaintiffs.

Section 80 is express, explicit, mandatory and admits of no implications or exceptions and where there are two plaintiffs, notice by one is not sufficient notice within the meaning of S. 80; it is not sufficient compliance with its provisions and in such circumstances, the suit as a whole is bad. AIR (Vol 22) 1935 Sind 206: 29 SLR 404: 159 Ind Cas 33.

——S. 80 — Joint notice by plaintiffs in different suit — Total amount mentioned not exceeding the claims in suit — Notice, if valid.

Where a joint notice is given by all the plffs. of different suits mentioning the total sum payable by the Secretary of State, the notice is a proper one if the sum total demanded in the separate suit does not exceed the amount mentioned in the notice. No particular form of notice is prescribed. The mere splitting up of the notified claim into the different suits does not render the suits non-maintainable for want of notice if the notice served satisfies the conditions of S. 80. AIR (Vol 21) 1934 Pat 346: 150 Ind Cas 1131.

—— S. 80 — Construction.

In determining whether a notice fulfils the requirements of S. 80, the document should be looked at and interpreted in a fair and reasonable sense in the way in which the writer meant and the addressee understood it. A little commonsense must be imported into notices of this kind. AIR (Vol 20) 1933 Mad 105: 36 MLW 694: (1932) MWN 1240: 140 Ind Cas 458.

——S. 80 (4) — Requirements, substantial compliance.

Section 80 (4) does not specifically require that the notice should bear any particular heading or refer to any particular act. Even if it is assumed that this is intended, where all the express requirements of the law so far as the ingredients of the notices are concerned were complied with, there is a substantial compliance with the requirements of the law and that substantial compliance which consists of a compliance with all the express requirements of the law is a sufficient compliance. AIR (Vol 20) 1933 Sind 240: 148 Ind Cas 178.

——S. 80, O. 7, R. 11 — Notice given by one plaintiff — Suit by two plaintiffs — Maintainability — Procedure — Partial rejection or dismissal — Suit, whether can be proceeded with against other defendants.

The giving of notice about the suit claim by one plaintiff would not be a strict compliance with the mandatory provisions of S. 80, when the suit is actually filed by two plaintiffs, though one of them happens to be the person that gave the notice.

When notice under S. 80, has been given by only one of the plaintiffs, it is doubtful whether the plaint can be rejected against the other plaintiff alone. The entire suit should be dismissed for non-compliance with S. 80, Civil P.C.

Where a suit was instituted for a declaration that the Secretary of State had no right to enfranchise certain inams and for recovery of possession of the inam lands from the persons in possession, and the suit was not maintainable against the Secretary of State for non-compliance with the provisions of S. 80:

Held, that the suit could not be proceeded with even as against the other defendants. AIR (Vol 18) 1931 Mad 175: 32 MLW 810: 54 Mad 416: 59 MLJ 923: 129 Ind Cas 456.

——S. 80 — A notice which contains no description and no statement of the place of residence does not comply with S. 80. Such a notice cannot be held to be sufficient upon the strength of evidence or suggestions that the defendant would have had little or no difficulty in finding out these matters for himself whether by reference to documents in his possession or by independent research. AIR (Vol 18) 1931 Cal 61: 57 Cal 1127: 130 Ind Cas 903 (DB).

——S. 80 — Notice by plaintiff.

The notice of suit required by S. 80 must be given by the person who actually becomes the plaintiff and by no other. Notice by plaintiff's father in respect of the same cause of action is not therefore sufficient. 124 Ind Cas 814: 32 Bom LR 604: AIR (Vol 17) 1930 Bom 367 (DB).

——S. 80 — Sufficiency.

A substantial compliance with the provisions of S. 80 is sufficient. AIR (Vol 16) 1929 Sind 61.

——S. 80 — Object of section.

The object of S. 80 is merely to inform the defendant substantially of the ground of complaint and it must not be strictly or too narrowly construed and must not be construed as if it is pleading. It need not set out all the details and facts of the case which the plaintiff intends to prove and the notice must be considered sufficient, if it substantially fulfils its object in informing the parties concerned generally of the nature of the suit intended to be filed. 23 MLW 464 : 91 Ind Cas 368 : AIR (Vol 13) 1926 Mad 408.

——S. 80 (S. 424 old Code) — Notice of suit, sufficiency of, who can object — Notice, object of.

An objection as to the sufficiency of a notice under S. 424 cannot be taken by any defendant other than the Secretary of the State for whose benefit the notice is intended. The object of a notice under S. 424 is to give the Government and to the servants of the Government time and opportunity of making amends before the matter is brought into Court. When therefore, relief is claimed on the ground of fraud, but no fraud is charged against the Secretary of the State and no relief is claimed as against him on that ground, the suit is not bad because the notice has not been served on him within the time prescribed by S. 424 of the Civil Procedure Code. (1905) 1 CLJ 542 : 32 C 1130 (1134) (DB).

——S. 80 (S. 424 old Code) — Notice, contents of.

Notices required to be given under S. 424, C.P.C., should not be construed as if they were pleadings and need not set out all details and facts of the case which the plaintiff intends to prove. The notice should be considered sufficient if it substantially fulfils its object in informing the parties concerned generally of the nature of the suit intended to be filed. A notice not charging express malice but not inconsistent with such a suggestion is good when the cause of action is based on malice. (1902) 5 Bom LR 30(34, 35) : 27 B. 189.

(b) Plea of want of notice.

——S. 80 — Notice as required by — Right to — If can be waived — Plea of estoppel and implied

waiver — Onus — Suit filed in wrong Court — Defendant raising only the question of want of jurisdiction — Suit subsequently filed in the proper Court — Defendant raising plea of want of proper notice at that stage — If estopped from raising it.

There is no reason why the notice required to be given under S. 80 C. P. Code, should not be waived if the authority concerned thinks fit to waive it. It is for his protection that the notice is required; if in the particular case he does not require that protection and says so, he can lawfully waive his right. There is no inconsistency between the proposition that the provisions of the section are mandatory and must be enforced by the court and that they may be waived by the authority for whose benefit they are provided.

Where the plaintiffs contend that the defendants have waived their right to the notice, or alternatively, are estopped from saying that they did not, the burden lies on the plaintiffs to establish the facts upon which they rely for raising the implication or creating the estoppel.

The suit was originally instituted in the Court of the District Munsiff against the Government of the Province of Madras and a Municipal Council. Notice under S. 80 was given only on behalf of one of the plaintiffs. The defendants raised only the question of want of jurisdiction of that Court. They were successful and a suit was subsequently filed in the Court of the Subordinate Judge. The defendants at that stage raised the plea of want of proper notice. The plaintiffs contended that the defendants had waived their right to proper notice of the suit, or alternatively are estopped from contending that no proper notice was given.

Held, that the plaintiffs had not established any facts upon which the defendants must be deemed to have waived proper notice or are estopped from asserting want of proper notice. There is no reason why the defendants should not raise the plea of want of proper notice. The plaintiffs were in error throughout in instituting a suit which S. 80 prohibited. The defendants were under no duty to them to point out their error. They might have been negligent in their own interest in not raising the plea at an earlier stage. But negligence cannot give rise to an estoppel unless there is a duty to care. 74 IA 223 : ILR (1948) Mad 214 : 1947 ALJ 576 : 60 LW 630 : 1947 MWN 679 : 49 Bom LR 794 : 52 CWN 27 : AIR (Vol 34) 1947 PC 197: (1947) 2 MLJ 208.

——S. 80 — Plea of want of notice, if can be raised by third party.

A third party is not entitled to raise the plea of want of notice under S. 80. AIR (Vol 20) 1933 Pat 49 : 13 PLT 169 : 136 Ind Cas 445.

——S. 80 — A plea as to want of notice under S. 80 is not barred even though it is raised for the first time at the date of final hearing. AIR (Vol 12) 1925 All 241: 47 All 291: 22 ALJ 1116: 6 LRA Civ 106: 84 Ind Cas 739 (DB).

——S. 80 (S. 424 old Code) — Notice — Object — Waiver.

A notice under S. 424 of the Code is given for the benefit of the defendant and the intention of the Legislature is that the Secretary of state should have an opportunity of investigating the alleged cause of complaint and of making amends, if he thinks fit, before he is impleaded in the suit, and there is nothing to prevent the defendant from waiving the notice or from being estopped by his conduct from pleading the want of notice at the trial.

If the provisions of law are waived in the course of a trial, they cannot afterwards be set up by way of objection to any step taken or about to be taken upon the footing of the waiver; when a litigant has, without mistake induced by the opposite party, taken a particular position in the course of a litigation he must act consistently with it, especially if to allow him to do otherwise would be to prejudice his opponent. (1906) 5 CLJ 148(168, 169) (DB).

(c) Mode of service.

——S. 80 — Service of notice — Suit against Central Government — Notice to whom to be addressed and on whom to be served.

In the case of a suit against the Central Government, the notice under S. 80, C. P. Code, is to be served on the Secretary to that Government. A notice addressed to the Secretary and served on him is a valid notice. It is not necessary that it should be addressed to the Governor-General, Federation or Dominion of India. AIR (Vol 36) 1949 Pat 416: 28 Pat 292 (DB).

——S. 80 — Notice to Registrar, Co-operative Societies delivered to Secretary, Central Co-operative Bank.

The provisions of S. 80 are imperative and must be strictly proved.

Where, in a case, some paper which purported to be a notice was sent by post addressed to the Registrar of Co-op. Societies through the Secretary of the Central Co-operative Bank and the notice was delivered to the Secretary but there is no evidence of any kind to indicate that the Secretary conveyed the notice to the Registrar, and there is no admission that the Registrar ever received it, it cannot be presumed that the Secretary delivered it to the Registrar as it is not part of the Secretary's duty to carry letters of this kind to the Registrar and the provisions of S. 80, Civil P. C., cannot be held to have been complied with and service of notice cannot be held to be proved. AIR (Vol 26) 1939 Pat 32: 5 BR 13: 177 Ind Cas 709.

——S. 80 — Service on son of public officer.

The words of S. 80, as to how the notice is to be served are mandatory and not controlled by the provisions contained in O. 48, R. 2, which should be read as subject to the special procedure as to service contained in S. 80 itself. Service of notice on the son of the public officer is, therefore, not valid service of notice on that officer. AIR (Vol 18) 1931 Cal 503: 35 CWN 161: 58 Cal 850: 132 Ind Cas 634 (DB).

——S. 80 — Notice — If necessary in all suits against Secretary of State — 'District' — Meaning of.

Notice under S. 80 C. P. C. is necessary in every case instituted against the Secretary of State including one arising on a contract. The term 'District' in S. 80 means the district in which the suit is instituted and the notice must be served on the Collector or one of the Collectors of that District and not on the Collector of another District where the cause of action partly arises. AIR (Vol 2) 1915 Cal 62: 18 CWN 1340: 27 Ind Cas. 232 (DB).

(d) Necessity.

——S. 80 — Suit against two defendants — Suit not properly constituted against one of them for want of notice — Claim against the other — If can be decreed.

Where the claim against one of the two defendants against whom a suit has been instituted can be severed from the claim against the other, it is competent to the Court to decree the claim against the person against whom it has been properly constituted and dismiss the suit against the other because no notice was given to him under S. 80, C. P. Code. ILR (1949) Nag 875: AIR (Vol 39) 1952 Nag 213 (DB).

——S. 80 — **Applicability and scope — Suit for malicious prosecution against private individual and village munsif — No notice served under S. 80 — Suit, if bad as a whole — Procedure.**

In a suit for malicious prosecution against a private person and the village munsif, it being alleged that the former was a mere tool in the hands of the latter who was an enemy of the plaintiff, and that both the defendants were actuated by malice, if it is found that what the village munsif did was done in discharge of his duty as village munsif, the suit cannot be dismissed 'in toto' on the ground of want of notice under S. 80, C. P. Code. Since a suit against the 1st defendant without impleading the second defendant would be maintainable, the suit can proceed against the first defendant and no difficulty would arise by striking out the second defendant from the action. AIR (Vol 35) 1948 Pat 117: 13 Cut LT 44.

——**S. 80 — Suit under S. 14, Madras Survey and Boundaries Act — Provincial Government made party — Notice, if necessary.**

If, in fact, notice had to be given as required by S. 80 and if notice was not given in accordance with the provision of that section, the Court has no jurisdiction to entertain the suit as against the Provincial Government.

In the suits brought under S. 14, Madras Survey and Boundaries Act, to which the plaintiff chooses to make the Provincial Government a party, two months' notice as required by S. 80 is necessary in order that the suit should be maintained against the Provincial Government. AIR (Vol 30) 1943 Mad 284: 56 LW 50: 1943 MWN 56: 210 Ind Cas 418.

——Ss. 80, 2 (17) — **Person who was public officer at time of cause of action — Notice under S. 80.**

An 'adhikari' receiving money towards arrears of revenue comes within the definition of a 'public officer'.

There is nothing in the definition of a 'public officer' in S. 2 (17), Civil P. C., to justify the inference that it includes a person who was once in the employ of Govt. but is so no longer.

The object of S. 80, Civil P. C. is to give time for a public officer threatened with a suit in respect of his official acts to take the orders of his superiors on the question whether the suit shall or shall not be defended and to get permission to use the services of the law officers of the Crown, if necessary. Such considerations would not ordinarily arise in the case of a person who has ceased to be in the employ of the Govt. at the time of the suit. Hence notice under S. 80 is not necessary in a suit instituted against a person who was at the time of the cause of action a public officer and is sued in respect of his act as such public officer, but has ceased to be a public officer by the time the suit was instituted. AIR (Vol 29) 1942 Mad 288 (1): (1941) 2 MLJ 242: 54 MLW 172: 1941 MWN 734: 200 Ind Cas 813.

——**S. 80 — Loan by common manager appointed under S. 95, Bengal Tenancy Act — Suit on bond — Notice, if necessary.**

Where a loan is taken by a common manager appointed under S. 95, Ben. Ten. Act as such and the bond is given by him as common manager, the Act of taking the loan and executing the bond will be "act done by a public officer in his official capacity" within the meaning of S. 80. But a mere omission to pay either interest or principal cannot be an act purporting to be done by the manager in his official capacity. Consequently, a suit on such bond does not come under S. 80 and no notice is required for such a suit. AIR (Vol 28) 1941 Cal 643: 73 CLJ 356: 197 Ind Cas 869.

——S. 80 — In a suit for compulsory registration under Registration Act, a notice under S. 80, Civil P. C., is not necessary. AIR (V 27) 1940 All 108: 1939 AWR 878: (1939) ALJ 1151: 186 Ind Cas 505.

——**S. 80 — Alternative and lesser claim not mentioned in notice — Plaintiff's right to have suit tried on issues claimed in notice, if affected.**

An alternative and lesser claim which is not mentioned in the notice cannot derogate from the plaintiff's right to have the suit tried on the issue which is claimed in the notice. AIR (Vol 25) 1938 Nag 415: ILR (1939) Nag 206: 179 Ind Cas 711.

—S. 80 — Dispute between two brothers who were 'mutwallis of wakf'—Dist. Judge under Charitable and Religious Trusts Act appointing third person for collection of profits and management — One brother refusing to execute power of attorney in favour of agent — Court itself doing it — Court's action, held not valid — Agent, held liable to be sued for profits without issue of notice under S. 80, Civil P. C AIR (Vol 23) 1936 All 801: (1936) ALJ 1112: 1936 AWR 1012: 165 Ind Cas 681.

——**S. 80 — Suit filed before expiry of two months — Suit allowed to be withdrawn with permission to institute fresh suit — Fresh notice.**

Where a person, after giving notice under S. 80, has filed a suit against the Secretary of State for India before the expiry of two months and has been permitted to withdraw the suit with liberty to bring a fresh suit, he can institute the fresh suit without fresh notice to the Secretary of State under S. 80, as the withdrawal of the suit left the parties in the same position as if there had been no such suit instituted. AIR (Vol 22) 1935 Bom 21: 36 Bom LR 1106: 59 B 149: 154 Ind Cas 629.

—S. 80 — Where a suit was instituted for a declaration that the Secy. of State had no right to enfranchise certain 'inams' and for recovery of possession of the 'inam' lands from the persons in possession, and the suit was not maintainable against the Secretary of State for non-compliance with the provisions of S. 80:

Held, that the suit could not be proceeded with even as against the other defendants. AIR (Vol 18) 1931 Mad 175: 32 MLW 810: 54 Mad 416: 59 MLJ 923: 129 Ind Cas 456.

——S. 80 — Where defendant's interests devolve upon Government during suit, no notice as prescribed by S. 80 need be given. The matter is governed by O. 22, R. 10. 24 ALJ 726: 96 Ind Cas 351: AIR (Vol 13) 1926 All 585.

——**S. 80 — Injunction — Suit for — Notice.**

S. 424 of the Old Code makes notice necessary in all suits against the Secretary of State including suits for injunction. AIR (Vol 1) 1914 Mad 502: 37 Mad 113: 23 MLJ 181: (1912) MWN 786: 12 MLT 224: 16 Ind Cas 947 (DB).

——**S. 80 — Notice — Requisites of — Bom. Land Rev. Code (1879), S. 79 (A).**

Where a Collector issued notice under S. 79(A) on a person asking him to vacate a certain land within a certain time, which notice by implication declared that the sale and mortgage under which he held the land were void, a suit against the Collector must be instituted after a notice under S. 80, C. P. C. Mere letter by plff. to the Collector that he cannot be evicted except by a suit and that if he were evicted he would sue in his turn, is not a sufficient notice. (1912) 14 Bom LR 577: 16 Ind Cas 445 (DB).

——**S. 80 — Notice — When dispensed with.**

Where a person takes steps before Revenue authorities against an order of a Revenue autho-

rity, he cannot be exempted from the obligation of giving notice to the Govt. under S. 80 before bringing a declaratory suit against the Secretary of State unless it appears that it was impossible for him to serve the Government with a notice and comply with the provisions of S. 80. (1912) 14 Bom LR 353: 15 Ind Cas 539 (DB).

7. Official capacity.

——S. 80 — Applicability — "Public officer" — "Purporting to be done ..... in his official capacity" — Test to be applied.

S. 80, C. P. Code, protects a public officer in respect of any act purporting to be done by such public officer in his official capacity. Two conditions are clearly necessary for the section to apply: (1) he must be a public officer; (2) he must purport to act in his official capacity. The correct approach is not by an insistence on the name of the permanent post which the officer in question holds under the Government. The act must purport to be done in his official capacity. Generally whether a person performing under an invalid statute the duties of an office is an officer 'de facto' depends on whether there can be said to be an office of which the duties are to be performed. The test is different under the definition of public officer contained in S. 2 (17), Criminal P. Code. AIR (Vol 37) 1950 Pat 527 (DB).

——S. 80 — Applicability — Act done by public officer in bad faith — Notice, if necessary.

If an act done by a public officer is apparently an official act, its character as such will not be changed by allegation that it was done in bad faith or that it had not that character which it purports to have. A headman of a village appointed under Bihar Act VI of 1943 who files malicious petitions against a person accusing him of certain offences, purports to act as a public officer, and a notice under S. 80, C. P. Code, ought to be given to him before a suit is filed against him in respect thereof. AIR (Vol 37) 1950 Pat 32 (DB).

——S. 80 — "Act done in discharge of official duty" — Meaning of.

A public servant can only be said to act or to purport to act in the discharge of his official duty, if his act is such as to lie within the scope of his official duty. A kick administered by him is not an act which lies within the sphere of his official duty. ILR (1939) Nag 419 and 31 NLR 297, not foll. ILR (1949) Nag 232 : AIR (Vol 36) 1949 Nag 362.

——S. 80 — Applicability — Act of the defendant in the exercise of his authority as a District Magistrate.

Where the act of the defendant complained against though not in the discharge of his public duty purported to be in the exercise of his authority as District Magistrate, the provisions of S. 80, C. P. Code, would be attracted to the case. (1948) 52 CWN 494 : ILR (1948) 2 Cal 310 (DB).

——S. 80 — "Official capacity" — Acts of convening and holding Court-Martial.

It cannot be disputed that a military officer cannot refuse to convene a general Court-Martial and the members of the Court-Martial who are also military officers cannot refuse to function as a Court-Martial under the Army Act, when ordered so to do by a competent authority. The fact that they had no right in law to act is beside the point. The act of convening a Court-Martial and the act of holding a Court-Martial are therefore purported to be done in official capacity. A suit against the military officers in respect of such acts would consequently fall within the ambit of S. 80, C. P. Code, and could not be instituted without complying with its provisions. ILR (1947) Lah 22 : 225 Ind Cas 414 : AIR (Vol 33) 1946 Lah 247 (SB).

——S. 80 — "Purporting to be done, etc."

The expression "any act purporting to be done by such public officer in his official capacity" means "any act of a public officer which is intended by him to carry forth or convey to the minds of all persons who become aware of that act the impression that he did the act in his official capacity and not as an ordinary private individual and which has the effect of conveying such an impression by its seeming or appearance".

An act done by a public officer would 'purport' to be an act done in his official capacity, not only if it was properly and rightly done by him in such capacity and within his powers but also if it has such a reasonable resemblance (though a false or pretended resemblance) to a proper and right act that ordinary persons could reasonably conclude from the character of the acts and from the nature of his official powers & duties that it was done in his official capacity.

But if the act done is so outrageous and extraordinary that no reasonable man could detect in it any resemblance to any act which the powers of such an officer could allow him to do on the facts as represented and declared by such officer, his mere allegation that he did the act in his official capacity could not suffice. AIR (Vol 33) 1946 Pat 31 : 24 Pat 514.

——S. 80 — Suit for damages for malicious prosecution — Some of defendants Police Officers — Cause of action against them based on their acts done purported to be official acts.

Held, that the notice under S. 80 was necessary.

Held, further, that the bar of S. 80 applied to the suit as a whole and not only to the claim for relief against those Police Officers defendants only. AIR (Vol 28) 1941 Pat 461 : 22 PLT 392 : 7 BR 737 : 194 Ind Cas 263.

——S. 80 — V and J having equal shares in property — Insolvency of J — Release deed by Official Assignee in favour of V in respect of J's share, for consideration — J's share found already sold in execution of mortgage decree — V's suit against Official Assignee for return of consideration on ground that release was void, dismissed — Another suit by him against Official Assignee representing J's estate on ground of damages — Notice under S. 80 is not necessary. AIR (Vol 25) 1938 Mad 221 : (1938) MWN 10 : 47 LW 46 : (1938) 1 MLJ 92 : 177 Ind Cas 579.

——S. 80 — Mere setting up of claim to property on behalf of estate which Receiver represents, whether act by public servant in official capacity.

The mere setting up of a claim to property, for example, the debt due to insolvent, on behalf of the estate which a Receiver represents cannot be considered to be an act purporting to be done by a public officer in his official capacity so as to attract the application of S. 80. In a suit, therefore, against the Official Receiver who has set up such a claim, a notice under S. 80 is not necessary. AIR (Vol 25) 1938 Nag 449 : 1938 NLJ 264 : ILR (1939) Nag 200 : 178 Ind Cas 602.

——S. 80 — Mortgage by manager of estate appointed under S. 95, Bengal Tenancy Act — Death of manager — Suit on mortgage against subsequent manager — Claim against manager not made personally — Claim not based on breach of contract.

A mortgage upon an estate was executed by the common manager of the estate appointed under S. 95, Bengal Tenancy Act. On the death of the manager another manager was appointed and a third on his death. The mortgagee filed a suit on his mortgage. It was contended that the manager was entitled to two months' previous notice of the suit under S. 80, and that no such notice had been given:

Held, (1) that the mortgage was not executed by the defendant manager but by a former manager and that the plaintiff did not complain in any way of the execution of the mortgage.

(2) that non-payment by the defendant was not an "act purporting to be done by" the manager "in his official capacity". Mere omission to pay either interest or principal could not be said to be an act purporting to be done by the manager in his official capacity. The mortgage imposed no personal liability upon the manager, but merely provided that if payment was not made, the mortgagee would be entitled to realize his dues by sale through the Court & this was all that the plaintiff sought and although the manager for the time being had an option to pay in order to save the sale, failure to exercise an option was not in any sense, a breach of duty. The plaintiff made no claim against the defendant personally and he was there only as representing the estate of which sale was sought and consequently, the suit was not within the ambit of S. 80, and no notice of suit was required.

(3) Although a claim based on a breach of contract by a public officer may in many cases be sufficient to entitle him to notice under S. 80, the omission by the manager to pay off the mortgage was not such a breach. AIR (Vol 21) 1934 PC 96 : 11 OWN 463 : 38 CWN 517 : 66 MLJ 506 : (1934) MWN 381 : 39 MLW 504 : (1934) ALJ 406 : 59 CLJ 252 : 36 Bom LR 544 : 61 Cal 470 : 3 AWR 561 : 61 IA 171 : 148 Ind Cas 462.

[Reversing AIR (Vol 19) 1932 Cal 275 : 55 CLJ 8 : 138 Ind Cas 4.]

——S. 80 — Mala fide.

Notice under S. 80, Civil P. C., is necessary in the case of a suit against a public officer in respect of an act done by him in his official capacity, even though he might have acted mala fide. AIR (Vol 21) 1934 Pat 14 : 154 Ind Cas 219.

——S. 80 — Act done in official capacity — Neglect of duty imputed to public officer.

Where the plaintiffs complained of a failure on the part of the Official Receiver to use reasonable diligence,

Held, that the claim was within the scope of S. 80 and that notice was necessary. 57 Cal 1127 : AIR (Vol 18) 1931 Cal 61 (DB).

——S. 80 — Sind Encumbered Estates Act (XX of 1896) — Suit against zamindar — Zamindar placed under protection during pendency of suit — Manager impleaded as party — Notice under S. 80, necessity of — Suit for partition — Necessity of notice.

Where, during the pendency of a suit, the defendant is placed under the protection of the manager under the Sind Encumbered Estates Act, the manager can be impleaded as party without giving notice under S. 80.

A suit for partition against the manager, Encumbered Estates, in which the claim to partition is not disputed is not a suit in respect of any act done by him within the meaning of S. 80, and no notice is necessary under that section. AIR (Vol 18) 1931 Sind 158 : 25 SLR 200 : 133 Ind Cas 74.

——S. 80 — Suit for damages for malicious prosecution — Suit against Police Officer for something done in the exercise of his powers under Criminal P. C.:

Held, that the notice under S. 80 was necessary. AIR (Vol 17) 1930 All 742 : 1930 ALJ 1443 : 53 A 44 : 132 Ind Cas 17.

——S. 80 — Police Inspector.

Police Inspector proceeded to the scene of of offence on receipt of the report forwarded to him by the head muharrir. His subsequent report complaining of assault and obstruction by the plaintiff and his party was made by him in his capacity as police-officer. One of the offences with which the plaintiff was charged was that under S. 332, I. P. Code. Plaintiff was acquitted and suit was filed by him for damages for malicious prosecution.

Held, that the Police Inspector was acting in his official capacity and that it was imperative on the plaintiff to give notice to him of the suit for malicious prosecution. AIR (Vol 17) 1930 All 742 (DB).

——S. 80 — If the act was such as is ordinarily done by the officer in the course of his official duties, and he considered himself to be acting as a public officer and desired other persons to consider that he was so acting, the act clearly purports to be done in his official capacity within the ordinary meaning of the term 'purport.' The motives with which the act was done do not enter into the question at all. AIR (Vol 17) 1930 All 742 : 1930 ALJ 1943 : 53 All 44 : 132 Ind Cas 17.

——S. 80 — Meaning of.

If the act was one such as is ordinarily done by the officer in the course of his official duties, and he considered himself to be acting as a public officer and desired other persons to consider that he was so acting, the act clearly purports to be done in his official capacity within the ordinary meaning of the term "purport." The motives with which the act was done do not enter into the question at all: 1930 ALJ 1080: 124 Ind Cas 705 : AIR (Vol 17) 1930 All 704 (DB).

——S. 80 — Want of good faith — Necessity for notice.

Notice should be given if act was done in official capacity whether or not in good faith. 80 Ind Cas 72 : 22 ALJ 812 : 5 LRA Civ 599 : 46 All 884 : AIR (Vol 11) 1924 All 851 (DB).

——S. 80 — Mala fides — Necessity for notice.

In a suit for damages for wrongful arrest against a public officer, he is entitled to notice of suit under S. 80 even if in the discharge of his duty he has acted mala fide. 16 CWN 145, Diss. But no notice is necessary for the recovery of money extorted from the plaintiff by the officer as a consideration for his release. 75 Ind Cas 173 : 50 Cal 992 : 38 CLJ 104 : 28 CWN 10 : AIR (Vol 11) 1924 Cal 145 (DB).

——S. 80 — "Purporting to be done" — Public officer acting mala fide — Notice before suit — "Purporting."

A public officer is entitled to notice under S. 80 before suit, though he acts 'mala fide' in the discharge of his duties. The word "purporting" covers a profession by acts, by words or by appearance of what is true as well as of what is untrue. 7 C 499; 26 A 220 Diss.: 7 LW 586: 34 MLJ 494: 23 MLT 357: (1918) MWN 414: 41 M 792: 46 Ind Cas 86: AIR (Vol 5) 1918 Mad 62 (FB).

——S. 80 (S. 424 old Code) — The Collector of Kaira acting under S. 3, Bhagdari Act, 1862, declared that certain mortgages in favour of plaintiff were

illegal and inoperative. The plaintiff filed a suit to have it declared that the order was null and void. The notice required by S. 424 of the Civil Procedure Code of 1882 was not given:

Held that the notice was compulsory for the declaration was a distinct act of the Collector done in the exercise of a statutory power and therefore in his official capacity. The true test of an action for the purposes of S. 424 of the Civil Procedure Code of 1882 (which is the same as 80 of the new Code of 1908) is whether the wrong complained of as having been done by the public officer sued amounts first to a distinct act on his part and secondly whether that act purported to have been done by him in his official capacity. Both these elements must combine to render the giving of notice under S. 424 as a condition precedent to suit. (1910) 12 Bom LR 825 (829) (DB).

——S. 80, (S. 424 old) — Suit against public officer — Notice — Suit to recover articles seized by Police during a search.

The plaintiff sued to recover from the defendant three account books which he alleged that defendant, a Sub-Inspector of Police, had seized during a search, apparently in pursuance of the provisions of S. 165 of the Code of Criminal Procedure, of the plaintiff's house. Held, that the defendant, if he seized the books, which was denied, did so in his capacity as Police officer, and that the suit was not maintainable in the absence of the notice prescribed by S. 424 of the Code of Civil Procedure, 1907 AWN 170: 29 A 567 (568).

8. Official Receiver.

See also Civil P. C. (1908) .O. 40, R. 1.

(a) General.

(b) When notice not necessary.

General.

——S. 80 — Suit by insolvent's wife against Official Receiver for declaration that she has right to retain her husband's property till her dower debt is paid.

A suit by a wife of an insolvent against the Official Receiver for declaration that she is entitled to retain possession of the lands in suit so long as her claim for dower debt remains unsatisfied is liable to be dismissed for not giving notice to the Official Receiver under S. 80, Civil P. C., which is applicable to all forms of action and to all kinds of relief as against a public officer. AIR (Vol 27) 1940 Cal 578: 71 CLJ 594: 44 CWN 586: 191 Ind Cas 783.

——S. 80 — Suit by sons for partition and injunction restraining dealings with properties pending suit against father and Official Receiver — No notice to restrain official acts of Receiver. No 'interim' relief can be granted. AIR (Vol 23) 1936 Mad 225: (1936) MWN 89 (FB).

——S. 80 — An Official Receiver is a public officer and no suit can be instituted against him in respect of all acts done by him without a notice under S. 80, Civil P. C. AIR (Vol 19) 1932 All 575: (1932) ALJ 842: 54 All 379: 139 Ind Cas 701.

——S. 80 — Suit against Official Receiver to prevent sale of property.

A suit against an official Receiver for declaration of title to property which the Official Receiver threatens to sell cannot be instituted without issuing a notice under S. 80, Civil P. C. The fact that the property has not yet been sold does not dispense with the necessity of such notice. AIR (Vol 18) 1931 Lah 703: 31 PLR 865: 12 Lah 260: 132 Ind Cas 4.

——S. 80 — Notice of suit against.

A suit against a Receiver appointed by Court cannot be sustained without the requisite notice under S. 80, C. P. Code. There is no distinction between cases where the Receiver is already discharged and cases where the order of discharge has not been made. AIR (Vol 17) 1930 Cal 737: 34 CWN 671 (DB).

——S. 80 — Notice of suit against.

The Official Receiver, being a public Officer, has to be served with a notice under S. 80. AIR (Vol 17) 1930 Lah 708: 125 Ind Cas 625 (DB).

——S. 80 — Official Assignee — Notice of suit against.

An Official Assignee purporting to act legally in taking possession of certain goods believing them to be the insolvent's property which ultimately turns out not to be his property does not act strictly legally; all the same he is acting as an Official Assignee and in a suit against him for damages notice under S. 80 is necessary. AIR (Vol 17) 1930 Mad 458: 124 Ind Cas 144: 31 MLW 339 (DB).

——S. 80 — Notice of suit against.

As soon as a receiver is appointed under the Provincial Insolvency Act, he becomes a public officer within the meaning of S. 2, sub-S. 17 and he is protected by S. 80. An Official Receiver stands on a higher footing than a receiver appointed in a particular case and therefore no suit is maintainable against him without the requisite notice. A sanction granted by Insolvency Court 'ex parte' cannot be taken as an adequate compliance with the requirements of S. 80 of the Code of Civil Procedure. AIR (Vol 12) 1925 All 241: 47 All 291: 22 ALJ 1116: 6 LRA (Civ.) 106: 84 Ind Cas 739 (DB).

——S. 80 — Notice of suit against.

The utmost that can be said is that an Official Receiver is a public officer within S. 2, sub-clause 17 (d), C. P. Code, and notice under S. 80 is necessary before filing a suit against him. AIR (Vol 11) 1924 All 40: 77 Ind Cas 57: 21 ALJ 737: 4 LRA (Civ.) 483: 46 All 16 (DB).

(b) When notice not necessary.

——S. 80 — Suit against Official Receiver of estate for recovery of arrears of rent.

No notice under S. 80, Civil P. C., is necessary in a suit against an Official Receiver of an estate for recovery of arrears of rent as the omission of the Receiver to pay rent is not an act purporting to have been done by him in his official capacity. AIR (Vol 25) 1938 Cal 191 : 65 CLJ 561 : 174 Ind Cas 576.

——S. 80 — Act of Receiver not essential part of cause of action.

Under S. 80, if the act of the public officer is not an essential part of the cause of action disclosed by the plaint, though having regard to his position in relation to the subject-matter of the suit, he is a necessary party, no notice is necessary.

Where the plaintiff instituted a suit for a declaration that a gift deed executed by her was void on account of fraud and that the property to which the deed related was not liable for the satisfaction of the debts of the donee's father who had become insolvent and for whose debts the property had been attached by the Official Receiver, impleading the Official Receiver also as a party to the suit:

Held, that the suit was not liable to be dismissed for want of notice to the Receiver under S. 80. AIR (Vol 19) 1932 All 657 : (1932) ALJ 797 : 139 Ind Cas 484.

——S. 80 — Receiver in insolvency proceedings. — Mortgage suit against —Notice.

Though a receiver appointed under Provincial Insolvency Act (1920) may be a public officer within the meaning of S. 80, C. P. Code yet a suit to recover a mortgage property, being not a suit in respect of any act done by the receiver as such, is

maintainable without notice under S. 80. 31 Bom LR 1199 : 122 Ind Cas 857 : AIR (Vol 17) 1930 Bom 11(DB).

——S. 80 — Suit against receiver — Enforcement of charge — Notice.

When the Official Receiver is sued for establishing and realizing a charge over moveable and immoveable property of a debtor and when the plaintiff does not allege any act or omission on the part of the Receiver, no notice under S. 80 is necessary. AIR (V 14) 1927 All 132: 48 All 821: 24 ALJ 1067: 99 Ind Cas 138 (DB).

——S. 80 — Suit for declaration and injunction — Notice.

A suit for a declaration that the suit properties belonged to the plaintiff, and Defendants Nos. 3 and 4 and for perpetual injunction restraining the Official Receiver from selling them as the properties of the 2nd defendant is really to restrain the intended sale by the Official Receiver and it is not unsustainable for want of notice under S. 80. Case-law considered. AIR (Vol 14) 1927 Mad 166: 51 MLJ 671: 50 Mad 239: 24 MLW 730: 99 Ind Cas 284 (DB).

——S. 80 — Notice of suit against.

Where the plaintiff sues the Official Assignee for declaration and possession of insolvent's land, he can do so without having to give notice under section 80, the suit not being based on tort. 73 Ind Cas 240: 25 Bom LR 378: AIR (Vol 10) 1923 Bom 392 (DB).

9. Plaint.

Rejection.

——S. 80 — Delivery of notice —Mention in plaint — If necessary.

Where a plaint contains a statement that a notice under S. 80, C. P. Code, was sent by registered post, and the registration receipt and acknowledgment due are on the record as exhibits in the case, the statement must be read to mean not only that the notice was sent by registered post but it had been delivered. The actual use of the word "deliver" in the plaint is not necessary. AIR (Vol 36) 1949 Pat 93.

——S. 80 — Notice mentioning two reliefs while in plaint only one relief claimed — Valuation not same.

In the draft plaint attached to the notice under S. 80, Civil P. C., the valuation of the suit was given as Rs. 10,500 whereas in the plaint as presented in the Court, the valuation appeared as Rs. 60,000. In the notice there were two reliefs, one for damages and the other for a declaration, whereas in the plaint of the suit the only relief prayed for was that of declaration:

Held, that the defects were sheer technicalities which could not operate to defeat the suit because S. 80 did not require that the valuation of the suit should be stated and the defendant had been in no way prejudiced by the fact of one of the two reliefs being subsequently dropped. AIR (Vol 30) 1943 All 345: 1943 ALJ 463: 1943 RD 458: 1943 AWR 218: ILR (1943) All 860: 210 Ind Cas 128.

——S. 80 — Averment in plaint not traversed — Amendment of written statement after five years.

Where there is in the plaint a proper averment that notice was served within the meaning of S. 80, Civil P. C., and that averment is not traversed in the written statement, service of notice may be taken as admitted and leave thereafter should not be granted to deny what has once been admitted either expressly or by implication and an amendment of the written statement raising this plea after five years should not be granted where the notice under R. 80 has been given and the suit is brought two months thereafter, and where also the granting of the amendment would have the effect of disentitling the plaintiff from bringing another suit. AIR (Vol 30) 1943 Bom 160: 45 Bom LR 220: ILR (1943) Bom 186: 207 Ind Cas 474.

——S. 80 — O. VII, R. 11 (d) — Secretary of State one of defendants — No mention in plaint that notice under S. 80 is sent — Plaint, if should be dismissed.

Section 80, Civil P. C., applies to all suits in which the Secretary of State is a defendant and its provisions cannot be relaxed where he happens to be only one of the defendants. In the absence of a statement that a notice as required by the section has been issued to him, the plaint is defective and is liable to be rejected as a whole under O. VII, R. 11 (d). Non-compliance with S. 80 is a ground covered by O. VII, R. 11 (d). AIR (Vol 25) 1938 Pat 127: 18 PLT 921: 4 BR 435: 174 Ind Cas 358.

——Section 80 and O. VI, R. 6.

Section 80 says that the plaint shall contain a statement that the notice which is required has been served upon the requisite person. Such an averment is implied under O. VI, R. 6 also. AIR (Vol 25) 1938 Rang 437: 11 Rang 266: 178 Ind Cas 739.

——S. 80 — Averment in plaint that notice is "sent".

Where the plaint avers that a notice under S. 80 is "sent" to the officer concerned, the averment is not in compliance with S. 80. The words "delivered" or "left" should be used. AIR (Vol 24) 1937 Sind 291: 32 SLR 67: 172 Ind Cas 722.

—S. 80 — Amendment of plaint sought to give more detailed description of disputed lands and to state that notices under S. 80, Civil P. C., had been served in time:

Held, that in the circumstances of the case, amendment should be allowed, especially when no question of limitation could arise if notices had in fact been served as required by S. 80, Civil P. C. AIR (Vol 22) 1935 Pat 86: 1 BR 276: 154 Ind Cas 102.

——S. 80 — Notice referring to plaint annexed — Sufficiency of.

Where a person sues for declaration of title to certain land which he claims as part of a permanently settled estate from the defendant on ground of dispossession, and the defendant claims settlement under the Secretary of State, the plaintiff has a cause of action against the Secretary of State who can be impleaded in the suit. Where the notice says that cause of action is described in the copy of plaint annexed forming part of the notice, the notice is in substantial compliance with S. 80, Civil P. C., though defective in form. AIR (Vol 21) 1934 Cal 187: 38 CWN 409: 59 CLJ 295: 151 Ind Cas 1076.

——S. 80 — Notice under, whether should be copy of plaint — All forms of reliefs need not be given in detail — Relief not covered in notice added in plaint — Effect.

What S. 80, Civil P. C., requires is that the notice should contain the cause of action, etc., and the relief claimed. If the fact that a particular rule was 'ultra vires' is mentioned in the notice and omitted from the plaint, the notice does not become invalid on that ground. From the plain meaning of S. 80, the notice need not be practically a copy of the plaint. The notice should be such as to give substantial information to the Government concerning the basis of the claim and the relief which the plaintiffs seek. Where it is obvious from the notice taken as a whole that the plaintiffs wanted to have it declared by the Court that the assessment

of cess on their 'zemindari' on the income of the 'hat' was 'ultra vires' and that the relief which they wanted to seek was that they should be relieved of that assessment, it is not incumbent upon the plaintiffs to give in detail all the forms in which they would seek the relief.

The addition in the plaint of a relief which was not covered by the notice does not entail the dismissal of the entire suit. It is open to the plaintiffs to amend their plaint at any stage and proceed with the suit without a prayer for that relief. AIR (Vol 21) 1934 Pat 701: 16 PLT 129: 14 Pat 283: 1 BR 553: 155 Ind Cas 1099.

——S. 80 — Notice — Defects in — Plaint, variance in, effect of.

Where plots mentioned in the notice comprised all the plots mentioned in the plaint, the variance between the notice and the plaint does not justify dismissal of the suit. AIR (Vol 4) 1917 Cal 614: 20 CWN 636: 32 Ind Cas 752 (DB).

——S. 80 — Notice — Defective — Suit against Secretary of State.

A notice under S. 80 is not a proper notice if the case set up in the plaint is different from the case stated in the notice. A suit instituted upon such a notice cannnot be maintained. AIR (Vol 3) 1916 Cal 66: 32 Ind Cas 235 (DB).

——S. 80—Suit against several defendants including Government — Absence of notice to Government under S. 80 — Effect — Whole suit — If to be dismissed — Right to give up Government and proceed against other defendants only:

In the case of a suit instituted against several defendants including the Government, where relief is asked for against all the defendants including the Government, and the plaint in which categorically mentions a cause of action which involves a Government Officer, if notice of suit under S. 80, C. P. Code, has not been given to the Government, the plaint as a whole has to be rejected and not merely in part as against the Government only. It is not open to the plaintiff to get over the difficulty at a late stage by saying that he would give up the Government and confine his relief against the other defendants only. AIR (Vol 37) 1950 Orissa 257.

——S. 80 — Notice — Recital in plaint as to service of — Defect in — If goes to the root of the matter — Procedure to be followed by Courts in such a case.

Where in a plaint it is recited that the notice under S. 80, C. P. Code, was served by a registered postal notice with an acknowledgment due upon the secretary to the Governor-General in Council, the defect, if any, does not go to the root of the plaintiff's right to sue. As such the Court can only pass an order under O. 7, R. 11, C. P. Code, in such a case and cannot dismiss the suit. AIR (Vol 35) 1948 Pat 164.

——Section 80 itself provides that the plaint shall contain a statement as to the notice and when on the face of the plaint, there is no averment as to service of the notice, the Court should reject the plaint, instead of going on with the suit. It is not proper to dismiss the suit. AIR (Vol 18) 1931 Cal 503: 35 CWN 161: 58 Cal 850: 132 Ind Cas 634.

——S. 80 — Injunction — Suit against Secretary of State — Notice.

A suit for injunction against the Secretary of State must be rejected, if no notice has been given under the section. (1912) 6 SLR 123: 19 Ind Cas 361.

——S. 80 (S. 424 Old) — Notice by person under whom the plaintiff's claim, insufficiency of — Plaint, rejection of.

A notice given under the provisions of S. 424 by a party who dies before filing the suit, will not enure for the benefit of his representatives so as to entitle them to institute a suit without giving fresh notice, S. 424, is imperative and a plaint filed without giving the required notice is to be rejected under S. 424 (c) C. P. C., and cannot be cured by a subsequent notice. (1903) 1903 AWN 13: 25 A 187 (193) (DB).

10. Pro forma party.

——S. 80 — Where no relief is claimed against the Secretary of State, he being made merely a 'pro forma' defendant and no notice is sent under S. 80, his name may be expunged and the suit allowed to proceed against the others. But where such a course is not possible without material change in the nature of the suit, the cause of action and the relief sought, the proper course is to reject the plaint as barred by S. 80. AIR (Vol 25) 1938 Pat 127: 18 PLT 921: 4 BR 435: 174 Ind Cas 358.

——S. 80 — Secretary of State impleaded as pro forma defendant.

The words of S. 80 which are mandatory are perfectly unambiguous that no suit shall be instituted against the Secretary of State until two months after notice of the suit has been served upon him. There is no qualification to this requirement and no qualification can be read into the section. To accept the interpretation that where there is no cause of action against the Secretary of State who is impleaded merely as 'pro forma' defendant, or where no relief against him is claimed, no notice is required would entail reading into the section a qualification that in a suit against the Secretary of State, notice is not required where no relief is sought as against him. It is impossible to insert these words in the section or to read the section as if these words found a place in it. AIR (Vol 23) 1936 Pat 339: 15 Pat 353: 17 PLT 152: 2 BR 352: 161 Ind Cas 690.

11. Public Officer.

See also Civil P. C. S. 2 (17)

(a) General.

(b) Notice not necessary.

General.

——Ss. 80 and 2(17) (c) — "Public Officer" — Members of Court-Martial.

The members of a Court-Martial convened under the Army Act are public officers as defined by S. 2(17) (c), C. P. Code. AIR (Vol 33) 1946 Lah 247: ILR (1947) Lah 22: 225 Ind Cas 414 (SB).

——S. 80 — Commissioner of wakfs is a public officer within S. 80. AIR (Vol 31) 1944 Cal 206: 48 CWN 157: 214 Ind Cas 160.

——Ss. 80 and 2 (17) — Secretary of State.

The Secretary of state is a public officer. AIR (Vol 31) 1944 Lah 203: 216 Ind Cas 89.

——S. 80 — Panch or member of Village Panchayat under C. P. Village Panchayat Act, S. 66.

It is only for the purpose of the Penal Code that the 'Panch' or every member of the Village Court or Village Panchayat is regarded as a public servant under S. 66, C. P. Village Panchayat Act; he is not regarded as a public servant for all purposes. There is no provision in the Village Panchayat Act that a notice under S. 80 should be given before a suit is instituted against any member of the Village Panchayat. AIR (Vol 31) 1944 Nag 130: 1944 NLJ 79: ILR (1944) Nag 687: 216 Ind Cas 30.

——S. 80 — An Adhikari receiving money towards arrears of revenue comes within the definition of a "public officer". There is nothing in S. 2 (17) to justify the inference that it includes a person

who was once in the employ of Govt. but is so no longer. AIR (Vol 29) 1942 Mad 288 (1): (1941) 2 MLJ 242: 54 LW 172: 1941 MWN 734: 200 Ind Cas 813.

——S. 80 — A common manager appointed under S. 95, Ben. Ten. Act like a Receiver is a public officer within the meaning of S. 80. AIR (Vol 28) 1941 Cal 643: 73 CLJ 356: 197 Ind Cas 869.

——S. 80 — A manager appointed under Bengal Court of Wards Act (IX of 1879) is not a public officer within the meaning S. 2, cl. 17 (g), Civil P. C. But since he is in the "service" of Govt. under S. 2, cl. 17 (h), Civil P. C., he is entitled to the notice under S. 80, Civil P. C. AIR (Vol 26) 1939 Cal 720: ILR (1940) 1 Cal 73: 43 CWN 1212: 76 CLJ 11: 188 Ind Cas 637.

——S. 80 — Suit under Madras Survey and Boundaries Act (IV of 1897), concerning title between plaint charity and temple represented by ward — Ward represented by Collector — Suit, if one against Secretary of State — Case, if falls under S. 80.

Where, in a suit under the Madras Survey and Boundaries Act, a minor whose property is under the management of the Court of Wards is impleaded as a defendant and is represented by the estate Collector, and the suit relates to a claim of title between the plaint charity on the one hand and the temple represented by the minor on the other, the suit is not one against the Secretary of State or a public officer. Consequently, the claim does not bring the case under S. 80. AIR (Vol 25) 1938 Mad 612: 47 LW 673: (1938) MWN 435: (1938) 1 MLJ 763: 187 Ind Cas 880.

——S. 80 — Returning officer.

A person appointed as returning officer under U. P. Municipalities Act is not a public officer and a notice under S. 80 is not necessary. AIR (Vol 22) 1935 All 106: 4 AWR 1392: (1935) ALJ 139: 152 Ind Cas 817.

——S. 80 — In the case of a suit against a public Officer, it is only where the plaintiff complains of some act purporting to have been done by him in his official capacity that notice is enjoined under S. 80. AIR (Vol 21) 1934 PC 96: 11 OWN 463: 38 CWN 517: 66 MLJ 506: (1934) MWN 381: 39 MLW 504: (1934) ALJ 406: 59 CLJ 252: 36 Bom LR 544: 61 C 470: 3 AWR 561: 61 IA 171: 148 Ind Cas 482.

[Reversing AIR (Vol 19) 1932 Cal 275: 55 CLJ 8: 138 Ind Cas 4].

——S. 80 — A common manager appointed under S. 95, Ben. Ten. Act, being a public officer, for a suit for enforcement of a simple mortgage bond executed by the former common manager against the present common manager, a notice under S. 80, Civil P. C., is necessary. AIR (Vol 19) 1932 Cal 275: 55 CLJ 8: 59 Cal 961: 138 Ind Cas 4.

——S. 80 — "Public Officer" — Receiver appointed by Court.

A receiver appointed under O. 40 of the Code is a public officer and he is entitled to notice as prescribed by S. 80, C. P. Code. AIR (Vol 18) 1931 Cal 503: 35 CWN 161 (DB).

——S. 80 — Public Officer — Official Receiver appointed receiver in particular case.

The Official Receiver in any particular case is a public officer within the meaning of S. 19, C. P. Code, and is entitled to notice under S. 80. AIR (Vol 18) 1931 Cal 61: 57 Cal 1127 (DB).

——S. 80 — Municipality.

A municipal Council is not a 'public officer' to whom notice under S. 80 is necessary. AIR (Vol 18) 1931 Mad 808: 61 MLJ 642: (1931) MWN 1097: 34 MLW 719: 55 M 207: 135 Ind Cas 311.

——S. 80 — Sanitation Panchayat — Applicability to.

Village Sanitation Panchayat is not a Public Officer within the meaning of S. 80 & hence in the absence of notice, a suit is not untenable. 34 Bom 583, Diss. AIR (Vol 16) 1929 Nag 70: 114 Ind Cas 288.

——S. 80 — Government school master — Services lent — Notice.

A schoolmaster who was originally in Government service, but whose services are only lent to the municipality and part of whose allowance is payable by Government and who has a lien on the Government post he held, must be deemed to be a public officer and as such entitled to a notice of suit under the section. AIR (Vol. 15) 1928 Nag 33: 104 Ind Cas 762.

——S. 80 — Village Headman — Applicability to.

A Village Headman is a public officer within the meaning of S. 2 and no action for damages can lie against him for an act done in his official capacity unless the requirements of S. 80 are fulfilled. A report to the S. D. O. or D. C. is not notice. AIR (Vol 10) 1923 Rang 250: 79 Ind Cas 818: 2 Bur LJ 29.

——S. 80 — Public officer — B. T. Act, S. 95 — Common manager.

A suit for accounts against a common manager appointed under S. 95 of the B. T. Act cannot be maintained without service of the notice under S. 80 of the C. P. C., and without leave obtained from the Court appointing him. Acts of officers 'de facto' performed in the scope of their assumed official authority in the interests of the public or third persons and not for their own benefit are valid and binding as if they were acts of officers 'de jure' and cannot be collaterally impeached. AIR (Vol 7) 1920 Cal 575: 24 CWN 138: 30 CLJ 279: 53 Ind Cas 747 (DB).

——S. 80 — Public officer — Bench clerk — Loss of document.

A suit against a Bench clerk for damages resulting from the loss of a record in Court through his negligence cannot be brought without giving notice prescribed by S. 80, C. P. C. AIR (Vol 5) 1918 Upp Bur 28: (1917) 3 UBR 1: 11 Bur LT 95: 40 Ind Cas 677.

——S. 80 — Public officer — Damages — Police officer.

A notice under S. 80 is necessary, before suing a police officer for damages when he acts under the powers conferred by Cr. P. C., & S. 42 of the Police Act, will not apply. AIR (Vol 2) 1915 All 358: 13 ALJ 788: 30 Ind Cas 173.

——S. 80 — Injunction — Suit against a public officer — Bom. Land Rev. Code Ss. 79A and 202 — Talukadari settlement officer.

For a suit for an injunction to restrain a public officer from performing an act purported to be done by him in his public capacity a notice under S. 80 is necessary. A Talukdari settlement officer is public servant. AIR (Vol 1) 1914 Bom 125: 16 Bom LR 766: 26 Ind Cas 749 (DB).

——S. 80 (S. 424 old) — Public officer — Official Assignee — Notice to — Necessity of.

The Official Assignee of the Insolvent Court is a public officer as defined in S. 2 of the Civil Procedure Code; consequently a suit regarding acts done by him in the capacity of Official Assignee cannot be filed against him without giving him the notice prescribed by S. 424 of the Code. (1902) 4 Bom LR 929: 26 Bom 809 (811).

——S. 80 (S. 424 old) — "Public Officer" — Administrator-General — Cause of action — Statement of service of notice in plaint — Administrator-Generals Act (2 of 1874 and 5 of 1902).

All estates in the hands of the Administrator-General are held by him as Administrator-General, i.e., as a public officer, and in any suit instituted

against him in respect of any act purporting to be done by him in his official capacity he is entitled to notice under S. 424, C. P. C.

The phrase "cause of action", in S. 424, C. P. C., should not be too narrowly construed, the object of the section being merely to inform the defendants of the grounds of complaint. The portion of S. 424 C. P. C., relating to the plaint containing a statement that such 'notice has been left or delivered in the manner prescribed by the section is separable from the earlier portion which deals with the delivery of the notice two months before suit. It is only when notice is not given that the suit is liable to be dismissed. The suit, however, may be proceeded with if notice has been given in the manner prescribed, and subsequently the plaint is amended in order to state that fact. (1904) 8 CWN 913.

(b) Notice not necessary.

——S. 80 — Suit against public officer in respect of act done by him as person appointed by Court to do duties of mutwalli.

Notice under S. 80 is not necessary where a public officer is sued in respect of an act done by him, not in his official capacity, but in his capacity as the person appointed by the District Judge to perform the duties of a 'mutwalli' under a wakf. AIR (Vol 28) 1941 Oudh 529: 1941 OWN 906: 1941 AWR 274: 196 Ind Cas 787.

——S. 80 — Assessment by Municipality — Subsequent supersession under S. 65, Bengal Municipal Act by Public Officer — Suit for declaration that tax was illegal — Notice under S. 30, if required.

It is only where the plaintiff complains of some act purporting to have been done by a Public Officer in his official capacity that notice is enjoined. The fact that the assessment complained of was made before the supersession of the Municipality under S. 65, Bengal Municipal Act, by a Public Officer appointed to perform the duties of the Commissioner is sufficient for the purpose of holding that S. 80 could not possibly apply to a suit to declare the assessment illegal and 'ultra vires'. Therefore, in such a case no notice under S. 80, Civil P. C., is required. AIR (Vol 22) 1935 Cal 726: 62 CLJ 429: 159 Ind Cas 542.

——S. 80 — Suit against police officer.

In the case of a suit for damages for assault and battery by police officer while investigating cognizable offence the police officer is not entitled to notice either under S. 80(4) or C. P. Code, S. 80. AIR (Vol 15) 1928 Bom 352: 30 Bom LR 1018: 52 Bom 832: 30 Cr LJ 278: 12 AI Cr R 154: 114 Ind Cas 246 (FB).

——S. 80 — Injunction — Notice.

A suit for injunction to restrain a threatened and imminent injury is maintainable against a public officer even in the absence of notice under S. 80 of the C. P. C. AIR (Vol 7) 1920 Bom 419: 21 Bom LR 980: 53 Ind Cas 627.

——S. 80 — Injunction.

No notice is required for a suit for injunction against a public officer and not Secretary of State, for restraining an irreparable injury. (1913) 37 Bom 243: 14 Bom LR 1148: 17 Ind Cas 876 (DB).

——S. 80 — Public Officer — Act done in bad faith — Notice not necessary.

A Public Officer who is sued in respect of an act done in bad faith is not entitled to notice under S. 80 of the C. P. C. (1912) 16 CWN 145: 13 Cr LJ 65: 13 Ind Cas 721.

——S. 80 and O. 27 — Tort — Public Servant — Damages — Notice.

Where a public officer insults, uses defamatory language or assaults his subordinate, the act is not one which is done in official capacity and hence no notice of a suit for damages as required by S. 80, C. P. C. is necessary in this case. (1910) 7 ALJ 301: 5 Ind Cas 467 (DB).

——S. 80 — Public officer — Trespass.

In a suit by an execution against certain trespassers not in their official capacity but in their individual capacity, to restrain them from committing, an act threatened to be done is not covered by S. 424 old (C. P. C. 1882) and no notice is necessary. (1909) 36 Cal 28: 12 CWN 1065: 1 Ind Cas 514.

——S. 80 (S. 424 old) — Notice when necessary.

When public officers are sued not in their admitted official capacity but as individual trespassers, no notice under S. 424 of the Code of Civil Procedure is necessary. Even in a case where such a notice would be otherwise necessary, so far as the suit sought relief by an injunction to restrain the commission of an act, no notice under that section would be necessary. (1908) 12 CWN 1065 (1071, 1072).

——S. 80 (S. 424 old) — Notice not necessary — Police Act, S. 42 — Suit against police officer for damages for wrongful confinement — Action of police officer malicious.

One P. L. brought a suit against a Sub-Inspector of Police claiming damages for wrongful confinement among other matters. It was found that the Sub-Inspector did not purport to act in good faith in pursuance of the law, but that he took advantage of his position as a police officer to commit illegal and tortuous acts maliciously and without cause.

Held, that under these circumstances the defendant was not entitled to notice of suit either under S. 424, C. P. C., or under S. 42 of the Police Act 1861, and the plaintiff's suit was not liable to dismissal for lack of such notice. (1903) 1903 AWN 241: 26 A 220 (222).

——Ss. 80, 115 (Ss. 424, 622 old Code) — Notice of amended plaint — Notice to a subordinate public officer also impleaded along with Government.

There is nothing in the law to show that in case of any amendment necessitated by the alleged discovery of facts previously unknown to the plaintiffs, the Secretary of State or other public officer should have a further notice of two months, especially where the relief asked for is not altered by the amendment. No separate notice is necessary to be served to a subordinate public officer who is impleaded along with Government if he is not sued for any act done by him independently of Government and no separate relief is asked for against him. (1902) 7 CWN 249: 30 C 36 (72) (DB).

12. Railway.

——Ss. 80 and 86 — Notice and sanction — If necessary for suit against Jodhpur Railway — Fresh notice after merger — Necessity.

A plaintiff suing the Jodhpur Railway has to give notice under S. 80, Civil P. Code and also obtain sanction under S. 86, C. P .Code. After the merger a fresh notice would have to be given. AIR (Vol 38) 1951 Sau 16 (DB).

——S. 80 — Suit against Central Government relating to railway — Notice sent to Secretary of Railway Board instead of General Manager — Receipt by latter — Burden of proof — Evidence Act, Ss. 106 and 114.

Section 80, C. P. Code, clearly lays down that in the case of a suit against the Central Government where it relates to a railway, the notice under the section must be sent to the General Manager of the Railway. A notice sent to the Secretary of the Railway Board instead of the General Manager is not a valid notice, and the General Manager cannot be called upon to state when he received the notice.

Section 114, Evidence Act, can have no application because it cannot possibly be presumed that a wrong addressee would immediately forward the communication to the person who by statute is bound to receive it. The addressee might or might not act and there can be no presumption under S. 114. Section 106 of the Evidence Act also does not shift the onus on the General Manager. If, therefore, there is no evidence before the Court that the General Manager received the notice within time, the suit is liable to be dismissed. AIR (Vol 37) 1950 Cal 426.

——S. 80 — Notice acknowledged by "Secretary, Railway Board" — Suit against Central Government — Section, if complied with.

The receipt of the notice was acknowledged on behalf of the "Secretary, Railway Board". It did not appear he was a "Secretary to the Central Government" within the meaning of S. 80 (a), C. P. Code. In a suit against the Central Government

Held, that the provisions of S. 80, C. P. Code, had not been strictly followed. AIR (Vol 36) 1949 Lah 165.

——S. 80 — Contents of notice — Error in notice with reference to date of railway receipt — Cause of action based on loss of goods despatched through railway.

Where the cause of action is based upon loss by way of shortage in weight of goods despatched through the railway administration under a railway receipt a 'bona fide' error in the notice under S. 80, C. P. Code, with reference to the date of the railway receipt, the number of the railway receipt being quite accurate, is not fatal to the suit. AIR (Vol 36) 1949 Pat 93.

——S. 80 — Suit against B. N. Rly. for damages for loss of goods in transit — Failure to give notice under S. 80, C. P. Code, on the Governor-General in Council — Effect — Notice under S. 77, Railways Act — If dispenses with notice under S. 80, C. P. Code.

Where a suit is filed against the B. N. Rly. for damages for loss of goods in the transit, the omission to serve upon the Governor-General of India in Council notice under S. 80 of the C. P. Code, is fatal to the suit. The rule of procedure laid down in S. 80 is mandatory and explicit and admits of no implications.

The service of a notice under S. 77 of the Railways Act will not dispense with the necessity for service of notice under S. 80 of the C. P. Code. The object of a notice under S. 77 of the Railways Act is to prevent stale and presumably dishonest claims for compensation being put forward when after lapse of time, it would be difficult, if not impossible, for the Railway administration to trace the transaction and adduce proper evidence in connection therewith. S. 80, C. P. Code, on the other hand aims at giving an opportunity to the public officer concerned an opportunity to reconsider the matter and to settle the claim, if necessary without recourse to litigation. AIR (Vol 34) 1947 Cal 26: ILR (1946) 2 Cal 316: 225 Ind Cas 193.

——S. 80 and O. 7, R. 2 (d) — Suit against a Railway Company for damages — Taking over of Railways by Government of India — Amendment of plaint by addition of Governor-General in Council as a party to suit — Notice to Governor-General in Council under S. 80, C. P. Code, essential for maintainability of suit.

On the 6th June, 1944, the respondent sued the South Indian Railway Company, Limited, for damages for short delivery of goods consigned to him. But on the 1st of April, 1944, the Government of India had taken over the South Indian Railway, and relief, if at all, could only be granted against the Governor-General of India in Council. The respondent applied for leave to amend his plaint by adding the Governor-General of India in Council as the second defendant. His application was granted but he gave no notice under S. 80, C. P. Code, to the Governor-General in Council.

Held, that (i) the suit was not maintainable without notice being served upon the Governor-General in Council under S. 80 of C. P. Code. (ii) O. 7, R. 2 (d) of the C. P. Code applies to a case where the suit appears from the statements in the plaint to be barred by law and cannot apply to a case like this. AIR (Vol 34) 1947 Mad 64: 59 LW 391: 1946 MWN 462: (1945) 2 MLJ 65: ILR (1947) Mad 258: 229 Ind Cas 512 (DB).

——S. 80 — Suit against Secretary of State as representing G. I. P. Railway — Notice to Collector.

What sub-s. (1) of S. 179, Government of India Act, is concerned with is the person who is to be named as a defendant in suits of the description mentioned there and not with any question of notice which has to be served before the suit can be maintained at all. The matter of notice is dealt with in S. 80, Civil P. C., and it is undeniable that the provisions of that section of the Code have to be strictly complied with. (A notice to the Collector, Agra, in a suit against the Secretary of State for India as representing G. I. P. Railway was held wholly defective.) AIR (Vol 30) 1943 All 158: (1943) ALJ 1: ILR (1943) All 223: 1943 AWR HC 8: 206 Ind Cas 372.

——S. 80 — Suit against Railway administration which is a company.

Where the Railway administration (The Bengal Nagpur Railway) against which a suit is filed is a company and not owned by the Secretary of State for India, a notice under S. 80, Civil P. C., will not help the plaintiff to extend the time to save limitation if it is otherwise barred. AIR (Vol 23) 1936 Nag 21: 31 NLR 79 Sup.: 161 Ind Cas 867.

——S. 80 — Whether dispenses with notice under S. 77, Railways Act.

For purposes of S. 77, Railways Act, a notice to a Collector under S. 80, Civil P. C., cannot be considered to be a notice to the Government in the case of State Railways. Two separate notices are necessary before the suit can be maintained. AIR (Vol 22) 1935 All 900: (1935) ALJ 908: 1935 AWR 1010: 156 Ind Cas 541.

——S. 80 — Rule, if mandatory — Railways Act (IX of 1890), S. 77, notice under — Whether dispenses with necessity of notice under S. 80, Civil Procedure Code.

The statutory rule of procedure in S. 80 is imperative and the delivery or service of a notice under S. 77, Railways Act, does not obviate the necessity of the rule contained in S. 80. AIR (Vol 21) 1933 All 53: (1932) ALJ 1033: 143 Ind Cas 298.

——S. 80 — Suit against Agent of a Railway as such — Suit against Agent of State Railway.

In all cases where the suit is against the Secretary of State or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, it cannot be instituted without two months' notice to the Secretary of State or the public officer sued. The provision of S. 80 is express, explicit and mandatory and it admits of no implications or exceptions.

The Agent, N.W. Railway, Lahore, cannot be sued as such, as it amounts to a suit against the Office of the Agent and not against the person

or official himself. AIR (Vol 20) 1933 Lah 203: 14 L 330: 34 PLR 975: 148 Ind Cas 49.

[AIR (Vol 14) 1927 Mad 166 treated as overruled].

——S. 80 — Suit against Railway — Notice issued under S. 80, Civil Procedure Code — Omission to state fact of notice in plaint — Maintainability of suit.

If the notice given by the plaintiff in a suit against a Railway Administration substantially complies with the requirements of Ss. 77 and 140 of the Railways Act, the suit cannot be dismissed merely because the notice purported to be one under S. 80, Civil P.C., and the fact that a notice under S. 77, Railways Act, had been given was not mentioned in the plaint. AIR (Vol 19) 1932 All 381: (1932) ALJ 405: 137 Ind Cas 205.

——S. 80 — A suit cannot be instituted against a Railway Administration which is owned by the Govt. without giving a notice under S. 80. A notice served on the Manager of the Railway administration under the Railways Act is insufficient. AIR (Vol 18) 1931 Pat 393: 12 PLT 681: 135 Ind Cas 98.

——S. 80 —Ss. 80, 79 — Description of deft. as 'Railway Administration through Agent', whether sufficient — Notice to Secretary of State — Railways Act (IX of 1890), S. 3 (6).

Where, in a suit against the East Indian Railway Company after it had been taken over by the Govt., the defendant was described as the Railway Administration through their Agent resident at Calcutta and notice was given to the Agent alone:

Held, (1) that the suit was a proper suit against the Secretary of State and was instituted against a wrong person:

(2) that even assuming that the suit was virtually one against the Secretary of State, notice to the Agent or Manager of the Railway Administration was not a sufficient notice and did not relieve the plaintiffs from the statutory obligation to serve a notice upon the Secretary of State for India in Council and the suit was bad for want of notice under S. 80, Civil P.C. AIR (Vol 18) 1931 Pat 326: 10 Pat 466: 13 PLT 86: 133 Ind Cas 451.

——S. 80 — Notice under Railways Act — State Railway — Sufficiency.

"S. 80 is express, explicit and mandatory, and it admits of no implications or exceptions." It is not abrogated by S. 77 of the Railways Act, where the Secretary of State represents a State-owned railway. 123 Ind Cas 902: AIR (Vol 18) 1931 Nag 96.

——S. 80 — Sufficiency.

A notice under S. 77 would not dispense with the necessity of a notice under Section 80, C. P. Code. 124 Ind Cas 711: 1930 A.L.J. 1125: AIR (Vol 17) 1930 All 476 (DB).

——S. 80 — Sufficiency — Vice Versa.

Notice served under S. 80, C.P. Code, on the Collector within six months, may be considered to be a good notice under S. 77 to the railway administration by virtue of the extended definition of railway administration including the Government under S. 3, Cl (6). The notice, however, to be served under S. 140, Railways Act, on the manager of a railway admiinstered by the Government is a notice required or authorised by the Railways Act to be served on a railway administration and would not be a substitute for a notice necessary to be given before institution of a suit against the Secretary of State under S. 80, C.P. Code, (Case-law discussed).

Obiter.—It is a matter for the legislature to consider whether, in the case of a suit against a railway belonging to the State, it is necessary to give notice under S. 80, C.P. Code when notice of claim is given under Ss. 77 and 140, Railways Act. 52 Bom 548: 113 Ind Cas 511: 30 Bom LR 970: AIR (Vol 15) 1928 Bom 421 (DB).

——S. 80 — State Railway, combined notice to.

In the case of a State Railway it is open to a party to give a combined notice which would satisfy all the requirements of S. 77, Railways Act, and S. 80, C.P. Code. But if a party does not do that, he must give a notice under S. 77 within six months in order to enable him to claim compensation for loss of goods and he must also give a notice under S. 80, C.P. Code, in order to enable him to file a suit against the Secretary of State. 109 Ind Cas 406: 1928 MWN 218: AIR (Vol 15) 1928 Mad 599.

——S. 80 — Sufficiency.

The plaintiff, who consigned at Bombay some goods, brought a suit against the G.I.P. Rly. Co., and the Secretary of State for loss of goods in transit. He gave a notice, as required under S. 77, Railways Act, within six months of the loss, that is, on 20th February, 1925. The Railway Administration was taken over by the Secretary of State for India on 1st July, 1925, and the suit was filed on 18th August, 1925. It was contended that the suit was bad by reason of the want of notice under S. 80, C.P. Code.

Held: that the contention could not be upheld as the Secretary of State having taken over the administration of the railway company stood in the shoes of the Railway Administration which he took over and, therefore, the suit which was good against the Railway Administraion was also good against him. 109 Ind Cas 406: 1928 MWN 218: AIR (Vol 15) 1928 Mad 599.

13. Receiver.

(a) General.

(b) When notice not necessary.

General

——S. 80 (2) and O. 40, R. 1 — Receiver under O. 40, R. 1 — Position of, whether same as Official Trustee or Administrator.

A receiver appointed by the Court under O. XL, R. 1, has a legal position different from that of the Official Trustee or the Administrator-General. Unlike the Receiver, these officers have an estate in the properties which they hold by virtue of their office and consequently, a suit in respect of the properties they hold would be a suit against them in the legal sense. The same reasoning does not apply to a Receiver. AIR (Vol 27) 1940 Cal 1: 44 CWN 74: 186 Ind Cas 584.

——Ss. 80, 2 (17) — Receiver is public officer.

It is the duty of a Receiver to take charge of the properties in suit on behalf of the Court. He exercises his functions under the supervision and control of the Court and is remunerated under its orders. He can thus be deemed to be an officer of a Court of justice whose duty it is to take charge of or dispose of any property within the meaning of S. 2 (17) (d). Even if he is not an "officer," he is clearly a person specially authorized by a Court of Justice to perform such duties and consequently, a public officer. AIR (Vol 27) 1940 Cal 1: 44 CWN 74: 186 Ind Cas 584.

——S. 80 — A Receiver appointed by the Court to receive the rents and profits of an estate for the purpose of satisfying creditors who have taken out execution against the estate is a public officer within the meaning of S. 80. AIR (Vol 20) 1933 Mad 105 : 36 MLW 694: (1932) MWN 1240 : 140 Ind Cas 458.

——S. 80, O. 41, R. 1 — Receiver, whether public officer.

A Receiver appointed under O. 40, R. 1 and on whom the powers referred to in cl. (d) of that rule have been conferred, is a public officer with-

in the meaning of S. 2 (17), and no suit can be instituted against him without a notice in writing complying with the provisions of S. 80. AIR (Vol 18) 1931 Cal 503: 58 Cal 850: 35 CWN 161: 132 Ind Cas 634.

——S. 80 — Quaere:—Whether Receivers are public officers and as such entitled to notice under S. 80, Civil P.C. AIR (Vol 18) 1931 Cal 175: 53 CLJ 31: 130 Ind Cas 894.

——S. 80 — Neglect or default in realising the rents, issues and profits of properties in respect of which the Official Receiver has peen appointed a Receiver by a decree of the Court comes within the words "any act purporting to be done by such public officer in his official capacity" in S. 80. AIR (Vol 18) 1931 Cal 61: 57 Cal 1127: 130 Ind Cas 903.

——S. 80, O. 6, R. 17 — Suit for accounts against Receiver — Amendment of plaint into one for damages for conversion at late stage, propriety of.

A suit against a Receiver which is one for accounts and not for damages for conversion cannot be instituted without serving a notice under S. 80.

Such a suit cannot be allowed to be converted into a suit for damages for conversion at a very late stage. AIR (Vol 17) 1930 Cal 721 (1): 129 Ind Cas 319.

——S. 80 — Suit against Receiver — Notice is necessary.

A suit against a receiver in respect of acts done in the course of his duty, even if it is brought after discharge, cannot be brought without a notice under S. 80. 34 CWN 671: AIR (Vol 17) 1930 Cal 737 (DB).

(b) When notice not necessary.

——S. 80 — Receiver impleaded in suit — Notice — If and when necessary.

It is true that a Receiver is a public officer within S. 80, C.P. Code. But where the complaint of the plaintiff is not in respect of any act done by him acting in his official capacity and he is impleaded in the suit merely because he is in possession of the property in dispute, notice under the section is not necessary. (1950) 54 CWN 960 (DB).

——S. 80 — Receiver appointed by Court — Suit for realization of price for seeds supplied against defendants including Receiver — Notice to Receiver under S. 80, if necessary.

No doubt a Receiver appointed by a Court of law is a public officer but a notice to him under S. 80 would be necessary only if the suit against him is in respect of any act purporting to be done by him in his official capacity.

In a partition suit between the owners of an Oil Mill, a Receiver was appointed by the Court to manage the business of the mill and pay the net profits in Court for distribution among the parties. The plaintiff supplied oil seeds to the mill after the appointment of the Receiver. The Receiver was managing the mill through a manager. The whole of the correspondence regarding the supply of seeds passed between the manager and the plaintiff. In the suit brought by the plaintiff for realization of a certain sum of money as the price of seeds supplied to the defendants, one of whom was the Receiver, it was contended that the suit was not maintainable for want of notice to the Receiver under S. 80, Civil P.C.:

Held, that the Receiver could not be said to have purported to act in his official capacity in not paying the price of seeds supplied and, therefore, no notice under S. 80 was necessary. AIR (Vol 33) 1946 Pat 31: 24 Pat 514.

——S. 80, O. 40, R. 1 — Cause of action as regards declaration of title based on acts committed by Receiver — Notice under S. 80.

No estate vests in the Receiver by virtue of his appointment. He collects rents or profits, income or capital on the title of the persons who are parties to the suit, and he defends the suit because of the powers gvien to him by the Court under O. 40, R. 1 (a). In cases where no relief is claimed against the Receiver personally, and the suit is really against the estate which does not vest in the Receiver, but which is held by him under orders of the Court who made the appointment, the suit cannot be said to be one against the Receiver within the meaning of S. 80.

In other words, S. 80 contemplates a suit against the Receiver which seeks to make him personally liable for the acts done or purporting to be done by him in his official capacity, and it does not contemplate a case where a suit for possession is brought against the owners of the estate in respect of which he has been appointed a Receiver, and which suit he has got to defend under powers conferred on him by the Court. In such cases, it is undoubtedly necessary to take the leave of the Court which appointed the Receiver before the latter can be made a party to the proceedings, and that is on the principle that interference with the possession of the Receiver without leave would amount to a contempt of the Court whose officer the Receiver is. But there is no necessity to serve upon him a notice under S. 80. AIR (Vol 27) 1940 Cal 1: 44 CWN 74: 186 Ind Cas 584.

——S. 80 — A Receiver who is merely in possession of some property in suit is not entitled to notice under S. 80. (1937) ILR (1937) 2 Cal 265: 41 CWN 322.

14. Scope and object.

——S. 80 — Scope — Notice given by father — Suit after father's death by son on notice by father — Maintainability.

A notice of suit given by a person under S. 80, C.P. Code, cannot, after his death subsequent to the notice, be availed of by his son or other legal representative who actually brings the suit. AIR (Vol 37) 1950 Orissa 257.

——S. 80 — Suit on behalf of trust against Government — Notice not specifying names and addresses of trustees — Suit, if competent.

The provisions of S. 80, C.P. Code are imperative and should be strictly complied with before it can be said that a notice valid in law has been served on the Government. As there is no provision in the Code enabling the trustees to sue in the name of the trust, a suit on behalf of a trust against the Government must be filed by the trustees as plaintiffs. If no notice under the section was given to the Government specifying their names and addresses, the condition precedent to the filing of the suit is not fulfilled and the suit is incompetent. 76 IA 85: 53 CWN 489: ILR (1949) Bom 110: 62 LW 444: AIR (Vol 36) 1949 P.C. 143: 1949 MWN 407: 51 Bom LR 635: (1949) 2 MLJ 161.

——S. 80 — Scope and construction.

S. 80 C.P. Code, may be divided into two parts. The first part deals with the service of notice in writing and the second part with a rule of procedure as to what the plaint should contain. The mandatory words prefixed to the first part cannot be read as prefatory to the second part of the section. While the one part affects the plaintiff's right to sue, the other relates to a matter of procedure. The second part may be classed with certain rules of procedure as to the contents of a plaint prescribed in O. 7 of the C.P. Code. AIR (Vol 35) 1948 Pat 164.

——S. 80 — Scope — Non-compliance — Effect — Duty of Court — Plea not raised in written statement — Waiver — If can be implied.

The provisions of S. 80, C.P. Code, are express, explicit and mandatory and admit of no implications or exceptions. No question of waiver of notice under S. 80 can therefore arise. A plea of want of a proper or valid notice can therefore be allowed to be raised for the first time at the hearing.

Where the defendant does not in his pleading deny the allegation of due service of notice under S. 80, he will not subsequently be allowed to adduce evidence to show that S. 80 has not been complied with. He can rely on the notice itself, and the Court having the notice before it cannot if it shows that the requirements of S. 80 have not been complied with, ignore this fact. If the Court finds non-compliance with the section, it must refuse to entertain the suit, whether the point has been raised by the defendant or not. (1946) PWN 137: 230 Ind Cas 274: AIR (Vol 34) 1947 Pat 81: 13 BR 421.

——**S. 80 — Petition under S. 151 to avoid S. 80 — Maintainability.**

"Justice" in the Criminal Appeal Act in England means "criminal law" and "justice" in the Civil Procedure Code means that standard of justice which the Civil Procedure Code is designed to achieve. That being so, it is impossible to say that because of the reservation of the inherent powers of the Court, the Court can, in pursuance of those supposed powers, open a loophole in a barrier between the Government and the aggrieved subject which the Legislature has deliberately set up.

If the Legislature has seen fit to render Government and its officers free from a suit for a period of two months after every act of which the subject may complain, it is not intended that there should be a side-route round S. 80 by which any subject might start proceedings against officers of Government by the simple process of lodging a petition instead of a suit. AIR (Vol 32) 1945 Bom 370: 47 Bom LR 415: 221 Ind Cas 422: ILR (1945) Bom 665.

——S. 80 — There is no authority for the argument that the statutory provision as to procedure is subject to some exception in cases where hardship or irreparable harm might be caused. AIR (Vol 28) 1941 Pat 517: 20 Pat 394: 7 BR 866: 23 PLT 167: 195 Ind Cas 93.

——S. 80 — Section 80 was intended "to afford protection to officials against personal responsibility for official acts". If it is sought to make an officer personally liable for certain acts done or purporting to be done by him in his official capacity, it is essential before a suit is commenced that there should be a notice served upon him under S. 80. The object of the notice is to give him an opportunity to re-consider his position with regard to the claim and to make amends, or settle the claim if he is so advised. AIR (Vol 27) 1940 Cal 1: 44 CWN 74: 186 Ind Cas 584.

——**S. 80, if enacts only a rule of procedure — Limitation Act (IX of 1908), S. 15(2)—Scope of U. P. Court of Wards Act (IV of 1912), S. 54 — Whether affects procedure of Courts in Delhi — Enactment for the time being in force — S. 15(2), if includes notice given in accordance with enactment of local Legislature.**

Per Monroe, J., (agreeing with Coldstream, J.) Section 80, Civil Procedure Code, only enacts a rule of procedure. Section 54 of the U.P. Court of Wards Act cannot affect the procedure of the Courts in Delhi, for, not only has the Legislature of the United Provinces no power to legislate for the Courts in Delhi but S. 2 of the Act expressly disclaims an intention to do so. Section 54 is not an enactment in force in the Province of Delhi and there is, therefore no enactment for the time being in force within the meaning of S. 15(2) of the Limitation Act.

The question of limitation is itself one of procedure and if a consideration of that question involves the consideration of other rules of procedure, the rules of procedure which must be considered are those of the lex fori. There is no enactment in force in the Province of Delhi which requires the giving of notice to the Collector or other person in charge of a ward under the U. P. Court of Wards Act.

Per Jai Lal, J. — By virtue of the U. P. Court of Wards Act, no suit will lie against a disqualified person personally even in Courts outside the United Provinces as he is neither competent to contract nor to sue or to be sued in his name anywhere so long as the disqualification lasts. The only person who can sue or can be sued in such cases is the Court of Wards and all suits must be filed in the name of the Collector in charge of the property of the disqualified person. Hence the Collector can be named as defendant only under S. 55 of the U. P. Court of Wards Act, and under S. 54 of that Act, no suit can be brought against him unless the prescribed notice is given. The phraseology of S. 15(2), Limitation Act, is sufficient to include a notice which has been given in accordance with the requirements of an enactment of a local Legislature. AIR (Vol 24) 1937 Lah 41 : 38 PLR 992 : ILR (1937) Lah 11 : 164 Ind Cas 1090.

——S. 80 — The notice of a suit contemplated by S. 80, Civil Procedure Code, is entirely different from notice of an application for leave to sue. AIR (Vol 18) 1931 Cal 503: 35 CWN 161: 53 Cal 850: 132 Ind Cas 634.

——S. 80 — In view of the ruling of the Privy Council in (107 Ind Cas 255: AIR (Vol 14) 1927 PC 176) is not open to the Courts to make exceptions on qualifications to the explicit terms of S. 80 on account of consideration of hardship and absence of prejudice or detriment to the interest of the Government. AIR (Vol 18) 1931 Mad 175 : 59 MLJ 923: 32 LW 810: 54 Mad 416: 129 Ind Cas 456.

——**S. 80 — Scope — Suit by two plaintiffs — Notice by one plaintiff — Validity.**

The requisites of S. 80 should be literally complied with. The person who issued the notice and the person that brings the suit should be identical. So the giving of notice about the suit claim by one plaintiff is not a sufficient compliance with the provisions of S. 80, when the suit is actually filed by two plaintiffs, though one of them happens to be the person who gave the notice. 59 MLJ 923 : AIR (Vol 18) 1931 Mad 175.

15. "Two months."

See also N. 6.

(a) General.

(b) Limitation.

General

——**S. 80 — Notice under S. 80 — Subsequent discovery that certain plot had been omitted — Another notice adding that plot — Suit more than two months after first notice, whether premature.**

A notice under S. 80 was served on the Secretary of State for India but when subsequently it was discovered that a certain plot was omitted from the notice, another notice adding that plot to the subject-matter of the suit was sent. The suit was brought more than two months after the first notice:

Held, that S. 80 was complied with & the suit could not be said to be premature so far as it related to the other plots mentioned in the first notice. AIR (Vol 26) 1939 Cal 758: 70 CLJ 126: 185 Ind Cas 454.

——S. 80 — **Joint tort-feasors — One requiring notice under S. 80 extending limitation against him — Extension, if can be granted against other as well.**

In a suit for damages against joint tort-feasors, one of the defendants required notice under S. 80 which would extend period of limitation as against him by two months:

Held, that time must be calculated in the same manner against both the defendants, though the other did not require notice under S. 80. AIR (Vol 24) 1937 Sind 281: 32 SLR 106: 172 Ind Cas 622.

——**Question of "good faith" for applicability of S. 80.**

For the applicability of S. 80 which extends the period of time by two months, no question of good faith arises. It applies whether an officer acts in good faith or bad faith. AIR (Vol 24) 1937 Sind 281: 32 SLR 106: 172 Ind Cas 622.

——S. 80 — **Exclusion of period of notice against all.**

If it is necessary or even permissible for a plaintiff to bring a suit claiming relief against all the defendants jointly and if a notice under Section 80 was necessary against one of the defendants and was in fact given, the period of notice is to be excluded in computing the period of limitation for the suit and not merely so far as the defendant to whom notice was given is concerned. AIR (Vol 17) 1930 All 742: (1930) ALJ 1443: 53 A 44: 132 Ind Cas 17.

——S. 80 — **Municipal Council — Suit against — Two months' notice if necessary.**

A Municipal Council is not an office of the Government within the meaning of Section 80 and that the suit instituted against the Municipality was not bad for want of two months' notice. AIR (Vol 17) 1930 Mad 844: (1930) MWN 821.

——S. 80 — **Expiry of — Injunction.**

The view that plaintiff can bring his suit before the two months' time prescribed has expired in the case of suits against officials for acts purporting to be done in discharge of their duties, when part or the whole of the relief claimed is an injunction, is not correct; 35 Bom 362; 10 IC 639; 37 Bom 243; 17 IC 876 and 40 Bom 392; 34 IC 535. Overruled. Section 80 is to be strictly complied with and is applicable to all forms of action and all kinds of relief. AIR (Vol 14) 1927 PC 176: 53 MLJ 81: 51 Bom 725: 54 IA 338: 25 ALJ 641: 29 Bom LR 1227: 46 CLJ 76: 1927 MWN 561: 1 LC 291: 104 Ind Cas 257: 32 CWN 61: 26 MLW 809.

(b) Limitation.

——S. 80 — **Exclusion of day of service.**

A suit brought before the expiry of two months as required by S. 80 is not maintainable. In computing the period, the day on which the notice is served should be excluded. AIR (Vol 32) 1945 Cal 341: 49 CWN 395: 80 CLJ 178.

——S. 80 — **Day on which notice is served is to be excluded — S. 10, General Clauses Act, if applies.**

Section 10, General Clauses Act, has no application to notice under Section 80, since Section 80 does not direct that any act or proceeding should be done or taken in any Court or office on a certain day or within a prescribed period. The day on which notice was actually served should be excluded in calculating the period of two months provided in S. 80. AIR (Vol 30) 1943 Mad 284: (1943) 1 MLJ 53: 56 LW 50: 1943 MWN 56: 210 Ind Cas 418.

——S. 80 — Whenever a period of time is to be computed from or after an act was done or an event happened, the day on which the act was done or the event happened should be excluded. Hence, when, as in the case of Section 80, Civil P. C., the statute says that no suit should be instituted till after the expiry of two months after the doing of a particular act, that is the delivery of the notice, the day of the delivery must be excluded in computing the period of two months. AIR (Vol 28) 1941 Mad 446: (1941) 1 MLJ 328: 53 LW 233: (1941) MWN 205: 200 Ind Cas 207.

——S. 80 — **Period of notice — Deduction of.**

In the case of a suit alleged to be barred under a special law of limitation, the party is not entitled to deduct the period of two months for service of notice under S. 80 of the C. P. Code. AIR (Vol 8) 1921 Cal 661: 66 Ind Cas 287: 34 CLJ 205 (DB).

——S. 80 — **Suit under Bengal Tenancy Act, S. 104 H — Exclusion of time of notice — Limitation.**

The period of two months of notice under Section 80, C. P. C. cannot be excluded in reckoning the limitation for a suit under S. 104 H of the B. T. Act. AIR (Vol 6) 1919 Cal 1001: 46 Ind Cas 899 (DB).

——S. 80 — **Deduction of time — Notice — Limitation Act, S. 15 (2).**

Where notice to Government is necessary under Section 80, C. P. C. the period of two months is excluded from the prescribed limitation. AIR (Vol 4) 1917 Lah 212: 52 PR 1917: 42 PWR 1917: 38 Ind Cas 600 (DB).

16. Waiver.

——S. 80 — **Waiver of notice by defendant — Competency — Plea of want of notice — Estoppel by conduct.**

It is competent for the authority, for whose benefit the right to notice under Section 80, C. P. Code, has been provided, to waive that right. All objections regarding the maintainability of a suit for want of notice under S. 80, C. P. Code, are to be taken at the earliest opportunity and if that is not done at the proper time and the plaintiff is prejudiced, it will not be open to the defendant to raise the plea of want of notice at a very late stage of the case. He would be deemed to have waived the notice and may be estopped by his conduct from pleading the want of notice. AIR (Vol 39) 1952 Nag 213: ILR (1949) Nag 875 (DB).

——S. 80 — **Waiver of notice by defendant — Competency.**

Section 80, C. P. Code, is mandatory in character, but the mandatory nature of the section is no bar to the defendant waiving the notice under the section. It is open to the defendant to waive the benefit of Section 80, i. e., his right to a proper notice. There is no inconsistency between the facts that the provisions of Section 80 are mandatory and that they may be waived by the authority for whose benefit they are provided. AIR (Vol 37) 1950 Pat 366: 31 PLT 93 (DB).

——S. 80 — **Public officer — Liquidator — Suit for declaration that contributory order passed by him is illegal — Notice — Waiver.**

The Liquidator of a Co-operative Credit Society is a public officer and a notice to him in the manner prescribed by Section 80, C. P. Code, is an essential pre-requisite for the institution of a suit against him for a declaration that a contributory order passed by him against the plaintiff is null and void.

A plea of want of notice should be taken at the earliest opportunity for the simple reason that it goes to the root of the case. If the Liqui-

dator files a full and complete written statement on merits and even joins issues with the plaintiff on the point of court-fees and fights them up to the High Court and then files an additional written statement putting forward the plea of want of notice for the first time, he should be deemed to have waived his rights to a notice under S. 80, C. P. Code. AIR (Vol 36) 1949 Nag 25: ILR (1948) Nag 216: 1948 NLJ 212 (DB).

——S. 80 — Non-service of notice — Waiver.

Where the defendant who is a public officer and not the Secretary of State does not object to the maintainability of the suit against him on the ground of non-service of a notice under Section 80, C. P. Code, he must be deemed to have waived the objection. AIR (Vol 35) 1948 Cal 150: 52 CWN 212: ILR (1948) 2 Cal 77.

——S. 80 — Waiver — Delay in taking objection.

Any prejudice to the plaintiff caused by the delay in taking objection to want of notice would result in the defendant being deemed to have waived his right to notice, even though delay, however long, would not necessarily by itself be a ground for holding that he had waived it. AIR (Vol 29) 1942 Bom 339: 44 Bom LR 727: 204 Ind Cas 89.

——S. 80 — It is open to the party protected by Section 80, Civil P. C., to waive his rights, and his waiver binds the rest of the parties. But only he can waive notice and a party who has himself no right to notice cannot challenge a suit on the ground of want of notice to the only party entitled to receive it. AIR (Vol 29) 1942 Bom 339: 44 Bom LR 727: 204 Ind Cas 89.

——S. 80 — Plea under, if can be waived.

Section 80, Civil P. C., is explicit and mandatory. If the suit is filed before the expiration of two months after notice had been delivered or left at the office of the Collector, it is not maintainable and the Court is bound to dismiss it. It is not open to the Collector to waive the plea under S. 80. AIR (Vol 28) 1941 Mad 446: 53 LW 233: 1941 MWN 205: (1941) 1 MLJ 828: 200 Ind Cas 205.

——S. 80 — Waiver — Suit during currency of notice — No denial by defendant that notice had been regularly sent — Plea for first time during trial that suit was not maintainable.

Where, in a suit, the applicability of Section 80, Civil P. C., depends upon proof of certain facts and the facts alleged in the plaint are not denied by the Secretary of State, against whom the suit is filed; then under the ordinary rules of pleadings, the Secretary of State must be held to have waived his objection to the proof of those facts. Where the Secretary of State does not raise any objection to the statement of the plaintiff in the plaint that the notice under Section 80 has been served on certain date which is beyond two months of the date of the suit, the Secretary of State would be debarred from challenging those facts in the course of the trial.

Similarly, when it has been alleged that the notice was served with all the requisites beyond the period of two months and the defendant does not deny that the notice was received by him, he cannot contend during trial that he has not received the notice. Where, however, the plaintiff himself has admitted the facts and fails under the express provisions of the statute, albeit in a Procedure Code, no question of waiver arises. Provisions of Section 80 are express, explicit and mandatory admitting of no implications or exceptions.

Where a suit against the Secretary of State is filed during the currency of a notice under Section 80, and the defendant takes up the defence that the suit as framed is not maintainable without denying that the notice under Section 80 had been regularly sent to him and for the first time at the trial takes the plea that the suit was not maintainable having been filed during the currency of the notice, there is no question of waiver in the case and the hardship or irreparable injury to the plaintiff cannot be taken into consideration. The suit having been filed during the currency of the notice under S. 80 is unsustainable in limine. AIR (Vol 28) 1941 Pat 517: 20 Pat 394: 7 BR 866: 23 PLT 167: 195 Ind Cas 93.

——S. 80 — No notice under S. 80 — Point overlooked by legal adviser — Duty of Court — Point, if amounts to waiver.

Section 80 applies to all forms of suit whatever the relief sought. The section is explicit and mandatory and it admits of no implications or exceptions. The suit in which Section 80 is not complied with is unsustainable in limine.

Held, that no inference that the point as regards notice must be deemed to have been waived, could be drawn from the mere omission to frame an issue and to put in an application asking for an issue on the point. This negligence did not seem to have been confined to the Government Pleader appearing in the trial Court but extended to the Subordinate Judge himself who neglected his plain duty in the matter. It was his duty to see that a plaint which did not satisfy the provisions of law was not allowed to proceed further so far as the Secretary of State was concerned. The suit should have been dismissed by him on this ground alone in limine. AIR (Vol 25) 1938 Mad 583: (1938) MWN 208: 182 Ind Cas 767.

——S. 80 — Notice is mandatory — It cannot be waived by Officer.

The words of Section 80, are even more imperative than the words of Section 92. Section 80 contains a clear and unqualified prohibition upon the institution of suits without the statutory notice, and indeed it would appear that if it were clear upon the record that no notice had been given in accordance with the provisions of Section 80, far from it being possible to argue that the objection as to notice had been waived, it would be the duty of the Court to discharge the statutory and unqualified obligation imposed upon it and to reject the plaint. It cannot have been the intention of the Legislature and it is not in the public interest that the provisions of Section 80 as to notice can be waived at the whim or caprice of an individual officer. AIR (Vol 24) 1937 Sind 291: 32 SLR 67: 172 Ind Cas 722.

——S. 80 — Plea of want of notice not taken for two years — Non-maintainability of another suit by Plaintiff on same cause of action.

Where the plea of want of notice under Section 80, Civil P. C., is a plea not raised before in the history of the case and further having regard to the fact that at the time of the hearing before the Judge more than two years had elapsed since the arising of the cause of action and it was impossible for the plaintiff to bring another suit, and no issue had been raised at any time in the case as to whether or not notice had been served and inasmuch as the defendant had not

at any time taken any point on the subject of notice to him:

Held, that under the circumstances, the want of notice must be held to have been waived. AIR (Vol 21) 1934 Pat 354: 150 Ind Cas 590.

——S. 80 — The objection that a suit is bad for want of notice under Section 80, can be waived. AIR (Vol 20) 1933 Mad 917: 38 LW 891: 146 Ind Cas 698.

——S. 80 — Plea of.

A double duty ordinarily devolves upon the party who alleges that his opponent has waived any of the rights which the law confers upon him. The party who sets up this case must make the averment and he must make it good. He must allege and he must prove, first that the opponent knew what his rights were, and second that he knowingly discarded them. AIR (Vol 20) 1933 Sind 1: 142 Ind Cas 501.

——S. 80 — Omission to raise plea early.

Where a plea of want of notice under Section 80 which is a clear bar to the suit, is taken, it must be taken at the earliest opportunity and it must be specifically pleaded.

Where such a plea was taken at a very late stage of the proceedings and indeed only at a time when the plaintiffs would have been precluded from bringing a further proceeding against the defendants:

Held, that in the circumstances of the case the defendants must be deemed to have waived their privilege of notice. AIR (Vol 18) 1931 Cal 175: 53 CLJ 31: 130 Ind Cas 894.

——S. 80 — Notice — Requisities of — Suit against the Secretary of State.

A notice which does not contain all the names, descriptions and places of residence of the plaintiffs in a suit against the Secretary of State etc., is an invalid notice. A notice though invalid may be waived by the Secretary of State and would be deemed to have been waived if no issue is joined at the time of settlement of issues. No other defendant can raise the question of validity of notice under Section 80. (1913) 40 Cal 503: 17 CWN 64: 16 Ind Cas 849 (DB).

——S. 82.

——S. 82 — Applicability — Decree against Dominion of India for breach of contract or negligence of Railway — Decree not fixing time for its satisfaction — Executability.

The words "such act as aforesaid" in S. 82(1), C. P. Code, refer to the acts mentioned in the earlier sections, and there can be no doubt that this section would govern a decree against the Dominion of India for breach of contract or negligence of a Railway. The section requires that the decree should have on the face of it a time limit for its satisfaction. If, therefore, no time is stated in the decree within which it was to be satisfied, the decree as it stands cannot be executed. AIR (Vol 37) 1950 Cal 247 : 54 CWN 749(DB)

——S. 82 — Scope — Non-compliance — Effect — Decree not specifying time for satisfaction — If void — Executability — Refusal by executing Court to execute — Propriety.

Section 82, C. P. Code, is mandatory & requires that the decree against the Crown should specify a time limit within which it shall be satisfied. Where the decree does not specify such a time limit the decree is incomplete, though not void or erroneous. It is not executable until the conditions of the section are fulfilled. The executing Court would be acting correctly if it refuses to execute such a decree. AIR (Vol 35) 1948 Pat 179.

——S. 82.

——Award made by Calcutta Improvement Trust Tribunal, if a decree.

Section 82 is confined to decrees passed in suits which are referred to in previous sections and which can only be instituted after service of notice under S. 80. The object of the section undoubtedly is to allow time and opportunity to the Crown or public officers to satisfy the decree amicably before execution proceedings are allowed to be started against them. This provision cannot be applied to an award made by the Calcutta Improvement Trust Tribunal. An award made by the Tribunal is not a decree at all for purposes of the Civil P. C. It simply specifies the amount of compensation that is allowed to the claimant under several heads and the grounds of awarding the said amount. Power is given to the Calcutta Small Cause Court to enforce the award as if it were a decree of that Court; but, as a matter of fact, it is not a decree of that Court or of the Court which actually made it. But even assuming that an award made by the Tribunal is a decree, it is not a decree to which S. 82 is applicable, when there is no suit against the Crown or any public officer as such as contemplated by Part IV, Civil P. C., and which could only be instituted after service of notice under S. 80, of the Code. AIR (Vol 29) 1942 Cal 569: 46 CWN 927: ILR (1942) 2 Cal 528 : 203 Ind Cas 492.

——S. 83.

——S. 83, Explanation — Alien enemy — Person carrying on business in Federated Malay States, Government of which was not at war with United Kingdom — Territory occupied by enemy army — Person is not alien enemy and can sue in British Indian Courts.

The word 'Government' in the explanation to S. 83 must mean the recognized Government of the country and does not include any enemy army in temporary occupation of the country. Consequently, a person carrying on business in the Federated Malay States, the Government of which is not at war with the United Kingdom, is not an alien enemy within the meaning of the section & can bring a suit in British Indian Courts even though the territory may have been occupied by the Japanese army at the time of bringing the suit. AIR (Vol 33) 1946 Mad 328.

——S. 83 — Alien — Internment does not make one alien.

The mere fact that a person (German woman marrying a British Indian subject) has been interned by the Government of India does not make that person (her) an alien enemy. AIR (Vol 31) 1944 All 97: (1944) ALJ 77: 1944 OWN 41: 1944 AWR 70: ILR (1944) All 118: 214 Ind Cas 222.

——S. 83 — Alien can defend.

An alien enemy is entitled to defend if any proceedings are instituted against him. AIR (Vol 31) 1944 All 97: 1944 ALJ 77: 1944 OWN 41: 1944 AWR 70: ILR (1944) All 118: 214 Ind Cas 222.

——S. 83 — Firm in Singapore consisting of partners who were British Indian subjects residing at Madras — Outbreak of war with Japan — Contract in Madras — Parties residents of Madras — Money payable at Madras — Suit by firm at Madras for return of money paid under contract.

A film company carrying on business in Malay was not an incorporated body. It consisted only of two persons as its proprietors who were both residents of India and were British Indian subjects. The company was originally formed at Singapore and continued to exist there till Octo-

ber 1941, or even thereafter. A suit was brought after the outbreak of war:

Held, that even if the plaintiffs were residents in Singapore on the date of the suit and the company was carrying on business at that place, it could not be said that they were alien enemies merely because Singapore had been subjected to military occupation by the enemy. The contract having been made at Madras with the defendant company which was in Madras and the money being repayable in Madras, the Court would not, by directing the return of the money which had to be returned because the venture or adventure having become frustrated by reason of the outbreak of hostilities, be authorising any trade with the enemy in the sense that any commercial, financial or other intercourse with the enemy would be encouraged or sanctioned. AIR (Vol 31) 1944 Mad 239: 218 Ind Cas 235: 57 LW 23: (1944) 1 MLJ 58: ILR (1944) Mad 124: 1944 MWN 200.

——S. 83, Expl. — Foreign country must be at war with Great Britain — Residence or carrying on business in any other foreign territory does not disqualify person from suing in British Indian Courts.

The overrunning of an allied country by the enemy does not by itself render a person resident in such country or a company incorporated in such country and carrying on business there as alien enemy. There should be a foreign country, the Government of which is at war with the United Kingdom of Great Britain and Ireland. Residence in any other foreign country or the mere carrying on of business in such country is not enough to render the person or the company an alien enemy disentitled to sue in British Indian Courts. AIR (Vol 31) 1944 Mad 239: 218 Ind Cas 235: 57 LW 23: (1944) 1 MLJ 58: ILR (1944) Mad 124: 1944 MWN 200.

——S. 83 — Government prevailing temporarily in enemy occupied territory not recognised by Great Britain is not Government at war.

The words, "the Government of which is at war with the United Kingdom of Great Britain and Ireland" mean the lawful or recognised Government of the foreign country in question. It can have no application to such Government as may prevail temporarily at a particular place owing to its military occupation by the enemy, a government to which no recognition has been given or could be accorded by Great Britain. AIR (Vol 31) 1944 Mad 239: 218 Ind Cas 235: 57 LW 23: (1944) 1 MLJ 58: ILR (1944) Mad 124: 1944 MWN 200.

——S. 83 — Plaintiff going to Federated Malay States in 1941 — Malay States occupied by Japan — Plaintiff not alien enemy — Neither S. 83 nor Defence of India Act, held applicable.

The plaintiff went to Federated Malay States somewhere in 1941. As the territory had been overrun by Japan after the outbreak of hostilities between Japan and Great Britain in December 1941, the argument was raised that the plaintiff should be treated as an alien enemy within the meaning of the law and therefore disentitled from maintaining the suit either by himself or through his agent:

Held, that S. 83 had no application as the Federated Malay States was not a foreign country the Government of which was at war with the United Kingdom of Great Britain and Ireland. AIR (Vol 30) 1943 Mad 743: (1943) 2 MLJ 201: 213 Ind Cas 334.

——S. 83 — Alien enemy — Residence in hostile country firm — Alien enemy partner — Right to sue.

Nationality is not the test for determining whether a person is an "alien enemy" within S. 83, C. P. C. A British subject voluntarily residing or carrying on business in enemy country will be treated as an alien enemy. Residence need not amount to what is called domicile (i.e.,) permanent residence 'sine animo revertendi'. A much less permanent residence is sufficient to make a man an alien enemy provided it is not of a temporary character. If a person resides in a hostile country for a substantial period of time, he acquires the disability attaching to an enemy during the period unless such residence is with the consent of the Crown. If one of the partners in a firm is an alien enemy, neither he nor his partner who does not bear an enemy character can recover money owing to the firm in the English Courts. 1 Lah 276: 55 Ind Cas 324: AIR (Vol 7) 1920 Lah 4 (DB).

——S. 83 — Alien enemy — Contracts and commercial dealings.

It is not all contracts whatever, but only all dealings of a commercial nature between hostile aliens that are tainted with illegality. A contract whose tendency is to increase the enemy's resources is prohibited, but not an agreement for payment of money from funds accruing there. 31 MLJ 860: (1917) MWN 73: 5 LW 275: 37 Ind Cas 957: AIR (Vol 5) 1918 Mad 1294.

——S. 83 — Alien enemy — Suit by — Service of summons in foreign enemy country.

Under S. 83 an alien enemy residing in British India may sue in British Courts with the permission of the Governor-General in Council. An application by an alien enemy for summons of a suit for judicial separation filed in British India by him to be sent to the Probate, Divorce and Admiralty Division of the High Court of Judicature in England for transmission to the foreign office for service upon the respondent residing in enemy country should not be refused though the respondent is the subject of a country which is at war with Great Britain. 39 All 377: 39 Ind Cas 862: AIR (Vol 4) 1917 All 374.

——S. 83 — Alien enemy — Cause of action arising upon contract made after war — Internment, effect of.

Whether the cause of action arose before or after war, an alien enemy can be sued in British Indian Courts and would have every right to prosecute his case before the Courts in accordance with the law of procedure, and it makes no difference that he was interned at the time. 43 Cal 1140: 20 CWN 691: 23 CLJ 493: 35 Ind Cas 951: AIR (Vol 4) 1917 Cal 838 (DB).

——S. 83 — Alien enemy — License to trade — Right of suit.

An alien enemy who has been licensed to trade in British India has a right to bring suits in Indian Courts. 31 Ind Cas 888: AIR (Vol 2) 1915 Low Bur 33 (2): 9 Bur LT 51 (DB).

——S. 83 — Alien enemy — Jurisdiction of British Courts.

An alien enemy is amenable to all local laws in consideration of the protection he enjoys while residing in a foreign country. That being so there is no reason why an alien enemy should not be sued or proceeded against in the Courts of India. The decree would be effective against the defendant's property subject to any rights of the Crown. 8 SLR 329: 29 Ind Cas 22: AIR (Vol 1) 1914 Sind 107.

——S. 83 — Probate — Foreign corporation, suit by — C. P. C. (old) Ss. 430, 435.

It is an established rule of Private International Law that a corporation duly created according to the law in one State may sue and be sued in its corporate name in the courts of other states, and it is not necessary that it should have

been registered under the Indian Companies Act or any Act of Parliament to enable a foreign corporation to maintain a suit in this country. (1902) 30 C 103 (105, 106) (DB).

——S. 84.

——Ss. 84 to 87 — Where a question that whether a certain tribal chief residing within British territory is a Ruling Chief within the provisions of Ss. 84 to 87, Civil P. C., arises in a suit for ejectment brought against him, it is not a matter of such private or public importance either to the Chief himself or the public generally or any class or section of the public that a certificate of fitness for appeal to the Privy Council within the provisions of S. 109 (c) can be given. AIR (Vol 24) 1937 Sind 217: 171 Ind Cas 630.

——S. 84 — 'Foreign State' — Characteristics of.

Any state which has preserved any degree of sovereignty must have at least three characteristics. First, the people of the territory concerned must owe allegiance to the ruler of the supposed State, and in the term 'ruler' is included any person in whom, or body in which the sovereign power resides. Secondly, the law enforced in the State must be the ruler's law either made or recognised by him, not laws imposed by any outside authority, nor laws made by him in virtue only of a delegated authority. And thirdly, those laws must be enforced by his Courts, that is Courts deriving their authority from him and not subject to the judicial control of any outside authority. AIR (Vol 17) 1930 Mad 1004: 59 MLJ 548: 53 Mad 968: 32 LW 673: 128 Ind Cas 870 (DB).

——S. 85.

——S. 85 — S. 85 merely enables Prince or Chief to institute suits through special authorised agent.

The provisions of S. 85 enable a Sovereign Prince or Ruling Chief to institute a suit in British Indian Courts through his own agent, and that agent, in order to enable him to make or do appearances, acts and applications, must be specially appointed so that he could be regarded as a recognized agent for the purpose of the Code. There is, however, an alternative remedy open to the Sovereign Prince or the Ruling Chief to institute a suit in his own name or follow the procedure prescribed in O. 3, R. 2, which, according to the rules specially framed by Bombay High Court, would require a general power-of-attorney in the agent to institute a suit on behalf of the Prince.

The provisions of S. 85, like those of Ss. 86 and 87, are specially enacted for a privileged class of persons such as a Sovereign Prince or a Ruling Chief who are parties to suits or legal proceedings. That special provision is beyond question supplementary to the ordinary rule. Therefore, when there is a special rule conferring privilges on a special class of litigants, that rule must be strictly observed. AIR (Vol 27) 1940 Bom 172: ILR (1940) Bom 225: 42 Bom LR 262: 188 Ind Cas 805.

——S. 85(3) contemplates active appointment.

It is true that sub-s. (3) of S. 85 does not require that a person appointed under this section should authorize or appoint persons to make appearances by any writing. But it still implies necessarily an active appointment by the person in whose favour the special appointment is received, and this cannot be substituted by the mere passive attitude of allowing a person to continue the suit which had been admittedly filed by him under instructions from a person who has then no authority as required by S. 85. AIR (Vol 27) 1940 Bom 172: ILR (1940) Bom 225: 42 Bom LR 262: 188 Ind Cas 805.

——S. 85 — Suit filed on behalf of State by person not authorised agent under O. 3 R. 2 and without authority required by S. 85 — Suit must be dismissed — Authority under S. 85 after presentation of appeal upon dismissal of suit, if cures defect.

A suit instituted on behalf of a Ruling Prince or an Indian State by a person who is not an authorized agent under O. 3, R. 2, and without the authority required by S. 85 is a defective suit and must be dismissed and a subsequent authority obtained under S. 85 for the first time after the presentation of the appeal upon dismissal of the suit cannot cure that defect. AIR (Vol 27) 1940 Bom 172: ILR (1940) Bom 225: 42 Bom LR 262: 188 Ind Cas 805.

——Ss. 85, 79 — Order of June 20, 1935, appointing agent to prosecute or defend suits on behalf of Kashmir State is valid not being revoked.

The order of June 20, 1935, appointing a certain person to prosecute or defend all suits on behalf of or against the Jammu and Kashmir State is valid not having been revoked by the Government of India (Adaptation of Indian Laws) Order, 1937. AIR (Vol 26) 1939 Lah 279: 42 PLR 228: 184 Ind Cas 488 (1).

——Ss. 85, 87 — Administrator of Native State — Power to sue in British Indian Court.

The Administrator of the Nabha State, who, as representing the Government of India, is ruling the State and who has been appointed by the Government to prosecute suits, is competent to institute suits on behalf of the State in British Indian Courts.

The fact that such an appointment is made after a plaint has been put into Court will not render it ineffective, provided that it is put into Court within the period of limitation.

The fact that the plaintiff was described as the Administrator and Resident of Nabha and not as the Nabha State through its Administrator is a mere misdescription which the Court may allow to be rectified. AIR (Vol 20) 1933 Lah 456: 34 PLR 470: 143 Ind Cas 348.

——S. 85 (S. 432 old Code) — Recognized agents — Applicability of section to suit, in Revenue Courts.

Held, that S. 432, C. P. C., applies to suits filed in a Court of Revenue under the provisions of Act No. XII of 1881. (1903) 1903 AWN 189 (189) (DB).

——S. 86.

1. **Interpretation.**
2. **Jurisdiction.**
3. **Non-compliance.**
4. **Suit against ruling Prince, Chief, etc.**
5. **Waiver of objection.**

1. Interpretation.

——S. 86 — "Property" in S. 86, includes public property only.

Per Narsing Rau, J.— Section 86 is obviously a statutory adaptation to Indian conditions of certain well-known conventions of international law. When the local Court is faced with a case where such immunities come into question, it has to decide whether in the particular case the immunity exists or not. One of the immunities regarded as well-settled is that the foreign sovereign himself and his property are not to be subjected to legal process by the Courts of the territorial sovereign. The immunity in respect of property is only in respect of the public property of the foreign State and does not extend to property not dedicated to public uses. Property in this context includes debts to the State. AIR (Vol 27) 1940 Cal 244: ILR (1940) 1 Cal 344: 71 CLJ 316: 44 CWN 333: 189 Ind Cas 667.

——S. 86 — Whether applies to proceedings under S. 184, Companies Act.

Section 86 does not apply to the proceedings under S. 184, Companies Act, but it does apply to all the proceedings under Ss. 186 and 187, Companies Act. AIR (Vol 23) 1936 All 826: (1936) ALJ 1134: 58 A 742: 166 Ind Cas 98 (FB).

——**S. 86 (3) (5) — The sub-sections are distinct.**

Sub-section (5), S. 86, is entirely distinct from sub-s. (3). The two are really dealing with two quite distinct matters. Sub-section (5) is really a proviso to sub-s. (1) and sub-s. (3) deals with the question of execution and is independent of sub-s. (1). AIR (Vol 22) 1935 Cal 664: 33 CWN 1206: 159 Ind Cas 637.

2. Jurisdiction.

——**S. 86 — Function and power of Court under — Sanction of Crown representative for suit against prince — Power of Court to go behind certificate and investigate into facts as to existence of conditions for grant of sanction for suit.**

Under S. 86, C. P. Code, the test for the Court in a suit against a sovereign prince, as to whether the said prince was rightly impleaded before it, is the existence of the consent of the Crown representative duly certified by the signature of the political secretary. It is no part of its function to try by its process the question of fact whether any of the conditions required for the giving of his consent existed or not, or even the question whether it had appeared to the Crown representative that one or more of them did exist.

The certified consent is in all ordinary cases conclusive evidence that it did so appear, and it is not for the Court to go behind the certificate or to entertain an objection on the ground of absence of the conditions requisite for the grant of sanction by the Crown representative, in the absence of special circumstances justifying an investigation into the facts. The Court should not ordinarily try for itself what S. 86 has left to the Crown representative to ascertain. 77 IA 156: 54 CWN 419: AIR (Vol 37) 1950 PC 99: 1950 ALJ 270: 63 LW 434: 52 Bom LR 450: (1950) 2 MLJ 1.

——**S. 86 — Scope — Consent, nature of — Crown representative — Certificate, essentials of — Defective certificate, effect of.**

Section 86 does not say that the consent contemplated by it is to be given to a particular plaintiff. What cl. (2) of the section enacts is that the consent is to be given to a particular suit.

Per Kaniya, J. — Section 86 requires fulfilment of one or more of the three conditions to the satisfaction of the Crown representative. That is not a matter to be established in Court. Where the certificate itself shows that the Crown representative has not got the requisite satisfaction, the certificate is not binding on the Court. AIR (Vol 32) 1945 Bom 187: 46 Bom LR 882.

——**S. 86 — Suit against Prince or Ruling Chief of foreign State — Consent of Governor-General in Council applied for but refused — Court, if can question propriety or otherwise of refusal to give consent in the suit.**

Where the plaintiff has failed to obtain the consent of the Governor-General in Council under S. 86, Civil P. C., a suit is not maintainable against the Prince or the Ruling Chief of a foreign State. It is immaterial if the consent has been applied for and refused. It is not open to the Court to question the propriety or impropriety of the order of the Governor-General in Council in refusing consent under S. 86. AIR (Vol 22) 1935 Oudh 164 : 11 OWN 1426: 153 Ind Cas 856.

——**S. 86 — Jurisdiction of Court.**

Though the defendant becomes a Ruling Prince, after the institution of suit the provisions of S. 86 will apply to the further prosecution of the suit, but there is no inherent want of jurisdiction in the Court to try the subject-matter of the suit against him. So if the party suing ignores the bar and persists in the suit, and the party sued acquiesces in the procedure and proceeds to judgment, the judgment cannot afterwards be questioned on the ground that the bar was not removed before the suit was proceeded with. Where with full knowledge of the facts that entitled him to make an application under S. 86 of the Code, a Ruling Prince made application for adjournment to enable him to file his written statement.

Held, that applications for adjournment are applications in the suit, and there was accordingly an appearance by the defendant in the suit and submission to the jurisdiction of the Court, which disentitled him from objecting to the jurisdiction of the Court. AIR (Vol 8) 1921 Pat 23: 61 Ind Cas 989: 6 PLJ 185: 2 PLT 180: 1921 PHCC 136 (DB).

——S. 86 — The status of Sovereign Prince is absolute; he cannot divest himself of his status, and as such the courts have no jurisdiction over him except as provided by S. 433, C. P. C. The only way in which a Sovereign Prince can waive his right is by appearing and submitting to the jurisdiction of a court. (1905) 2 CLJ 163 (DB).

3. Non-compliance.

——**S. 86 — Consent — Declaratory suit against Ruling Chief with consent of Governor-General — Plaint amended by adding prayer for possession — Consent for suit for recovery of possession subsequently obtained — Effect.**

Where a suit was filed against a Ruling Chief with the previous permission of the Governor-General in Council under S. 86 of the C. P. C. for declaration of title and the plaint was allowed to be amended by the adding of a prayer for possession, the consent of the Governor-General for instituting a suit for possession having been obtained subsequently, Held that it would be safer for the plff. to withdraw the whole suit and file a fresh suit for possession. (1913) 17 CWN 1242: 22 Ind Cas 889 (DB).

——**S. 86 (5) Tenancy — Ruling Chief.**

Plaintiff held certain lands of the ruling chief (deft) without rent. The chief resumed the 'muafi' through Court which assessed rent against plff. who sued for declaration of his heritable right to hold the land free of rent. Held, that the suit being brought without the Governor-General's sanction as required by law, is not maintainable because it does not fall under Proviso 5 to S. 86 AIR (Vol 7) 1920 Oudh 203: 58 Ind Cas 912 (DB).

——**Ss. 86 and 87 — Leave obtained after suit.**

Under S. 433, the sanction of the Governor-General in Council is necessary for the institution of a suit against a ruling prince and a sanction obtained after the institution is bad and cannot validate a suit. 21 PR 1909: 27 PWR 1909: 32 PLR 1909: 1 Ind Cas 604 (DB).

——**S. 86 (433) old Code — Suit against Princes etc — Ruling Chief of — Suit against Raja of Poonch — Withdrawal of appeal — Suit against a Ruling Chief and other defendant without previous consent of Government — Entire suit not liable to be dismissed — Hearing of appeal in the absence of pro forma respondent.**

Under S. 433 of C. P. C., 1882, a Ruling Chief cannot be sued in Courts of British India, in respect of immoveable property acquired by him in that country without the previous consent of the Governor-General in Council and, that the suit filed by the plaintiff against the Raja of Poonch

was not cognisable by Court in the absence of previous consent of the Governor-General in Council for the Raja was a Ruling Chief within the meaning of S. 433 of the Code. The reversionary heirs of a sonless proprietor instituted a suit to contest several alienations made by the proprietor. The Raja of Poonch being one of the alienees was also made a defendant. The other alienees-defendants raised an objection that since previous consent of the Governor-General in Council was not obtained for the institution of the suit, the case must be dismissed. The various alienations were distinct and separate from each other.

Held, that the entire suit was not liable to be dismissed on the objection and it must proceed against the defendants other than the Raja of Poonch. Held, also that the appellate Court may proceed to hear the appeal although a respondent has not been served with a summons when his appearance is unnecessary for the decision of the appeal. Held further that the provisions of S. 373 of C. P. C., are applicable to appeals also. 21 PR 1909: 27 PWR 1909: 32 PLR 1909: 1 Ind Cas 604 (606) (DB).

——S. 86 — Sovereign Prince, suit against — Previous consent of the Governor-General or Local Government — Code of Civil Procedure (Act XIV of 1882), S. 433.

The Maharaja of Hill Tipperah is a Sovereign Prince and an action against him for declaration that the land in dispute is the 'lakheraj' land of the plaintiff and not the 'mal' land of the defendant is not maintainable, the consent of the Governor-General in Council or of the Local Government not having been previously obtained under S. 433 of the Code of Civil Procedure. (1905) 2 CLJ 163 (165) (DB).

4. Suit against ruling Prince, Chief, etc.

——Ss. 86 and 87 — Proper frame of suit against Prince or Ruling Chief.

The words "in the name" in S. 87 of the C. P. Code are very suggestive and they clearly indicate that, where a Prince or Ruling Chief has to be sued, it is his State that has to be arrayed on the defendant's side and the suit shall be taken as one against the Prince or the Ruling Chief himself. AIR (Vol 37) 1950 All 421: 1950 AWR 321.

——S. 86 (5) — Scope.

S. 86 (5), C. P. Code, contemplates a rival claim to be put forward against the ruling chief; but the only limitation is that the person who is the plaintiff in the suit must be a tenant of the ruling chief and the suit must relate to the lands which he holds under him. If both these conditions are fulfilled, S. 86 is no bar to the suit against the ruling chief. AIR (Vol 36) 1949 Dacca 16.

——Ss. 86, 141 — Applicability — Insolvency proceedings.

Section 86 in terms applies only to suits. The expression "suit" has not been defined in the Code. By S. 26, Civil P. C., every suit is to be instituted by the presentation of a plaint or in such other manner as may be prescribed. Excepting the presentation of a plaint, no other mode of instituting suits has yet been prescribed. A proceeding that does not commence with a plaint is, therefore, not a suit. An insolvency proceeding is started, not by the presentation of a plaint, but by the presentation of a petition.

For these reasons the provisions of S. 86 of the Code cannot be made applicable within the meaning of S. 141 of the Code to insolvency proceedings merely by reason of the fact that a Sovereign Prince or Ruling Chief is one of the creditors. AIR (Vol 27) 1940 Cal 244: ILR (1940) 1 Cal 344: 71 CLJ 316: 44 CWN 333: 189 Ind Cas 667.

——Ss. 86, 87 — Suit against Prince — Contract between plaintiff and Engineer-in-Chief of Baroda State Railway — Suit on contract against Engineer-in-Chief.

Sections 86 and 87, Civil P. C., relate to an important matter of public policy in India and the express provisions contained therein are imperative and must be observed.

The contracts for supply of sleepers were made in Baroda between the plaintiff and one M who signed the contracts as "Manager and Engineer-in-Chief, Baroda State Railway" The plaintiff filed his suit in the Court of the Subordinate Judge of Agra, claiming for the balance of the price of the sleepers supplied plus retrenchment money, and damages for failure to take delivery of the remainder of the sleepers and wood. The written statement was signed by the then manager and Engineer-in-Chief of the said Railway.

It contained many defences including the following plea, "the suit not having been filed against the proper party is not maintainable; the defendant Railway is owned by H. H. the Maharaja Gaekwar of Baroda, a Sovereign Prince and is managed by His Highness's Government; the claim against the Manager and Engineer-in-Chief of the defendant Railway who is only a paid servant of the State is bad in law". The Subordinate Court and also the High Court held that the defendant Railway was a Corporation, of which H. H. the Gaekwar was the owner who carried on business under an assumed name and that the suit, therefore, could be instituted against that assumed name without in any manner infringing the provisions of S. 86 of the Civil P. C., and that the case was governed by O. 30, R. 10:

Held, that H. H. the Gaekwar was a Sovereign Prince within the meaning of Ss. 86 and 87, Civil P. C., and that no certificate having been obtained as provided by S. 86, and further that no such certificate could have been obtained as none of the conditions contained in S. 86 (9) (a), (b) and (c), were applicable to this case, the suit could not be maintained.

Held, also that a notification of the State which was under the heading "Supreme Court" No. 77 of 1921-22, dated April 16, 1922, was no more than a direction regulating the procedure as to suits relating to the Railway Administration and the working of the State Railway in Baroda. It provided that such suits in Baroda were not to be regarded as suits against the State but were to be considered as other suits and it gave directions as to the Courts in Baroda in which the said suits might be instituted. The notification related to the State of Baroda only and was merely a piece of internal administration with respect to the Courts in Baroda in which the suits therein referred to were to be instituted and the procedure to be adopted in connection therewith. The notification afforded no evidence whatever that H. H. the Gaekwar intended to make the Railway Administration a legal entity or to establish it as a Corporation.

Held, further that the suit was in reality though not in form, a suit against H. H. the Gaekwar of Baroda and if the judgments of the Courts in India were allowed to stand, they would have far-reaching results and might have the effect of nullifying the provisions of Ss. 86 and 87 which are mandatory and provisions of which could not be waived by allowing the defendant Railway to defend the suit on its merits and to produce evidence and take the chance of getting a judgment in its favour, when in fact the written statement contained the plea that the

suit was not filed against the proper party and was not maintainable. AIR (V 25) 1938 PC 165 : 1938 AWR 123 : 1938 OWN 521 : (1938) ALJ 488: 47 LW 753: 42 CWN 705: (1938) MWN 481 : 4 BR 524: 67 CLJ 254 : (1938) 2 MLJ 11 : ILR (1938) All 601 : 40 Bom LR 811 : 19 PLT 689 : 65 IA 182: 32 SLR 531: 174 Ind Cas 551 (PC).

[Reversing AIR (Vol. 21) 1934 All 740 : 153 Ind Cas 824.]

——S. 86 — Suit against State-owned Railway — Notice, necessity of.

A suit against the Gwalior Light Railway, which is owned and managed by the Gwalior Darbar, does not come under Section 86, and cannot be said to be a suit against any Sovereign Prince or Ruling Chief. AIR (Vol 19) 1932 Lah 136: 33 PLR 100: 134 Ind Cas 300.

——S. 86 — Liability of state — Permission to sue.

An agent of a foreign State is personally liable for contracts entered into on behalf of his principal where the contracts are such as do not come under Section 86, C. P. Code, and permission to sue need not be applied for and even if granted no suit will lie against the foreign State. AIR (Vol 15) 1928 Sind 189: 113 Ind Cas 345.

——S. 86 — Ruling chief — Property in British India — Applicability.

Under Clause 26 of the instrument of transfer conferring the dignity of a ruling chief and the Maharajah of Benares there was the declaration that "within the other estates now in the possession of His Highness" which are outside the State of Benares, he shall continue to have the status and responsibilities of a land-holder under the ordinary law and within the pergannah of Kaswar Rajah he shall assume that status and those responsibilities". By Clause 26 the British Government reserved the right to itself to withdraw from the Maharajah any special privileges which he had enjoyed in a certain pergannah Kaswar Raja estate.

Held, that Clause 26 did not indicate that His Highness intended to waive his right to plead his status as a ruling chief in the case of suits in respect of properties held by him in British India. Section 86 therefore could be invoked in his aid. AIR (Vol 11) 1924 All 422: 78 Ind Cas 559: 46 All 355: 22 ALJ 317: 5 LRA Rev 129 (DB).

——S. 86 — The section does not apply to a defence put forth as set off. Such a defence can be put forward in answer to a claim by a Ruling Chief without the consent of the Governor. General (1921) 62 Ind Cas 778 (Lah) (DB).

——S. 86 — Ruling chief — Kurundwad Jagirdar.

The Kurundward Jagirdars are Ruling Chiefs who cannot be sued without the consent of the Governor-General under Section 86 of the C. P. C. AIR (Vol 6) 1919 Bom 122: 21 Bom LR 376: 51 Ind Cas 228 (DB).

——S. 86 — Ruling Prince when to be made party.

Section 86, C. P. C. is exhaustive and lays down the cases where a prince or chief can be brought on record whether he is suing or sued as such or in any other capacity. AIR (Vol 3) 1916 Mad 308: 38 Mad 635: (1913) MWN 977: 14 MLT 486: 25 MLJ 621: 21 Ind Cas 930.

——S. 86 — Ruling Chief — Suit against — Consent of Governor-General in Council.

No suit against a Ruling Chief is maintainable without the consent of the Governor-General-in-Council. AIR (Vol 1) 1914 All 493: 25 Ind Cas 271.

——Ss. 86 and 87 — Sovereign prince.

A suit will not lie against a sovereign prince without the consent of the Governor-General-in-Council. A state cannot be sued apart from its Ruling Chief. (1912) 12 MLT 496: 23 MLJ 605: 17 Ind Cas 444 (DB).

——S. 86 (S. 433 Old Code) — Sanction — Suit against a Ruling Chief — Permission to sue granted in absence of necessary conditions precedent — Jurisdiction.

A suit for the recovery of arrears of salary was brought in the Court of the Subordinate Judge of Agra against the Maharaja of Jaipur. The plaintiff obtained the consent of the Governor-General-in-Council to the institution of the suit granted ostensibly in accordance with the provisions of Section 433 of the Code of Civil Procedure, but in fact none of the conditions enumerated in Clause (2) of the section existed.

Held, that the suit was not maintainable.— (1907) 1907 AWN 95: 29 A 379 (381): 4 ALJ 358 (DB).

5. Waiver of objection.

——S. 86 — Immunity arising under S. 86, if can be waived.

Once it is held that the provisions of Section 86 are properly applicable to proceedings other than suits, no question of waiver by the foreign Sovereign or other person entitled to the immunity can arise under the Indian law, for, the immunity arising under Section 86 of the Code is not waivable. AIR (Vol 27) 1940 Cal 344: ILR (1940) 1 Cal 344: 71 CLJ 316: 44 CWN 333: 189 Ind Cas 667.

——S. 86 — Suit against Ruling Prince — Consent of Governor-General — Submission to jurisdiction — Effect.

Where a Ruling Prince having sovereign powers submits to the jurisdiction of a British Court, no objection can be raised by him, in the Appellate Court on the ground that the consent of the Governor-General had not been obtained prior to the institution of the suit. AIR (Vol 5) 1918 Cal 985: 46 Ind Cas 558 (DB).

——S. 86 — Ruling Chief — Consent of Governor-General-in-Council — Privilege — Pleading to merits of — Waiver of privilege — Submission.

No suit can be maintained against a Ruling Chief without the consent of Governor-General-in-Council. The mere fact that the defendant after claiming the privilege pleaded also on the merits, does not amount to a waiver of privilege and submission.

Per Oldfield, J.: The recognition of cases of waiver as excepted from the ordinary provision of international law as understood in England, cannot be imported into the clear language of the C. P. C. AIR (Vol. 3) 1916 Mad 835: 39 Mad 661: 29 MLJ 667: (1915) MWN 534: 2 MLW 637 : 30 Ind Cas 511 (DB).

[Confirming the judgment of Tyabji J. in AIR (Vol 2) 1915 Mad 495 : 38 Mad 535].

——S. 87.

See also Civil P. C., Ss. 85, 86.

——S. 87 — Form of suit against Sovereign Prince or Ruling Chief.

According to S. 87, C. P. Code, where a Sovereign Prince or Ruling Chief has to be sued it is his State that has to be arrayed on the defendant's side and the suit shall be taken as one against

the Prince or Ruling Chief. AIR (V 37) 1950 A 421 : 1950 AWR 321.

——S. 88.

See also Civil P. C., O. 35, Rr. 4 and 5.

——S. 88, O. 35, R. 5 — Rent suit by landlord — Tenant's plea that plaintiff was not his landlord investigated and overruled and suit decreed — Suit by tenant for declaration that third person and not plaintiff in rent suit was his landlord:

Held, that the suit being an interpleader suit within the meaning of S. 88 & O. 30, R. 5 was maintainable. AIR (V 28) 1941 Cal 512 : 197 Ind Cas 316.

——S. 88 — Civil Procedure Code (Act XIV of 1882), S. 470 — U.P. Court of Wards Act (III of 1899), S. 48 — Court of Ward — Power to file interpleader suit — "Person", meaning of.

Under S. 470 of the Civil P. C. of 1882, a person whose only interest in the property was that of a mere stake-holder and who was ready to render it to the rightful owner, was entitled to bring an interpleader suit to enable the Civil Courts to decide upon the rights of the rival claimants to the same property. The Court of Wards being a trustee for the rightful owner and thus a stake-holder, can file such a suit and the mere fact that no such capacity to sue or to be sued has been conferred upon the Court of Wards under S. 48 of the old Court of Wards Act does not in any way oust the jurisdiction of the Civil Court to take proceedings under S. 470 upon a plaint filed by the Court of Wards. The word "person" in S. 470 is wide enough to cover a corporate body like the Court of Wards. AIR (V 18) 1931 Oudh 177 : 8 OWN 349 : 136 Ind Cas 642.

——S. 88 — Inter-pleader suit, what is.

An inter-pleader suit from its very nature, as described in S. 88, C. P. Code, is a suit in which several claimants are to be deemed to be claiming adversely to each other. Consequently, though a widow who adopts a son and another person who is adopted by a co-widow are arrayed in that suit on the same side as defendants, yet they must be deemed to be claiming adversely to each other. If in such a suit the latter puts forward his adoption by the widow under the powers conferred upon her under the will of her late husband it is the duty of the co-widow to contest the said adoption, both in respect of the factum as well as its validity, by filing a written statement to that effect. If she does not do so in spite of the fact that she is represented by a pleader on the date when the issue relating to the adoption was framed on the pleadings of other defendants, she must be deemed to have raised the point, and, if the Court decided it adversely, the matter must be deemed, under Expl. 4 to S. 11, C. P. Code, to be a matter directly and substantially in issue in that suit and it is no more open to her to contest the factum and the validity of the adoption in a subsequent suit, the decision in the previous suit operating as res judicata against her. AIR (V 15) 1928 Oudh 155 : 108 Ind Cas 817 : 1 LC 733.

——S. 88 — Inter-pleader suit, when allowed.

The plaintiff in order to be entitled to bring an inter-pleader suit must satisfy the Court that he has no claim or no interest in the subject-matter in dispute, and that he does not collude with any of the claimants. If he has in some way identified himself with one of the parties in the sense that it makes a difference to him which party succeeds he will be debarred from bringing such a suit, although he will not be refused relief merely because he has a natural affinity for one side rather than the other. Where the plaintiff has taken an indemnity from one of the claimants, or where he was entered into an agreement with one of them, the effect of which is that he will have to pay over less if that party succeeds, he by his interested conduct, precludes himself from obtaining relief by way of inter-pleader. AIR (V 14) 1927 Rang 91 : 4 Rang 465 : 99 Ind Cas 985 (DB).

——S. 88 — Positions of parties — Limitation.

In an inter-pleader suit in which each of the contesting defendants attacks the title of the other, each is virtually in the position of a plaintiff. Where an adoption was set up by one party as having taken place in 1863 and the others pleaded that the former, not having sued within 12 years to establish the adoption, its right was barred as per the Limitation Act of 1871, Art. 129 and where the others also had not sued within the period prescribed by that Act, to set aside the adoption:

Held, if the supporters of the adoption are debarred from supporting it, the others will be equally debarred from getting a declaration that the adoption is invalid. AIR (V 12) 1925 Mad 497 : 93 Ind Cas 705 : 48 Mad 1 (DB).

——S. 88.

Where the defendants did not claim adversely to one another the property in suit 'from the plaintiff' and the plaintiff was not also ready to pay or deliver the property to one of them.

Held, in the circumstances of the case that the suit was not an inter-pleader suit. AIR (V 9) 1922 Cal 138 (DB).

——Ss. 88, 99 (Ss. 470, 578, old Code) — Inter-pleader suit — Appeal after remand, maintainability.

Plaintiff gave two kabuliyats to two parties of landlords and brought a suit praying that the Court may be pleased to declare which defendant has what right in which of the disputed lands, and in what right the plaintiff holds which of the said lands and under whom and for what amounts of rent the plaintiff is liable to which defendant for which land and to declare that one of the two parties claiming the rents of the said land is not entitled to the same:

Held, the suit was not only by way of inter-pleader; the plaintiff was not a stake-holder: there were not two persons claiming the same payment or money adversely to one another; and the suit was not maintainable. The fact that the appellant did not appeal from the order of the lower appellate Court remanding the case to the first Court did not have the effect of his losing the right of appeal from the final decision. (1910) 5 Ind Cas 577 : 14 CWN 784 : 11 CLJ 577 : 37 C 552 (557) (DB).

——S. 89.

[Repealed by S. 49 (1), Arbitration Act, 1940]

See also Arbi. Act 1940, S. 39.

1. **"Any other law."**
2. **Appeal.**
3. **Effect.**
4. **Pending suit.**
5. **Scope.**

1. **"Any other law."**

——S. 89 — Meaning of.

The words "any other law" in S. 89 are very general and there is no reason for interpreting them as excluding the law laid down in other parts of the C. P. Code. AIR (V 15) 1928 Mad 1025 : 55 MLJ 429 : 51 Mad 800 : 28 MLW 321 : 113 Ind Cas 632 (FB).

——S. 89 — The words "any other law for the time being in force" refer to amendments of, or

substitutions for, the Arbitration Act or other piece of legislation on that subject-matter. They do not include O. 23, R. 3. AIR (Vol 8) 1921 Cal 238 : 25 CWN 127 : 61 Ind Cas 919.

——S. 89 — **Record of award as adjustment.**

The words "by any other law for the time being in force" contained in S. 89 refer to some law extraneous to the Code of Civil Procedure and cannot be legitimately held to cover O. 23, R. 3. AIR (V 8) 1921 Lah 232 : 67 Ind Cas 123 : 3 Lah LJ 162 (DB).

——S. 89 — Per Madgavkar and Aston, A.J.Cs. — "Any other law" in S. 89 does not include Order 23, Rule 3. AIR (V 8) 1921 Sind 65 : 81 Ind Cas 653 : 16 SLR 174 (FB).

2. Appeal.

——S. 89 — **Award modified by compromise — Maintainability.**

A Court is competent on an application under Para. 20, Sch. II to pass a decree on an award as modified by a lawful compromise filed by the parties and from a decree so passed, no appeal lies except in so far as the decree is in excess of or not in accordance with the award so modified. AIR (Vol 9) 1922 Oudh 189: 68 Ind Cas 209: 9 OLJ 219 : 25 OC 213 (DB).

3. Effect.

——S. 89.

——S. 89 makes it obligatory that all references to arbitration whether by an order in suit or otherwise and all proceedings thereunder are governed by the provisions contained in Sch. II except where the Arbitration Act or any other law of arbitration applies, and that notwithstanding the use of the word "may" in Sch. II. After all, parties are not bound to go to arbitration. But if they want to do so and to that extent seek a decision of a private tribunal then they must proceed in the manner indicated in S. 89. If they do not, the arbitration is bad. AIR (V 17) 1930 Bom 98 : 124 Ind Cas 119 : 31 Bom LR 1403.

——S. 89 — **Effect on O. 23, R. 3.**

Section 89 does not affect the operation of O. 23, R. 3 at all and parties to a suit can resort to it if they have in fact adjusted the suit by an award. AIR (V 14) 1927 Bom 565 : 51 Bom 908 : 29 Bom LR 1254 : 105 Ind Cas 516 (FB).

——S. 89 — Per Kanhaiya Lal, J. — The words "any other law" in S. 89 do not exclude O. 23, R. 3 or any other portion of the Code of Civil Procedure, applicable to such a proceeding. The object of S. 89 clearly is to give effect to the provisions of Sch. II as if they had been enacted in the body of the Code, and it cannot be said that any material change of procedure, differing from what was in force prior to the enactment of the present Code of Civil Procedure, 1908, was really intended.

Per Mukerji, J. (contra) — Whatever meaning may be given to the words 'any other law for the time being in force' those words were never meant to apply to the schedule to be appended to the main Code of Civil Procedure, 1908. AIR (V 12) 1925 All 503 : 88 Ind Cas 768 : 47 All 637 : 23 ALJ 561 (FB).

——S. 89.

Any award made during the pendency of a suit and without the intervention of the Court, if it is not consented to, cannot be recorded as an adjustment and any attempt to enforce it by one of the parties is precluded by reason of S. 89. AIR (V 8) 1921 Lah 232 : 67 Ind Cas 123 : 3 Lah LJ 162 (DB).

——S. 89 and Sch. II, para. 22 — **Sp. Rel. Act, S. 21 — Arbitration proceedings.**

Section 89 (1) C. P. C. read with Sch. II, para. 22 makes the concluding provision of S. 21 of the Sp. Rel. Act inapplicable to all arbitration agreements and awards governed by Sch. II. AIR (V 6) 1919 Cal 479 : 46 Cal 1041 : 29 CLJ 399 : 23 CWN 716 : 51 Ind Cas 80 (FB).

——S. 89 — Section 89 excepts the procedure of the Code from being applicable to arbitrations under the Arbitration Act and S. 4 does the same generally. (1912) 5 Bur LT 155 : 6 LBR 88 : 17 Ind Cas 902 (DB).

4. Pending suit.

——S. 89 — **Validity of award.**

An award passed in a pending suit without the intervention of the Court may be regarded as an adjustment under O. 23, R. 3. AIR 1922 Cal 404; AIR 1921 Cal 238 and AIR 1924 Cal 567, not Foll. AIR (V 14) 1927 Mad 1126 : 53 MLJ 444 : 39 MLT 593 : 26 MLW 231 : 104 Ind Cas 674 (DB).

——S. 89 — If in a pending suit the parties go to a private arbitration without the consent of the Court the award cannot be enforced either under O. 23, R. 3, C. P. Code or under the provisions of the Indian Arbitration Act. If C. P. Code is looked into as a scheme for dealing with arbitrations in the course of litigation, it intends those to be under the strict conditions and stipulations of the second schedule and under the supervision of the Court. The Indian Arbitration Act does not apply to arbitrations in the course of litigation. AIR (V 9) 1922 Cal 404 : 69 Ind Cas 808 : 49 Cal 608.

——S. 89.

Reference to arbitration in a pending suit cannot be recognised. AIR (V 8) 1921 Cal 238 : 25 CWN 127 : 61 Ind Cas 919.

5. Scope.

——S. 89 — **If exhaustive.**

Section 89 is intended to be exhaustive in all cases in which the parties choose of their own free will to adopt a reference to arbitration as the method of settling their disputes. The parties are not forbidden by the section to adjust their difference by recourse to a third party. But unless the procedure prescribed in Sch. II is followed, there can be no award enforceable thereunder in the strict sense of the term; nor can there be any adjustment of the dispute by lawful agreement by reason of a submission alone or unless the third party to whom they have recourse brings them in fact to an adjustment by lawful agreement. AIR (V 26) 1939 Rang 300 : 1939 Rang LR 280 : 183 Ind Cas 343 (FB).

[Overrules AIR (V 18) 1931 Rang 58 : 131 Ind Cas 57.]

——S. 89 — Suit can be filed on an award irrespective of the procedure in Sch. II, despite S. 89, which only deals with the filing of awards under that special procedure. AIR (V 24) 1937 Rang 459 : 1937 Rang LR 225 : 173 Ind Cas 690.

——S. 89, **if covers all references to arbitration.**

Section 89 covers all references to arbitration, whether the reference is or is not made without the intervention of the Court, and whether an award does or does not follow and says that they shall be governed by the provisions of the Second Schedule, Civil P. C. AIR (V 23) 1936 Lah 374 : 38 PLR 102 : 160 Ind Cas 287.

——S. 89 — **"Or by any other law for the time being in force" in S. 89 must be read ejusdem generis with reference to specific legislation.**

The words "or by any other law for the time being in force" in S. 89 must be read 'ejusdem generis' with reference to a specific piece of legislation. It was not the intention of the Legisla-

ture to override either the Arbitration Act or any other specific piece of legislation, but the intention was to state that all references to arbitration of whatsoever kind, if they are intended to be given a binding effect, must be conducted and instituted according to the provisions of Sch. II of the Act. AIR (V 22) 1935 Pat 243 : 16 PLT 280 : 14 Pat 799 : 1 BR 679 : 156 Ind Cas 1050.

——S. 89.

Section 89, like S. 69, is intended to confer jurisdiction to link up the schedule and the body of the Code. Any change in the law is not intended unless it is so stated in express terms or unless it followed by necessary implication. The intention presumably is to provide for the exercise of jurisdiction in the case of those references to arbitration which fall within Sch. II. AIR (V 14) 1927 Bom 565 : 51 Bom 908 : 29 Bom LR 1254 : 105 Ind Cas 516 (FB).

——S. 89.

Blackwell, J. — The provision in S. 89 that "all references to arbitration whether by an order in a suit or otherwise, and all proceedings thereunder, shall be governed by the provisions contained in Sch. II" can only apply to cases in which persons choose to avail themselves of the machinery provided by Sch. II, and not to cases in which they adopt other methods of submitting their differences to arbitration. AIR (V 14) 1927 Bom 565 : 51 Bom 908 : 29 Bom LR 1254 : 105 Ind Cas 516 (FB).

——S. 89 — **Enforceability of award.**

Once a suit has been instituted, all proceedings in arbitration are subject to the control of the Court. It is not permissible to the parties to deprive the Court of its jurisdiction by private reference to arbitration, and no award made on such reference, unless consented to by both parties, can be enforced in the suit, either by treating it as an adjustment of the matters in dispute under R. 3, O. 23, or under the general law of contract. AIR 1921 Bom 310, Diss. from. AIR (V 14) 1927 Cal 887: 104 Ind Cas 360: 33 CWN 390: 47 CLJ 59 (DB).

——S. 89 — Reference to arbitration — Power to compromise.

Section 89 does not preclude the application of O. 23, R. 3 to cases in which there has been a reference to arbitration. The power given by S. 20 of Schedule II to any person interested to apply to a court is not to be understood as overriding the general power given to parties under O. 23, R. 3 to adjust their disputes by a lawful compromise at any time after the institution of a suit. 45 Bom 245, Followed, which overrules 40 Bom 386. AIR (V 12) 1925 Mad 50 : 76 Ind Cas 502 (DB).

——S. 89 — Award without intervention of Court.

A party need not file within six months an award without the intervention of the Court. Section 89 does not make it compulsory. AIR (V 8) 1921 All 384 : 18 ALJ 960 (DB).

——S. 89 and Sch. II — Arbitration without Court's order.

Arbitration between the parties to a suit without the Court's order is an arbitration without the intervention of the Court under the Code, and all applications for a decree based on an award, in cases not coming under the Indian Arbitration Act of 1899, should be under Sch. II of the Code only. AIR (V 3) 1916 Bom 125 : 40 Bom 386 : 18 Bom LR 559 : 37 Ind Cas 140.

——S. 90.

——S. 90 — Court should not interfere when legislature has provided special tribunal — Special tribunal for trial of disputes.

Where the legislature has constituted a special tribunal with special and effective powers for determining a dispute Civil Court ought not to interfere by giving some partial decision which it cannot make effective, and which accordingly will not necessarily end the dispute. 32 Bom LR 416: AIR (vol 17) 1930 Bom 232 (DB).

——S. 90 — **When not applicable.**

Where a Court can give merely a declaration without any substantial relief and such substantial relief was reserved to entirely different tribunals under the statute, thereby barring a fresh suit founded on the declaration, the case cannot be one "fit to be decided" within the meaning of O. 36, R. (5) (2) (c). AIR (Vol 17) 1930 Bom 232: 32 Bom LR 416 (DB).

——S. 91.

1. Advocate-General, consent of.
2. Injunction.
3. Obstruction to highway.
4. Pleadings.
5. Public nuisance.
See also N. 3.
6. Scope and applicability.
7. Special damage.
See N 3 and 8.
8. Sub-section (2).
See also N. 3.

1. Advocate-General, consent of.

——S. 91, O. 1, R. 8 — Doctrine of special damage, nature of — Applicability of, in India.

The doctrine of special damage is based on the principle of English common law that there can be no private action for a public wrong. To give a right of suit, the wrong must be in some way special or peculiar to the person who sues, and it is based on the sound rule that no man should be harassed by a multiplicity of suits in respect of a single wrong. English Law has never departed from that principle, and it has been adopted by the Courts in India as a matter of equity and good conscience and must govern their procedure in the absence of any specific provision of law giving a special right of suit in derogation of the general principle. It is however, a doctrine which has got two very definite limitations: first, it applies only to cases regarding public rights in the full sense. Secondly, an invasion of special rights will provide a cause of action without special proof of damage, for in such a case, the law will presume damage. The doctrine of special damage, subject to these limitations, applies also in India, as it is clear from the wording of S. 91.

It is by reason of these limitations that it has been held not to apply to cases of quasi-public rights, such as village roads, and where the plaintiff sues either for himself as a member of the limited class of persons having special rights in common, or on behalf of that limited class in a representative suit under O. 1, R. 8, for infringement of those rights. AIR (Vol 27) 1940 Pat 449: 19 Pat 208: 6 BR 894: 22 PLT 46: 190 Ind Cas 46.

——S. 91 — Advocate-General's permission not taken — No objection — Suit, if maintainable.

A mere failure to obtain the permission of the Advocate-General would not render a suit not maintainable if no objection is taken by the other side at the earliest stage. AIR (Vol 25) 1938 Mad 338: (1938) MWN 262: 177 Ind Cas 633.

——S. 91 — Common nuisance.

The only manner in which a common nuisance can be abated is by a suit to be brought under S 91 with permission of the Advocate General,

unless special damages are shown. Construction of a channel through village site is nothing more than a common nuisance. AIR (Vol 25) 1938 Mad 338: (1938) MWN 262: 177 Ind Cas 633.

——S. 91 — Sanction of Advocate-General, when required — Case of encroachment on a private easement — Sanction, if necessary.

Section 91 deals with the case of a public nuisance for which it is necessary that the sanction of the Advocate-General should be obtained. Where the case is clearly not one of a public nuisance but one of an encroachment on a private easement, sanction under S. 91 is not necessary. AIR (Vol 22) 1935 All 789: 1935 AWR 92: 153 Ind Cas 704.

——S. 91 — Plea of want of sanction — Maintainability in appeal for first time.

Where the contention that the suit is not maintainable for want of sanction of the Advocate-General under S. 91, C. P. Code, was not made the subject of any pleading in the trial Court, but was raised for the first time in the lower appellate Court and that Court refused to entertain it,

Held, that it was perfectly within its rights in doing so, as it raised questions of fact, and, as, on principle, a defeated litigant should not be allowed to take the successful party by surprise and expose him to the brunt of a new attack at the stage of appeal. 105 Ind Cas 113: AIR (Vol 15) 1928 Nag 39 (2).

——S. 91 — Constructive public nuisance — Power of Advocate-General to file suit.

The Advocate-General represents in the Bombay Presidency the Attorney-General in England and has all his powers. In case of constructive public nuisance in law — meaning that which is only wrong because it contravenes the provisions of an Act — the Attorney-General's special power extends in England. No such powers can be derived from S. 91 of the Code of Civil Procedure which is in terms restricted to public nuisances in fact.

Though constructive public nuisance does not fall under S. 91, the Advocate-General has special power to take action in respect of such class of nuisance; he is to proceed either against the offending local authority, or to help the local authority, where its power is inadequate. The jurisdiction of Advocate-General cannot be questioned by Court simply because the matter of suit is trifling but in case in vexatious suits, ask him to reconsider whether he would proceed. (1910) 12 Bom LR 274: 5 Ind Cas 213.

2. Injunction.

——S. 91, O. 1, R. 8 — Nuisance — Village lane, whether a public highway — Osara built on it — Person bringing action — Provisions of S. 91 must be observed — O. 1, R. 8, applicability.

There are three kinds of pathway: a public highway, a public path or lane over which a certain class of the community has a right, and a private way. A village lane is of the class of a public highway; it has not its origin in custom; but a village pathway or lane has its origin in dedication. An osara built on such a lane is a nuisance and in an action against it, provisions of S. 91 should be observed. And in treating it as a lane or as a right of the second class, notice will be necessary and leave also will be necessary under O. 1, R. 8, of the Code. AIR (Vol 24) 1937 Pat 54: 17 PLT 842: 3 BR 179: 166 Ind Cas 538.

——S. 91 — What constitutes public nuisance.

Where the plaintiff would, every day and every hour of the day when he desired to leave his house by the entrance on a particular side be compelled to go the other way and travel at least 3 or 4 times as far and 3 or 4 times as fast if he were presented for time.

Held, that that would amount to special damage or a more particular form of nuisance suffered by him than by the general public. The Court ought to consider, even although a particular form of nuisance is not capable of being translated into rupees and annas, whether it is a substantial grievance which constitutes a wrong peculiar to the plaintiff which in the ordinary way Court of Justice would remove by granting an injunction. AIR (Vol 11) 1924 All 599: 85 Ind Cas 304: 46 All 470: 22 All LJ 729: 6 LRA Civ. 67 (DB).

3. Obstruction to highway.

——S. 91 and O. 1, R. 8 — Suit by plaintiff for declaration of a right of way across a public street — No special damage.

In a suit by the plaintiff for a declaration of his right of way across a public street and for a direction to the defendant to remove certain obstructions and for a permanent injunction restraining defendant from obstructing plaintiff from using the public street as such, the contention of the defendants was that in such a suit the consent of the Advocate-General under S. 91, Civil Procedure Code, in the absence of proof of special damage to plaintiff was necessary and that as no such sanction was obtained the suit itself was not maintainable.

Held, that once it is appreciated that the infringement of the rights of the residents of the village in respect of a public street does not constitute a public nuisance in the sense of a nuisance caused to the public in general, such infringement can well be sued upon by any member of the public who suffers from the wrong complained of. In this view the case cannot be considered as one of public nuisance within S. 91, and the sanction of the Advocate-General is not required. Nor is it necessary to compel a person that suffers from such a wrong to have recourse to O. 1, R. 8, Civil Procedure Code, which is after all an enabling section. (1950) 2 MLJ 770: AIR (Vol 38) 1951 Mad 498.

——S. 91 — Obstruction to passage in village forming part of longer highway — Suit by residents of village — Maintainability.

In a suit for injuction the allegations in the plaint were that a passage ran through the village of the plaintiffs on either side of which there were residential houses, that the defendant by extending his house had encroached upon the passage, that the plaintiffs' right of passage and their right to take carts and processions over the route had been obstructed in consequence thereof and also the water flowing through the village over the path had been stopped on account of the defendant's acts. There was also a further allegation that the passage in question was connected with other villages so that people from outside the village also used to pass through it from one end or the other.

Held, that the passage in question from the point of view of the plaintiffs and their co-residents of the village was essentially a village pathway and not a public thoroughfare, and that therefore the suit was maintainable without proof of special damage or without the consent of the Advocate-General under S. 91 (1), C.P. Code. The obstruction being on a village path in which though the residents of that particular locality were commonly interested, each had a special right which was protected by sub-S. (2) of S. 91, C. P. Code, irrespective of the class of cases covered by sub-S. (1). AIR (Vol 36) 1949 All. 467.

——S. 91 and O. 1. R. 8 — **Obstruction to village pathway — If public nuisance — Suit in representative capacity for removal of obstruction — Proof of special damage — If essential — Village pathway — Representative suit — Maintainability.**

It is open to an individual member of the public to maintain a suit for removal of obstruction to a public highway which constitutes a nuisance without the sanction of the Advocate-General under S. 91, C.P. Code, and even without proof of special damage.

Very often Courts have to deal with the infringement of the rights of the residents of a village or a section of a community in pathways, wells and banks of rivers and so on. Infringement of such rights cannot be deemed to constitute a public nuisance within the meaning of S. 91, C.P. Code or S. 268, I.P. Code. A member of such class can file a representative suit under O. 1, R. 8, C.P. Code, for relief in respect of infringement of such rights. Case law discussed. AIR (Vol 36) 1949 Mad 634: 1949 MWN 38: (1949) 1 MLJ 56.

——S. 91 — **Applicability — Village pathway — Unauthorised obstructions on.**

S. 91 of the C.P. Code is not applicable to the case of an obstruction on a village road which is used by the villagers as means of passage. Unless it is proved to be a public pathway there, there would be no public nuisance and S. 91 will not apply. 22 Luck 279: 1947 OWN 142: 230 Ind Cas 334: 1947 O.A. (C.C.) 183: 1947 AWR (C.C.) 183: AIR (Vol 34) 1947 Oudh 204.

——S. 91 — **Suit by section of public to restrain defendants from obstructing procession.**

A suit by a Hindu as a representative of the Hindu community for a declaration of their right to take a procession along a certain public road and for an injunction restraining the defendants from obstructing the procession is maintainable without the consent of the Advocate-General. ILR (1946) Nag 246: 223 Ind Cas 486: 1946 NLJ 223: AIR (Vol 33) 1946 Nag 228.

——S. 91 — **Applicability — Pleading and relief claimed — Suit by particular section of public is maintainable without consent of Advocate-General.**

Where, from the nature of the pleading and the form of the relief, it is clear that a nuisance complained of was an obstruction in the way of processionists who did not constitute the public as a whole but only a certain section of the public who were interested in a procession, the plaintiff, suing in a representative capacity, does not rest his case on the allegation of public nuisance as such but of a private nuisance. Consent of the Advocate-General under S. 91 is not, therefore required for the maintainability of the suit. AIR (Vol 33) 1946 Nag 228: ILR (1946) Nag 246: 223 Ind Cas 486: 1946 NLJ 223.

——S. 91, O. 1, R. 8 — **Essence of public nuisance — Suit by party wanting to use highway in particular way against rival party.**

A suit by one party who wants to use the highway in a particular way against a rival party who would obstruct them in the use of the same, is not a suit relating to public nuisance. The essence of a public nuisance is that it causes damage, injury or annoyance to the public or to the people in general. An obstruction which aims at preventing only a particular class of persons from using the highway in a particular manner does not and cannot amount to public nuisance. Hence a person or a body of persons who claim a right to use a public highway in a particular way can bring a declaratory suit to establish that right against a person who threatens to obstruct it without allegation or proof of special damage. AIR (Vol 29) 1942 Cal 360: 75 CLJ 157: 46 Cal WN 261: ILR (1942) 1 Cal 533: 201 Ind Cas 488.

——S. 91 — **Suit by owner.**

No sanction of the Advocate-General under S. 91 is required for a suit by the owner for removal of the obstruction to the highway. AIR (Vol 29) 1942 Pesh. 1: 197 Ind Cas 856.

——S. 91 — **Representative suit by limited class of villagers for right of passage regarding rasta — Consent of Advocate-General — Proof of special damage.**

A representative suit by a limited class of villagers for right of passage regarding a rasta is maintainable without consent of Advocate-General and without proof of special damage. Under the general rule the consent of the Advocate-General is required in a suit with regard to a public right, but an action brought by a particular section is an exception to the general rule. AIR (Vol 27) 1940 Pat 160: 20 PLT 414: 6 BR 617: 188 Ind Cas 249.

——S. 91, O. 1, R. 8 — **S. 91 confers new right of suit — Obstruction to village pathway if public nuisance — Suit for removal of such obstruction — Whether can be brought without proof of special damage — S. 91, if overrules O. 1, R. 8.**

Section 91 takes away no existing right. It does confer a new right, and in express terms, namely, the right with the consent of the Advocate-General to sue for the removal of a public nuisance without proof of special damage. That is a right which could not exist independently of that section. The definition of public nuisance in S. 268, I.P.C., which is made applicable to the Civil Procedure Code under S. 3 (44) General Clauses Act, is wide enough to cover cases of obstruction to village pathways, though they may not be public highways in the full sense. It is possible, therefore, to bring a special suit under S. 91 with the consent of the Advocate-General for obstruction of a village pathway, and in the absence of any special damage. It is however not necessary to resort to the provisions of S. 91 if there is any independent right of suit for, having regard to the provisions of cl. (2), S. 91 takes away no independent right of suit which may exist, and it does not overrule the provisions of O. 1, R. 8 and take away any right of suit under O. 1. R. 8 even when it is a case of public nuisance. AIR (Vol 27) 1940 Pat 449: 19 Pat 208: 6 BR 894: 22 Pat LT 46: 190 Ind Cas 46.

——S. 91 — **Member of public, if can maintain action for removal of obstruction of public way without sanction of Advocate-General and without proof of special damage.**

The English rule requiring proof of special damage in cases in which a member of the public prays for the removal of an obstruction to public way does not apply to India.

Consequently, a person can maintain a suit for establishing a public right and for removal of obstruction which constituted a nuisance, without the sanction of the Advocate-General under S. 91, and without proof of special damage. AIR (Vol 26) 1939 Mad 691: (1939) 1 MLJ 392: 49 LW 334: (1939) MWN 259: ILR (1939) Mad 870: 186 Ind Cas 208.

——S. 91 — **Encroachment on public thoroughfare causing nuisance and inconvenience — Person residing opposite, whether entitled to have encroachment removed — Proof of and presumption as to, special damage.**

A person in the immediate neighbourhood and entitled to use a local public thoroughfare has a special cause of action and that irrespective of whether he has proved special damage or not. The real principle is, that a person of an imme-

diate community of section of the public who is deprived of the amenity provided for that particular section may be deemed to have suffered loss without proof of such loss. Consequently, a person residing on the opposite side is entitled to have the encroachment removed without proof of any special loss. He must be deemed to have suffered the loss from the inconvenience and the nuisance resulting from such encroachment. AIR (Vol 24) 1937 Pat 620: 18 PLT 737: 4 BR 87: 171 Ind Cas 933.

——S. 91 — Public nuisance — Road used as of right by public — Construction on it — Suit for removal of obstruction — Special damage not claimed — Permission of Advocate-General — Plaintiff, Muslim community, whether "public" — Penal Code, S. 268 — General Clauses Act, S. 3, cl. 44.

Making constructions upon a road which is used as of right by the public would constitute a public nuisance within the meaning of R. 91. Where, therefore, in an action for obstruction of a public highway the plaintiffs do not claim to have suffered any special damage, the suit is not maintainable without the permission of the Advocate-General under S. 91. The fact that the plaintiffs form only a Muslim community or the Muslims of the neighbourhood makes no difference for they are included in the word "public" which is used in the expression 'public nuisance'. AIR (Vol 23) 1936 Oudh 154: 1935 OWN 899: 157 Ind Cas 628.

——S. 91 — Lane serving as access to many houses — Suit by plaintiff for injunction to restrain encroachment — Absence of special damage.

Where a lane is admittedly open to use by the public highway the plaintiffs do not claim to have of the defendant and of the plaintiff, but also of two other persons, any encroachment on the lane may be a public nuisance, but unless there is special damage to the plaintiff, he is debarred from bringing a suit by the provisions of S. 91.

Where the plaintiff instituted a suit for injunctions against the defendant to compel him to close a door and window in his house and to remove a platform and never thereafter to reconstruct the same and the only inconvenience alleged by the plaintiff was that the privacy of his womenfolk was interfered with when they were in the lane, and he in common with other passers-by was inconvenienced by the structure which encroached upon the lane:

Held, that these inconveniences were not inconveniences affecting the plaintiff alone and not affecting other users of the lane and that the suit was misconceived and was barred by S. 91. AIR (Vol 22) 1935 Pesh 190: 160 Ind Cas 790.

——S. 91 (1) — Suit on behalf of one particular community for declaration that plaintiffs have a right to take a procession by a particular way — Sanction of Advocate-General, if necessary.

Section 91, sub-s. (1), Civil P.C., authorises two or more persons to sue with the previous consent of the Advocate-General in respect of a public nuisance, but there is nothing in S. 91 which confers a new right. If a right exists independently of that section, that right is not taken away; therefore, S. 91 confers no new right, and it does not take away any pre-existing right. A representative suit not brought on behalf of the public of a place but on behalf of a particular community forming part of it for removal of obstruction of a public way is not defective on the ground that previous consent of the Advocate-General has not been taken. AIR (Vol 21) 1934 All 941: 151 Ind Cas 263.

——S. 91 — Procession — Playing music in the vicinity of mosque — Right of suit.

When objection is taken to the taking out of a procession or of playing music in the vicinity of a mosque or temple, a civil suit lies for a declaration of the right to do so and such a suit can be brought either by individual plaintiffs against the individual defendants who object, or it may be of a representative character, the result of which will bind both the communities which are represented. AIR (Vol 18) 1931 All 341: (1931) ALJ 354: 53 All 484: 131 Ind Cas 40.

——S. 91 — What constitutes public nuisance.

Where the plaintiff would, every day and every hour of the day when he desired to leave his house by the entrance on a particular side be compelled to go the other way and travel at least 3 or 4 times as far and 3 or 4 times as fast if he were pressed for time,

Held, that that would amount to special damage or a more particular form of nuisance suffered by him than by the general public. The Court ought to consider, even although a particular form of nuisance is not capable of being translated into rupees and annas, whether it is a substantial grievance which constitutes a wrong peculiar to the plaintiff which is in the ordinary way Court of Justice would remove by granting an injunction. 85 Ind Cas 304: 46 All 470: 22 ALJ 729: 6 LRA Civ 67: AIR (Vol 11) 1924 All 599 (DB).

——S. 91 — Encroachment on village road.

An encroachment on a village road raises questions of the right of easement of the residents and proprietary right of the zamindars and S. 91 would not be applicable to issues which arise on encroachments being made on a road of this nature. A suit, therefore, lies without the permission of the Advocate-General. AIR (Vol 16) 1929 All 790.

——S. 91 — Public nuisance — Special damage — Consent of Advocate-General.

Where an obstruction to a public road causes a particular inconvenience of a substantial kind to the plaintiff, he can bring a suit to remove it without the consent of the Advocate-General. 117 Ind Cas 513: 53 Bom 187: 31 Bom LR 97: AIR (Vol 16) 1929 Bom 94 (DB).

——S. 91 — Suit for removal of encroachment — Public street — Proof of special damage.

Plaintiff filed a suit to have declaration that the land described in the plaint was street land and to obtain a mandatory order directing defendant to remove an otla made by him on the land.

Held, that such a suit at the instance of a private person is not maintainable unless he is able to show that he is unable to use the road, nor can he seek the assistance of the Court to get the otla removed, merely because he wants to walk over that portion of the street occupied by the otla, unless he proves special damage. 87 Ind Cas 934: 27 Bom LR 421: AIR (Vol 12) 1925 Bom 367 (DB).

——S. 91 — Village pathway — Obstruction — If public nuisance.

The public at large are not affected by the obstruction of a village pathway which only the villagers can use so that a suit for a declaration of their rights in respect of the pathway is not governed by S. 91, C.P.C. 46 Ind Cas 970: AIR (Vol 5) 1918 Cal 212 (DB).

——S. 91 — Nuisance — Public and private — Difference between — Right of suit — Obstruction to Procession of Hindu idol by Mahomedans — Individual right of suit.

A private action is not allowed for a public injury. The civil remedy against it, is a suit under

S. 91 but a private nuisance is actionable by the person injured by it. The general obstruction of a public thoroughfare, unless authorised by law, custom or contract, is a public nuisance for which a private suit is not allowed but to obstruct, annoy, or endanger a particular person or body of persons only, in his or their use of a public thoroughfare, may be a private nuisance, for which a private action may lie. Every class or community has a right to use the public streets for religious and musical processions, subject to the law against nuisances, and any wrongful attack on that right will give rise to a cause of action.

The procession of a certain Hindu idol along a particular road was obstructed by the members of a certain Mussalman mosque built on the road side. It was alleged on behalf of the idol that the procession was customary and lawful and the obstruction illegal. It was alleged on behalf of the mosque that the music, noise and disturbance caused by the procession was a nuisance to the worshippers in the mosque at the hour of prayer.

Held, that on this allegation each party was competent to bring a private suit for an injunction against the other. 12 NLR 130: 36 Ind Cas 534: AIR (Vol 3) 1916 Nag 81.

——S. 91 — Highway — Obstruction — Damage — Cause of action.

Obstruction of a way without any special damage can afford no cause of action to a member of the public.

Per Sundara Aiyar, J:—Special damage need not always be only pecuniary.

Per Sadasiva Aiyar, J:—Special damage should be something substantial and not mere pecuniary damage to the extent of four annas or eight annas. (1912) 23 MLJ 539: 12 MLT 491: (1913) MWN 991: 16 Ind Cas 962 (DB).

4. Pleadings.

——S. 91 — Special damage.

Where the plaintiff has pleaded that he would on account of proximity of his house to the land in dispute suffer in respect of light and air or damage and inconvenience beyond what is suffered by him in common with other persons of the locality, his suit cannot be thrown out in limine on the ground that it is not maintainable for want of a plea of special damage. AIR (Vol 36) 1949 Nag 314: ILR (1949) Nag 94: 1949 NLJ 499.

——S. 91 — Applicability — Application of section depends on form of pleading and relief claimed — Suit by particular section of public is maintainable without consent of Advocate-General.

The application of S. 91, Civil P. C., depends on the form of the pleading and the relief claimed. Consent of the Advocate-General is required in a suit for a declaration of a public right, but an action brought by a particular section of the public is an exception to the general rule.

Where, from the nature of the pleading and the form of the relief, it is clear that a nuisance complained of was an obstruction in the way of processionists who did not constitute the public as a whole but only a certain section of the public who were interested in a procession, the plaintiff, suing in a representative capacity, does not rest his case on the allegation of public nuisance as such but of a private nuisance. Consent of the Advocate-General under S. 91 is not, therefore, required for the maintainability of the suit. AIR (Vol 33) 1946 Nag 228.

——S. 91, O. 6, R. 17 — Pleadings — Suit by plaintiff for removal of wall — Plaint not averring special damage and basing claim on it — Plaintiff, held suffered special damage and it ought to have been averred in plaint — Amendment of plaint.

The plaintiffs instituted a suit for the issue of a mandatory injunction against the defendants requiring them to remove a wall which they had built close to the plaintiff's house. It was alleged that as the result of obstruction to the road caused by that wall which was six feet high and built across a public road, the plaintiffs were unable to approach their house from the left and the enjoyment of their property had been seriously interfered with. They did not state all this in the plaint, but left it to be inferred from a plan which they filed with the plaint:

Held, that the wall seriously interfered with the enjoyment of plaintiffs' house and they had, therefore, suffered special damage.

Held, further, that the plaintiffs were in error in not averring in their plaint that they had suffered special damage and making this the basis of their claim and they should be allowed to amend the plaint accordingly. AIR (Vol 28) 1941 Mad 669: 53 LW 728: 1941 MWN 637: (1941) 2 MLJ 105: 200 Ind Cas 369.

——S. 91 — Conditions for suit by one member — Plea of special damage — Proof of.

If the plaintiff relies on special damage in a suit to establish a public right, he must allege special damage in the plaint giving particulars and details of special damage which has accrued to him. The mere general allegation is not sufficient. AIR (Vol 13) 1926 Cal 549: 91 Ind Cas 728 (DB).

——S. 91 — Private individual — Particular damage — Damage must be direct and substantial.

To entitle a private individual to sue for a public nuisance, it must be shown that he seeks some particular damage beyond that suffered by the public and the particular damage must be both direct and substantial. (1903) 5 Bom LR 116 (117) (DB).

5. Public nuisance.

See also N. 3.

——S. 91, O. 1, R. 8 — Essence of public nuisance — Suit by party wanting to use highway in particular way against rival party.

A suit by one party who wants to use the highway in a particular way against a rival party who would obstruct them in the use of the same, is not a suit relating to public nuisance. The essence of a public nuisance is that it causes damage, injury or annoyance to the public or to the people in general. An obstruction which aims at preventing only a particular class of persons from using the highway in a particular manner does not and cannot amount to public nuisance. Hence a person or a body of persons who claim a right to use a public highway in a particular way can bring a declaratory suit to establish that right against a person who threatens to obstruct it without allegation or proof of special damage. AIR (Vol 29) 1942 Cal 360: 75 CLJ 157: 46 CWN 261: ILR (1942) 1 Cal 533: 201 Ind Cas 488.

——S. 91, O. 1, R. 8 — S. 91 confers now right of suit — Obstruction to village pathway, if public nuisance — Suit for removal of such obstruction — Whether can be brought without proof of special damage — S. 91, if overrules O. 1, R. 8.

Section 91 takes away no existing right. It does confer a new right, and in express terms, namely, the right with the consent of the Advocate-General to sue for the removal of a public nuisance without proof of special damage. That is a right which could not exist independently of

that section. The definition of 'public nuisance' in S. 268, I. P. C., which is made applicable to the Civil Procedure Code under S. 3 (44) General Clauses Act, is wide enough to cover cases of obstruction to village pathways, though they may not be public highways in the full sense. It is possible, therefore, to bring a special suit under S. 91 with the consent of the Advocate-General for obstruction of a village pathway, and in the absence of any special damage. It is however not necessary to resort to the provisions of S. 91 if there is any independent right of suit for, having regard to the provisions of Cl. (2), S. 91 takes away no independent right of suit which may exist, and it does not overrule the provisions of O. 1, R. 8 and take away any right of suit under O. 1, R. 8 even when it is a case of public nuisance. AIR (Vol 27) 1940 Pat 449: 19 Pat 208: 6 BR 894: 22 Pat LT 46: 190 Ind Cas 46.

——S. 91 — Right of way claimed not public highway but right of way claimed by section of public.

Section 91, Civil P. C., applies to public nuisances which affect public rights, such as a public highway. Where the right of way in dispute is not a public highway but is a right of way which is claimed by only a section of the public, S. 91 has no application and does not bar a suit by a person in his personal capacity for personal relief. AIR (Vol 26) 1939 All 586: (1939) ALJ 821: 1939 RD 390: ILR (1939) All 754: 1939 AWR 515: 184 Ind Cas 620.

——S. 91 — Construction of channel through village site — Whether public nuisance — No special damage — Remedy for abatement.

Construction of a channel through village site is nothing more than a common nuisance and unless special damages are shown, the only manner in which a common nuisance can be abated is by a suit to be brought under S. 91 with the permission of the Advocate-General. AIR (Vol 25) 1938 Mad 338: (1938) MWN 262: 177 Ind Cas 633.

——S. 91 — Taking of Granth Sahib to a cremation ground if public nuisance.

The taking of the Granth Sahib to the cremation grounds does not amount to a public nuisance. AIR (Vol 24) 1937 Pesh 81: 173 Ind Cas 813.

——S. 91 — Obstruction to public road.

Making constructions upon a road which is used as of right by the public would constitute, a public nuisance within the meaning of S. 91. AIR (Vol 23) 1936 Oudh 154: 1935 OWN 899: 157 Ind Cas 628.

——S. 91 — What constitutes public nuisance.

Where the plaintiff would, every day and every hour of the day when he desired to leave his house by the entrance on a particular side be compelled to go the other way and travel at least 3 or 4 times as far and 3 or 4 times as fast if he were presented for time.

Held, that that would amount to special damage or a more particular form of nuisance suffered by him than by the general public. The Court ought to consider, even although a particular form of nuisance is not capable of being translated into rupees and annas, whether it is a substantial grievance which constitutes a wrong peculiar to the plaintiff which in the ordinary way Court of Justice would remove by granting an injunction. AIR (Vol 11) 1924 All 599: 85 Ind Cas 304: 46 All 470: 22 All LJ 729: 6 LRA Civ 67 (DB).

——S. 91 — Right of easement — Suit for — No relief for nuisance — Maintainability

No relief was sought in respect of the public nuisance though the plaintiff's witnesses described the place by such expression as Shah-i-am and where a relief in respect of a right of easement was claimed.

Held, there can be no declaration that the place in suit is a public thoroughfare and has been obstructed as such. AIR (Vol 10) 1923 Lah 546: 73 Ind Cas 616 (DB).

——S. 91 — Constructive public nuisance — Power of Advocate General to file a suit.

Though constructive public nuisance, meaning that it is wrong only because it contravenes some provision of Act does not fall under S. 91, the Advocate General has special power to take action in respect of such class of nuisance; he is to proceed either against the offending local authority or to help the local authority, where its power is inadequate. The jurisdiction of Advocate-General cannot be questioned by Court simply because the matter of suit is trifling but it can, in vexatious suits, ask him to reconsider whether he would proceed. (1910) 12 Bom LR 274: 5 Ind Cas 213.

——S. 91 — Killing of cows by Mahomedans — Custom.

Under certain limitations the slaughtering of kine by Mahomedans is not illegal. It is the legal right of every person to make such use of his own property as he may think fit, provided that, in so doing he does not cause real injury to others or offend against the law, even though he may thereby hurt the susceptibilities of others. The right of Mahomedans to slaughter kine is one to which they are legally entitled irrespective of custom, and it is only when they abuse the right that its exercise can be interfered with. (1908) AWN 64: 5 ALJ 147: 7 Cri L Jour 381: 30 A 181 (187) (DB).

6. Scope and applicability.

——S. 91 — Village pathway.

S. 91 is not applicable to the case of an obstruction on a village road which is used by the villagers as means of passage. Unless it is proved to be a public pathway there, there would be no public nuisance and S. 91 will not apply. AIR (Vol 34) 1947 Oudh 204: 230 Ind Cas 334: 1947 OWN 142.

——S. 91 — Application of S. 91 depends on the form of pleadings and relief claimed. AIR (Vol 33) 1946 Nag 228.

——S. 91 — Applicability — Application of section depends on form of pleading and relief claimed — Suit by particular section of public is maintainable without consent of Advocate-General.

The application of S. 91 Civil P.C., depends on the form of the pleading and the relief claimed. Consent of the Advocate-General is required in a suit for a declaration of a public right, but an action brought by a particular section of the public is an exception to the general rule. AIR (Vol 33) 1946 Nag 228.

——S. 91 — Proof of special damages, when necessary — Encroachment on public road withdrawing part of highway from use of public — Private individual, when can maintain action — Special damage, if can be presumed.

A private individual has no right of action in respect of a public nuisance such as an encroachment upon the public road which has the effect of withdrawing a part of the highway from the use of the public unless he can show that he has sustained some special damage over and above that inflicted upon the public at large, the object being to avoid multiplicity of litigation. Hence,

if the suit by a person seeking relief in respect of a public nuisance is not brought in conformity with the provisions of S. 91 (1), Civil Procedure Code, it is bound to fail unless special damage is shown.

The fact that the roadway in front of the plaintiff's house has been narrowed by encroachment would not justify a presumption of special damage in favour of the plaintiff. AIR (Vol 29) 1942 Cal 360: 75 CLJ 157: 46 CWN 261: ILR (1942) 1 Cal 533: 201 Ind Cas 488.

——S. 91, O. 1, R. 8 — S. 91 confers new right of suit — Obstruction to village pathway, if public nuisance — Suit for removal of such obstruction — Whether can be brought without proof of special damage — S. 91, if overrules O. 1, R. 8.

Section 91 takes away no existing right. It does confer a new right, and in express terms, namely, the right with the consent of the Advocate-General to sue for the removal of a public nuisance without proof of special damage. That is a right which could not exist independently of that section. The definition of 'public nuisance' in S. 268, I.P.C., which is made applicable to the Civil Procedure Code under S. 3 (44), General Clauses Act, is wide enough to cover cases of obstruction to village pathways, though they may not be public highways in the full sense. It is possible, therefore, to bring a special suit under S. 91 with the consent of the Advocate-General for obstruction of a village pathway, and in the absence of any special damage. It is however, not necessary to resort to the provisions of S. 91 if there is any independent right of suit, for, having regard to the provisions of Cl. (2), S. 91 takes away no independent right of suit which may exist, and it does not overrule the provisions of O. 1, R. 8 and take away any right of suit under O. 1, R. 8 even when it is a case of public nuisance. AIR (Vol 27) 1940 Pat 449: 19 Pat 208: 6 BR 894: 22 PLT 46: 190 Ind Cas 46.

——S. 91 — Action by particular section of public.

As a general rule consent of Advocate-General is required in a suit with regard to a public right, but an action brought by a particular section of public is an exception to the general rule. AIR (Vol 27) 1940 Pat 160: 20 PLT 414: 6 BR 617: 188 Ind Cas 249.

——S. 91 — All members of public suffering damage — Action by an individual — Maintainability.

Where all members of the public have suffered inconvenience or damage, an action by an individual will not lie excepting as indicated by S. 91 of the Civil P.C. AIR (Vol 24) 1937 Pat 481: 3 BR 382: 16 Pat 190: 18 PLT 459: 167 Ind Cas 798.

——S. 91 — Encroachment on private easement.

Where the case is clearly not one of public nuisance but one of an encroachment on a private easement, sanction under S. 91 is not necessary. AIR (Vol 22) 1935 All 789: 1935 AWR 92: 153 Ind Cas 704.

——S. 91 — Encroachment on village road.

An encroachment on a village road raises questions of the right of easement of the residents and proprietary right of the zamindars and S. 91 would not be applicable to issues which arise on encroachments being made on a road of this nature. A suit, therefore, lies without the permission of the Advocate-General. AIR (Vol 16) 1929 All 790.

——S. 91 — Section merely procedural.

——S. 91 is a provision for procedure. It does not purport to create a right which did not exist before nor does it purport to deprive anybody of a right derived from the general law of the land. It is not a prohibitive section which prevents a person from asserting a right except in a particular way. 85 Ind Cas 304: 46 All 470: 22 ALJ 729: 6 LRA Civ 67: AIR (Vol 11) 1924 All 599 (DB).

——S. 91 — Scope of — S. 33 of Calcutta Municipal Act, if controls.

S. 33 of the Calcutta Municipal Act does not control S. 91 of C.P.C. and any two persons may, under the latter section, sue for the removal of a public nuisance, though situated within a Municipality. 21 CWN 595: 40 Ind Cas 74: AIR (Vol 5) 1918 Cal 497 (DB).

——S. 91 — Public and Private nuisance — Difference.

A private action is not allowed for a public injury. The civil remedy against it, is a suit under S. 91 but a private nuisance is actionable by the person injured by it. 12 NLR 130: 36 Ind Cas 534: AIR (Vol 3) 1916 Nag 81.

7. **Special damage.**
   See N. 3 and 8.

8. **Sub-section (2).**
   See also N. 3.

——S. 91 — Suit in respect of public nuisance — Plaintiff pleading special damage — Consent of Advocate-General not obtained — Suit, if maintainable.

A suit seeking relief in respect of public nuisance is maintainable although sanction of the Advocate-General has not been obtained as required by S. 91, C. P. Code, if the plaintiff proves special damage. Special damage is that damage which by reason of a nuisance would be suffered by some individual beyond what is suffered by him in common with other persons affected by that nuisance. Where the plaintiff has pleaded that he would on account of proximity of his house to the land in dispute suffer in respect of light and air a damage and inconvenience beyond what is suffered by him in common with other persons of the locality, his suit cannot be thrown out in limine on the ground that it is not maintainable for want of a plea of special damage. ILR (1949) Nag 94: AIR (Vol 36) 1949 Nag 314: 1949 NLJ 499.

——S. 91 (1) — Suit in a representative capacity in respect of an obstruction to a village cart track — Proof of special damage — Necessity.

Where the plaint filed in a suit in a representative capacity by some of the villagers in respect of an obstruction to the village cart track leaves no manner of doubt that according to the plaintiffs the path is a quasi public type in which only the people of the particular village and the adjoining villages are interested, the plaintiffs could very well frame their suit in accordance with the provisions of O. 1, R. 8, C. P. Code. The principle governing such a case is that a person of an immediate community or section of the public who is deprived of the amenity provided for that particular section may be deemed to have suffered loss without proof of such loss. No special damage need be proved in such a case. It will suffice if it is shown that a particular section of the public has been deprived of certain advantages which it has enjoyed so long. 29 PLT 165: AIR (Vol 35) 1948 Pat 183 (DB).

——S. 91 — Scope — Representative suit on behalf of Hindu Community — Consent of Advocate-General — If necessary.

Under S. 91, C.P. Code, the consent of the Advocate-General is required only for a suit for a declaration of a public right, but an action brought by a particular section of the public is an exception to the general rule. Therefore a suit by a Hindu as a representative of the Hindu community for a declaration of their right to take a

procession along a certain public road and for an injunction restraining the defendants from obstructing the procession, is maintainable without the consent of the Advocate-General. ILR (1946) Nag 246: 223 Ind Cas 486: 1946 NLJ 223: AIR (Vol 33) 1946 Nag 228.

——S. 91, O. 1, R. 8 — Public nuisance — Suit by private individual — Necessity to prove special damage.

If a person has not in himself the right to sue, he cannot be permitted to sue, not only on behalf of himself, but also on behalf of a number of others who suffer from the same disability as himself. Hence, since an individual has no right of action in respect of a public nuisance without proof of special damages, the adoption of the procedure laid down in O. 1, R. 8 cannot vest in him with such right and the necessity of proving special damage cannot be obviated by bringing the suit under O. 1, R. 1. AIR (Vol 29) 1942 Cal 360: 75 CLJ 127: 46 CWN 261: ILR (1942) 1 Cal 533: 201 Ind Cas 488.

[Overrules (1935) 62 Cal 692 : 39 CWN 590.]

——S. 91, O. 1, R. 8 — Essence of public nuisance — Suit by party wanting to use highway in particular way against rival party.

A suit by one party who wants to use the highway in a particular way against rival party who would obstruct them in the use of the same, is not a suit relating to public nuisance. The essence of a public nuisance is that it causes damage, injury or annoyance to the public or to the people in general. An obstruction which aims at preventing only a particular class of persons from using the highway in a particular manner does not and cannot amount to public nuisance. Hence a person or a body of persons who claim a right to use a public highway in a particular way can bring a declaratory suit to establish that right against a person who threatens to obstruct it without allegation or proof of special damage. AIR (Vol 29) 1942 Cal 360: 75 CLJ 157: 46 Cal WN 261: ILR (1942) 1 Cal 533: 201 Ind Cas 488.

——S. 91 — No special damage.

The fact that the roadway in front of the plaintiff's house has been narrowed by encroachment would not justify a presumption of special damage in favour of the plaintiff. Therefore a suit not in conformity with S. 91 is bound to fail unless special damage is shown. 75 CLJ 157: 46 CWN 261: ILR (1942) 1 Cal 533: 201 Ind Cas 488: AIR (Vol 29) 1942 Cal 360.

——S. 91 — Modes of escape from special restrictions of S. 91.

There are clearly two modes of escape from the special restrictions of S. 91: (1) by proof of special damage: and (2) by proof of the invasion of the special rights of a limited class which will give an independent right of action. AIR (Vol 27) 1940 Pat 449: 19 Pat 208: 6 BR 894: 22 PLT 46: 190 Ind Cas 46.

——S. 91 — Doctrine of special damage.

The doctrine of special damage which is based on the principle of English law that there can be no private action for a public wrong, does not apply to cases of quasi public rights, such as village roads, and where the plaintiff sues either for himself as a member of the limited class of persons having special rights in common, or on behalf of that limited class in a representative suit under O. 1, R. 8 for infringement of those rights. AIR (Vol 27) 1940 Pat 449: 19 Pat 208: 6 BR 894: 22 PLT 46: 190 Ind Cas 46.

——S. 91, O. 1, R. 8 — S. 91 confers new right of suit — Obstruction to village pathway, if public nuisance — Suit for removal of such obstruction — Whether can be brought without proof of special damage — S. 91, if overrules O. 1, R. 8.

Section 91 takes away no existing right. It does confer a new right, and in express terms, namely, the right with the consent of the Advocate-General to sue for the removal of a public nuisance without proof of special damage. That is a right which could not exist independently of that section. The definition of 'public nuisance' in S. 268, I.P.C., which is made applicable to the Civil Procedure Code under S. 3 (44) General Clauses Act, is wide enough to cover cases of obstruction to village pathways, though they may not be public highways in the full sense. It is possible, therefore, to bring a special suit under S. 91 with the consent of the Advocate-General for obstruction of a village pathway, and in the absence of any special damage. It is however not necessary to resort to the provisions of S. 91 if there is any independent right of suit for, having regard to the provisions of Cl. (2), S. 91 takes away no independent right of suit which may exist, and it does not overrule the provisions of O. 1, R. 8 and take away any right of suit under O. 1, R. 8 even when it is a case of public nuisance. AIR (Vol 27) 1940 Pat 449 : 19 Pat 208: 6 BR 894: 22 Pat LT 46: 190 Ind Cas 46.

——S. 91 — Effect of section on O. 1, R. 8.

S. 91 does not control or restrict the provisions of O. 1, R. 8, and therefore it does not take away the right of the plaintiffs to sue which may exist independently of its provisions. 88 Ind Cas 505: AIR (Vol 12) 1925 Cal 1233 (DB).

——S. 91 — Public nuisance — Damage — Proof.

In a suit by a private person for the removal of public nuisance, he must prove special damage to himself. Special degree of inconvenience, suffered by him cannot be said to cause him damages. 48 Ind Cas 88: AIR (Vol 5) 1918 Nag 159.

——S. 92.

See also Civil P.C., O. 1, R. 8.

1. **Abatement.**
2. **Accounts.**
3. **Appeal.**
   See also Notes 1 and 7.
4. **Applicability and scope.**
   See also Note 22.
5. **Appointment of trustee.**
6. **Arbitration.**
7. **Compromise.**
8. **Construction.**
   See also Note 12.
9. **Costs.**
10. **Co-trustees.**
11. **Court-fee.**
12. **Interpretation.**
    See also Note 8.
13. **Jurisdiction.**
14. **Limitation.**
15. **Nature of trust.**
16. **Onus.**
17. **Parties.**
    See also Note 23.
18. **Relief.**
19. **Removal of trustee.**
20. **Revision.**
21. **Right to sue.**
22. **Sanction.**
    See also Note 3.
23. **Scheme.**
    See Civil P.C. S. 47.
24. **Strangers.**
24A. **Suit, maintainability of.**
    See Notes 4, 18 and 19.
25. **Trespasser.**
    See Note 24.
26. **Trustee de son tort.**

1. Abatement.

——S. 92 and O. 22, R. 9 — Abatement of suit under S. 92 — Bar of fresh suit.

Where a suit under S. 92 of the C.P. Code has been allowed to abate as against a defendant by the plaintiffs therein, there is nothing in law which can bar either the idol or the present trustees from bringing a fresh suit. ILR (1946) All 305: 222 Ind Cas 463: 1946 ALJ 94: 1946 ALW 15: 1946 OWN (H.C.) 15: 1946 AWR (H.C.) 61: AIR (Vol 33) 1946 All 254 (DB).

——S. 92 — Where one of the appellants in a suit under S. 92, Civil P. C., dies and no legal representative is substituted, no abatement of appeal is caused. AIR (Vol 31) 1944 Oudh 289: 219 Ind Cas 39: 1944 OWN 213: 1944 AWR 147.

——S. 92 — A suit under S. 92, or an appeal in such a suit does not abate on the death of some of the plaintiffs, and there may be some ground to hold that on the death of some of the plaintiffs, the remaining can appeal from the decree; but there is no authority for the proposition that some of the persons who have obtained leave can either institute a suit or can present an appeal when the remaining persons are alive and have not concurred either in the institution of the suit or in the presentation of the appeal. AIR (Vol 22) 1935 Lah 251: 16 L 782: 158 Ind Cas 465.

——S. 92, O. 22, R. 1 — Suit for removal of defendant and framing of scheme for trust — Defendant contending trust to be private — Cause of action, if survives to sons of defendants on his death.

Where, in a suit under S. 92, the question is whether the property in suit is a public trust or a private trust, and the defendant contends that it is a private trust, so far as this question is concerned, his sons are his legal representatives and the cause of action survives against them on his death. It is open to them to say that the suit should fail on the ground that the trust was not a public trust. AIR (Vol 21) 1934 All 315: 4 AWR 565: 1934 ALJ 531: 148 Ind Cas 882.

——S. 92 — Death of one of the original plaintiffs.

Where a suit has been properly instituted according to S. 92, there is nothing in that section which says that the suit cannot be continued if one of the original plaintiffs who instituted the suit in the manner laid down by law happens to die. AIR (Vol 21) 1934 All 1: 149 Ind Cas 849: 1933 ALJ 1333: 55 All 687:

[AIR (V 2) 1915 All 59 : 37 All 298 : 28 Ind Cas 686 and AIR (V 2) 1915 All 51 held overruled by AIR (V 8) 1921 PC 123.]

——S. 92 — Suit for removal of trustee and framing scheme — Death of trustee pending suit — Effect of.

In a suit under S. 92, C. P. Code, for removal of the defendant-Pandara Sannadhi and framing a scheme, the death of the defendant pending the suit does not cause the whole suit to abate. In order to justify a suit for a scheme under S. 92, it is necessary for the plaintiff to allege a breach of trust and a prayer for a scheme is therefore not ancillary to a prayer for the removal of the trustee and the cause of action survives against the representative of the deceased. 48 Mad 688: 22 MLW 130: 1925 MWN 569: 91 Ind Cas 109: AIR (Vol 13) 1926 Mad 162: 49 MLJ 324 (DB).

——S. 92 — Death of one of the plaintiffs — Effect of.

Although one of the plaintiffs obtaining the sanction for instituting the suit dies, a suit under S. 92 or an appeal therefrom does not abate. 85 Ind Cas 666: 20 MLW 882: AIR (Vol 12) 1925 Mad 244: 47 MLJ 745 (DB).

——S. 92 — Abatement of suit — Death of plaintiff.

The death of one of the plaintiffs who have obtained sanction in a scheme suit does not cause abatement of the suit. AIR (Vol 5) 1918 Lah 146: 97 PR 1918: 173 PWR 1918: 47 Ind Cas 983.

——S. 92 — Abatement of suit — Death of defendant.

Where during the pendency of the suit against a trustee for his removal on the ground of mismanagement, breach of trust, for settlement of a scheme and appointment of committee of supervision, the defendant died:

Held that the cause of action survived against the successor in office in as much as the plaint contained among various averments, the allegation that the successor has also contributed to the previous mismanagement in his character of the agent of the deceased trustee. 28 MLJ 174: 2 LW 148: (1915) MWN 185: 27 Ind Cas 874: AIR (V 3) 1916 Mad 318 (DB).

(The same view was taken in (1921) MWN 24: 13 LW 318: AIR (Vol 8) 1921 PC 123).

——S. 92 — Abatement of suit — Suit against trustee — Death of one plaintiff — Fresh sanction.

S. 92 is not mandatory but is permissive and directory. It is necessary for the continuance of the suit that there should be at least two plaintiffs. If one representative dies, it is open to another member of the public interested in the trust to take his place after obtaining necessary sanction. In a suit under the section one of the plaintiffs died. Another applied to be brought on record.

The Court dismissed the suit as the applicant was not the legal representative of the deceased. Held, the Court ought to have given the applicant time to get the sanction required and for showing that he was a person interested in the trust and on proof of these two qualifications, the Court should make him a co-plaintiff. 37 All 296: 13 ALJ 379: 28 Ind Cas 681: AIR (Vol 2) 1915 All 59.

2. Accounts.

——S. 92 — Liability to account — Moneys not belonging to institution — Right to claim account.

In a suit under S. 92, C. P. Code, the defendant cannot be made liable to account for moneys which do not belong to the institution. 225 Ind Cas 554: 12 BR 568: 1946 ALJ 382: 1946 OA (PC) 171: 1946 AWR (PC) 171: AIR (Vol 33) 1946 PC 100: ILR (1946) Kar (PC) 87: 81 CLJ 306.

——S. 92 — District Judge, when an office of 'mutawalli' of 'wakf' has fallen vacant, has power in the proper circumstances to make an appointment to fill the vacancy but he has no general power to remove the 'mutawalli' in miscellaneous proceedings on an application by one of the beneficiaries his powers in this respect being limited and defined by Ss. 18 and 14, Religious Endowments Act, 1863, and S. 92, Civil P. C., nor has he power in such proceedings to require the 'Mutawalli' of a private endowment to render accounts. AIR (Vol 25) 1938 Pat 537: 5 BR 143: 19 PLT 934: 178 Ind Cas 813.

——S. 92 — Charitable Trust — Order of Court to file accounts — Breach of — Applicability.

When the order of the District Judge for filing of accounts under S. 5, Charitable and Religious Trusts Act, has not been complied with there is a breach of trust, by virtue of S. 6, which could be made the basis of a suit under S. 92, C. P. Code. Once such a suit is filed, the District Judge has jurisdiction to grant any or all the reliefs mentioned in S. 98 (1), C. P. Code. AIR (Vol 17) 1930 All 582 (DB).

——S. 92 — The provisions of S. 92 are wide enough to entitle the Court to direct an account against a trustee and to make an order on him to pay the amount found to be due on the taking of those accounts. 100 Ind Cas 841: 38 MLT 143: 1927 MWN 202: AIR (Vol 14) 1927 Mad 416: 52 MLJ 182 (DB).

——S. 92 — Suit for, with directions as to funds — Applicability.

Where the plaint asked that accounts should be taken with reference to trust property received by some of the defendants and further in effect it also asked for directions as to what should be done with trust funds where the prayer of the plaintiffs was that the funds should go to the plaintiffs and some other defendants, and it was further prayed that if the funds could not be allowed to go to them at least a direction might be given that they should be allowed to retain the funds for the benefit of the temple.

Held, that the case was within S. 92. 26 Bom LR 950: 86 Ind Cas 490: AIR (Vol 11) 1924 Bom 518 (DB).

——S. 92 — Suit for accounts by co-trustee — Applicability to.

S. 92 was intended to govern suits by the public or by the Advocate-General, for the vindication of the rights of the public in charitable trusts, i.e., to govern representative suits brought for the benefit of the public to enforce a public right in respect of an express or constructive trust and do not apply to suits brought by persons to remedy a particular infringement of their own individual right.

The correct principle is that S. 92 governs suits for vindication of the rights of the public in public charitable trusts and has no application to suits for the vindication of the rights of management by hereditary trustees or to disputes between such trustees 'inter se', as to their turns of management.

Two conditions have to be satisfied for the application of S. 92, (1) the suit should be one for the vindication of the rights of the general public in the charitable trust and (2) the relief should be all or any of the reliefs enumerated in clauses (a) to (h) in sub-section (1). 69 Ind Cas 304: 45 Mad 113: 15 MLW 18: 30 MLT 1: 1921 MWN 833: AIR (Vol 9) 1922 Mad 17: 41 MLJ 608 (FB).

——S. 92 — Suit by trustees against co-trustee — Applicability.

A suit by trustees against a co-trustee for directing the defendant to submit his accounts and to pay up whatever may be found as the balance in his hands on the scrutiny of the accounts falls under cl. (1) and cannot be instituted except in conformity with cl. (1). 66 Ind Cas 837: 16 MLW 155: 1922 MWN 83: AIR (Vol 8) 1921 Mad 696 (DB).

——S. 92 — Suit by general trustee against Kattalaidar — Sanction if necessary.

A suit was brought by the general trustee of a temple against a subordinate trustee or Kattalaidar for the recovery of the balance of the amount due by defendant under the terms of his trust and not paid by him to the temple.

Held, that the amount not being an ascertained one and having to be determined by enquiry in the suit, the case was within the mischief of S. 92 (d), C. P. Code, and the suit was bad for want of the sanction required by that section. If it be sought to recover it by way of damages, then the suit falls under S. 14 of the Religious Endowments Act, and is bad for want of the sanction required by S. 18 of the same. 14 MLW 238: AIR (Vol 8) 1921 Mad 479: 62 Ind Cas 911 (FB).

——S. 92 — Suit by trustee against dismissed servant — Applicability.

A suit by a trustee against a person whom he alleges to have lawfully dismissed is none the less outside the scope of S. 92 because it asks for an account of the trust money received and payment of the amount due. 62 Ind Cas 761: 14 MLW 38: 1921 MWN 439: AIR (Vol 8) 1921 Mad 403 (DB).

——S. 92 — Mandatory provision — Suit for accounts against trustee — Necessity for sanction — Trustee in possession under a compromise of a litigation.

The provisions of S. 92 of the C. P. Code are mandatory. It is not merely the right of the plaintiff that has to be looked to but also the nature of the relief which the plaintiff seeks and if the relief asked for is one which is specified in sub-section (1) the direction laid down in the section must be obeyed. A suit by a plaintiff for accounts from the defendants who were managing certain 'wakf' property as trustees under a compromise comes within S. 92, C. P. C. 49 Ind Cas 530: AIR (Vol 6) 1919 All 203 (DB).

——S. 92 — Accounts — Trustee — Power to order.

S. 92, C. P. C., is quite wide enough to entitle the Court to direct an account against a trustee and to order him to pay the amount found due upon taking those accounts. 28 Ind Cas 886: AIR (Vol 2) 1915 All 69 (DB).

3. Appeal.

See also N. 1 and 7.

——S. 92 — Suit found to be in respect of public trust — Finding supported by evidence must be upheld in appeal.

A trial Court's finding that the suit is in respect of a public trust when supported by the materials on the record must be upheld in appeal. AIR (Vol 29) 1942 Cal 343: ILR (1942) Cal 211: 46 CWN 59: 201 Ind Cas 248.

——Ss. 92, 104, 47, 115, O. XLIII — Suit under S. 92 — New Mahant appointed, scheme of management framed and committee appointed — In case of doubt, difficulty or disagreement with regard to any work connected with shrine or its property and for making alterations in scheme. Mahant and committee given right of applying to District Judge, in suit itself — Suit kept pending for aforesaid purposes — Application by Mahant — District Judge interpreting scheme and deciding general questions concerning rights of parties and leaving some points to be decided by parties themselves — Order did not fall under S. 47 nor under S. 104 or O. XLIII — Order held decree and hence appealable — Also revisable under S. 115 (c).

In a suit under Section 92, Civil P. C., the Court appointed a new Mahant for the public endowment, framed a scheme of management and appointed a committee. Paras 17 and 18 of the scheme were as follows: 17— On the occasion of any doubt, difficulty or disagreement in regard to any work connected with the shrine or its property, it will be competent to the Mahant or the committee to apply to the District Judge for his directions. 18 — If in future it is found necessary to make any alterations in the scheme it will be competent to the District Judge to do the same upon an application in this suit by the Mahant or the committee. The scope of the suit was enlarged and was kept pending. In exercise of the right, the Mahant applied to the District Judge who passed an order interpreting the

scheme and deciding the general questions which concerned the rights of the parties before him i. e. the applicant Mahant and the members of the committee, the opposite parties. All the points, which were raised in the application which fell within para. 17, however, were not decided. Some of them were left to be decided by the parties themselves:

Held, that the right of appeal was a creature of statute. When no such right was expressly given by the statute it did not exist. An order interpreting a scheme framed in a suit instituted under Section 92, Civil P. C. or giving directions for carrying out the provisions of the scheme could not be regarded as an order passed in execution, that is, under S. 47, Civil P. C. The appeal would be incompetent, as it was not an order made under Section 47 nor an order specified in Section 104 or O. XLIII, of the Code.

Held, however, that the order amounted to a decree within the meaning of Section 2, Civil P. C. and hence was appealable because (1) it decided once for all the general questions concerning the rights of the parties to the application; (2) the order must be taken to have been passed in the suit which was kept pending for the purpose of enabling the Mahant and the committee to apply for direction under para. 17 of the scheme and for modification of the scheme under paragraph 18; (3) the order passed by the District Judge modifying the scheme on an application made under Paragraph 18 would be a decree. A new suit under Section 92, Civil P. C., would lie for the alteration of a scheme and an order altering the scheme in such a suit would be a decree. Hence as soon as an application under paragraph 18 was made by the Mahant or the members of the committee, he or they automatically became parties to the suit without the formality of an order under Order I, Rule 10. The language of para 17 closely follows the language of para. 18 and the Mahant and the members of the committee must be regarded as parties to the suit as soon as an application under the former paragraph was made by one with the other or others as opposite parties:

Held, further, that assuming the appeal to be incompetent, the alternative application in revision was maintainable. The District Judge did not give his decision on all the points which he was asked to decide and which fell within paragraph 17 of the scheme, but left them to be decided by the parties. This brought the case within Clause (c) of Section 115, Civil P. C., if not within Cl. (b). The High Court in revision was competent to consider not only the points not decided by the District Judge but also those which were decided by him inasmuch as a consideration of the former necessarily involved the consideration of the latter. AIR (Vol 28) 1941 Cal 618: 73 CLJ 532: 199 Ind Cas 841: .

——S. 92 — Framing of scheme may involve removal or appointment of trustee.

Framing a scheme for the management of an institution may or may not involve the appointment of new trustees or the removal of existing trustees. AIR (Vol 28) 1941 Bom 317: 43 Bom LR 706: ILR (1941) Bom 556: 196 Ind Cas 826.

——S. 92 — Point that suit instituted under section was not validly instituted as it was not instituted by all those to whom consent was given, when can be raised for first time in appeal.

If the facts are in dispute, the point that the suit was not instituted by all those to whom consent was given to institute the suit by the Collector under Section 92 read with Section 93, and therefore, was not validly instituted, should not be allowed for the first time in appeal. But where there is no dispute about the facts, the point can be allowed to be raised for the first time in appeal. AIR (Vol 28) 1941 Sind 88: ILR (1941) Kar 204: 194 Ind Cas 461.

——S. 92 — One of several plaintiffs, if can file appeal.

Where the consent in writing of the Advocate-General or Collector has been given to a suit by three persons as plaintiffs, the suit cannot validly be instituted by two only. The suit, as instituted, must conform to the consent. On the other hand, if the three persons join as plaintiffs and two of them die pending suit, the suit does not become defective or incompetent. There is no provision whatever in the Civil P. C. for recourse being had to the Advocate-General or Collector during the course of a suit or of any proceedings in appeal.

As sub-section (2) of Section 92 sufficiently shows, the consent in writing is a condition of the valid institution of a suit and has no reference to any other stage. When once validly instituted, it is a representative suit subject to all the incidents affecting suits in general and representative suits in particular.

The persons who have instituted the suit with the leave of the Collector cannot be deemed to be one plaintiff and one of several plaintiffs in such a suit can appeal on the same terms and conditions as are applicable to suits in general. AIR (Vol 25) 1938 PC 184: 1938 AWR 131: 4 BR 593: 42 CWN 845: 67 CLJ 266: 40 PLR 740: (1938) 2 MLJ 1: 48 LW 1: (1938) MWN 757: 1938 OWN 698: ILR (1938) Lah 383: (1938) ALJ 825: 65 IA 198: 40 Bom LR 835: 32 SLR 749: 174 Ind Cas 873.

[Reversing the view of Jailal J. in AIR (V 22) 1935 Lah 251.]

——S. 92 — Orders passed merely for carrying out scheme.

Where orders are passed merely for carrying out the scheme, they are orders in execution, and appeals lie from such orders under Section 47. AIR (Vol 25) 1938 Rang 363: 177 Ind Cas 919.

——S. 92 — Question whether suit falls under Section 92 is mixed one of fact and law — All material facts on record — Question whether such facts do or do not show the trust to be a trust within the meaning of Section 92 is question of law which can be taken at any time. AIR (Vol 24) 1937 Sind 230: 31 SLR 510: 171 Ind Cas 344.

——S. 92 — Death of one plaintiff — Held, appeal can be prosecuted by surviving plaintiffs — Muhammadan Law — Religious Endowment — Suit for removal of mutawalli.

Where, in a representative suit for declaration by the residents of a village, the defendant appealed but in the meantime he died and one of the plaintiffs also died.

Held, that as the suit had been brought in a representative capacity, the surviving plaintiffs were competent to prosecute the appeal.

Held, also, that the District Judge could without sanction of the Collector settle a scheme in a declaratory suit claiming that the mutawalli of a mosque was not properly appointed and for his removal. AIR (Vol 23) 1936 Lah 361: 37 PLR 85: 162 Ind Cas 89.

——S. 92, O. 41, R. 4 — Four out of five persons who have obtained consent of Collector appealing — Owing to his absence, remaining person not impleaded as appellant but as respondent — Subsequent application by him for being transposed as appellant.

Where an appeal is filed by four out of five persons who had obtained consent of the Collector and the one who is not impleaded as appellant but impleaded as respondent, applies to be transposed as an appellant on the ground that his inclusion among the respondents was due to misrepresentation of law regarding procedure, the appeal is competent as it is presented with the concurrence and at the instance of such person.

Per Skemp, J.— If one of the persons who has obtained sanction under Section 92 does not join in an appeal, it is the duty of the Court hearing the appeal to ascertain the circumstances before deciding whether to proceed. AIR (Vol 22) 1935 Lah 251: 16 Lah 782: 158 Ind Cas 465.

——S. 92 — Scheme by District Judge, in pursuance of High Court's order — Person appointed as mutwalli — Person not party to original action, if can appeal against order of District Judge — Patna High Court Rules, Chap. VI, R. 5.

The matter arose out of an action in the Court of the District Judge, the subject matter of the action being a wakf. The matter came on appeal to the High Court whereupon, in pursuance of the order passed by the High Court the District Judge formulated a scheme for the management of this wakf containing certain rules which regulated the appointment and discharge of a mutawalli and a mutawalli was appointed:

Held, that a person who was not a party to the original action could not appeal from the orders of the District Judge;

Held, further, that, as the interest of such a person, if any, arose before the decree or order and not afterwards, he did not come under Cl. (d), R. 5 of Patna High Court Rules. AIR (Vol 22) 1935 Pat 261: 14 Pat 236: 1 BR 757 (2): 157 Ind Cas 407.

——S. 92 — An order of the District Judge approving the appointment of a new trustee by the committee under the terms of the scheme, not being a decree within the meaning of Section 47 read with S. 2, is not appealable. AIR (Vol 18) 1931 All 765: 1931 ALJ 1071: 33 Ind Cas 401.

——S. 92 — Right of court to confirm elections — Order on application — Appeal, if lies.

Where the Court reserves to itself the right to confirm elections held under a scheme framed by it and where application for confirmation is made by parties on one side in the suit and is opposed by parties on the other side, the order which the Court makes is not really an order in execution but is a decree in the suit itself and is, therefore, appealable as a decree under the Code. AIR (Vol 15) 1928 Rang 168: 6 Rang 97: 110 Ind Cas 41 (DB).

——S. 92 — Orders in execution — Appeal.

Orders passed by Court in relation to a scheme sanctioned in a scheme suit are not orders in execution and no appeal lies. AIR (Vol 14) 1927 Mad 1110: 102 Ind Cas 633 (DB).

——S. 92 — Order as to scheme by Dt. Judge as persona designata — Appeal or revision, if lies.

No appeal lies from an order of the District Judge as persona designata under a scheme of management of a charitable institution under Section 47 read with S. 2 and S. 100, nor does revision lie under S. 115. AIR (Vol 13) 1926 Bom 167: 28 Bom LR 64: 93 Ind Cas 195 (DB).

——S. 92 — Tentative scheme — Procedure.

Where a tentative scheme provides for the appointment but not the removal of the trustee appointed under it, such trustee cannot be removed except by a regular suit under Section 92. Any order removing such a trustee other than by a regular suit is without jurisdiction and is not appealable as it is not an order in execution. AIR (Vol 13) 1926 Mad 799: 94 Ind Cas 610 (DB).

——S. 92 — Order — Appeal, if lies.

Where in a scheme suit under Section 92 a scheme is settled, the suit comes to an end and there is no decree to be executed and no application can be made as if it were in execution of the decree. AIR (V 13) 1926 Mad 130 Disapproved. Parties cannot give power to a Court to treat the matter in a particular way. AIR (Vol 13) 1926 Mad 559: 49 Mad 580: 95 Ind Cas 720: 1926 MWN 226 (DB).

——S. 92 (S. 539 Old Code) — Suit relating to charity — Suit brought by the Advocate-General at the instance of relators — Dismissal of suit — Right of appeal — Relators cannot appeal in their own right:

Where a suit filed under Section 539, C. P. C., by the Advocate-General at the instance of relators is dismissed, and the Advocate-General does not think fit to appeal, it is not competent to the relators to file an appeal on their own account against the dismissal. (1907) 9 Bom LR 996: 32 B 155 (156). —

4. Applicability and Scope.

See also N. 22.

(a) Breach of trust.
(b) Conditions necessary.
(c) Public trusts.
(d) Suit, maintainability of.

——S. 92 — Judgment in suit under — Binding nature of.

Per Malik, C. J. — Where there is a public trust and the District Judge has appointed a person as a trustee in a suit brought against the then trustee, to my mind, it is not open to a third party to claim that the District Judge should not have appointed the person so appointed by him but should have appointed some others who had a better claim. To that extent a decree under S. 92, C. P. Code is binding not only on those who are parties to the suit but also on others.

Per Desai, J.— A judgment in a suit under Section 92, C. P. Code appointing a particular person as mutawalli would be a judgment-in-rem. It would be so because it confers a status on a particular person against the whole world. AIR (Vol 37) 1950 All 109: 1950 ALJ 776 (DB).

——S. 92 — Trustee appointed under scheme — Removal of — Recourse to S. 92 must be held.

A trustee appointed under scheme cannot be removed by a mere application and without recourse to a suit under S. 92. AIR (Vol 29) 1942 Oudh 135: 1941 OWN (CC) 1269: 1941 AWR (CC) 375: 17 Luck 391: 197 Ind Cas 743.

——S. 92 — Question as to validity of trust is beyond scope of suit under S. 92.

The question as to the validity of the trust itself is beyond the scope of a suit under Section 92. It should be raised in a separate suit properly brought for the purpose. AIR (Vol 29) 1942 Sind 137: ILR (1942) Kar 119: 205 Ind Cas 449.

——S. 92 — Section has no application to a suit by settlers of a trust against a trustee to hand over trust property. (1941) 1941 NLJ 587.

——S. 92 — Suits by trustees for right of management and possession of trust property.

A suit instituted by a newly appointed trustee for recovery of the movable properties of the temple including cash after taking an account of the trust money received by the previous trustees who have been lawfully removed by the members of the community is not governed by S. 92. AIR (Vol 26) 1939 Mad 594: 1939 MWN 255: (1939) 1 MLJ 517: 49 MLW 495.

——S. 92 — S. 73, Madras Hindu Religious Endowments Act (II of 1927).

No suit lies under Section 73, Madras Hindu Religious Endowments Act, 1927 or Section 92, Civil P. C., for removing a trustee of a kattalai. The Madras Act of 1927 while repealing Section 92, Civil P. C., provides for all the matters which are dealt with in Section 92. Though the closing words of Section 73 (2) of the Madras Act (barring the institution of suits) are wider and more comprehensive than the corresponding words of Section 92 (2), it was not intended to extend the scope of the prohibition beyond that of S. 92 (2). AIR (Vol 21) 1934 Mad 126: 1933 MWN 1235: 66 MLJ 98: 39 MLW 205: 57 Mad 362: 150 Ind Cas 448.

——S. 92 — Section 92 does not apply to applications at all. Where under a scheme, an application is maintainable, the section cannot make the consent of the Advocate-General or Collector a condition precedent. Any person interested in the trust may apply to the Court. AIR (Vol 18) 1931 Bom 388: 33 Bom LR 546: 133 Ind Cas 823.

——S. 92 — Decision under S. 92, whether operates as res judicata in suit under S. 7, Sikh Gurdwaras Act.

Decision in the previous suit under Section 92, Civil P. C., for the removal of the mahant of Gurdwara did not operate as res judicata in a subsequent suit under Section 7, Sikh Gurdwaras Act, which came into force subsequently, firstly because it was a subject-matter of appeal before the Privy Council and secondly, because the personnel of the plaintiffs in two suits was different. AIR (Vol 18) 1931 Lah 161: 12 L 497: 32 PLR 910: 135 Ind Cas 657.

——S. 92 — Scope.

A suit instituted solely for having it declared by Court that certain property is wakf is not a suit for administration of the wakf property or for the removal of the trustees mentioned in S. 92. AIR (Vol 17) 1930 Cal 787: 34 CWN 1129 (DB).

——S. 92 — Operation of the Madras Hindu Religious Endowments Act — Effect of.

The effect of Section 77 is to keep outside the operation of the Act any endowments, part religious, part secular, in respect of which the Board has not made an allocation to religious uses; when that has been done the portion allocated becomes religious endowment amenable to the provisions of the Act and until it is done, no portion is so amenable. If this be so, Section 73 (2) does not take the trust out of the operation of Section 92, C. P. Code. AIR (Vol 17) 1930 Mad 216 : 122 Ind Cas 337 : 31 MLW 849 : 58 MLJ 104.

——S. 92 — Express Trustee — Applicability.

A suit is maintainable under Section 92 against express trustees. AIR (Vol 11) 1924 All 884: 84 Ind Cas 631: 22 ALJ 866: 5 LRA Civ 697: 47 All 17 (DB).

——S. 92 — Mandatory provision.

Section 92 of the C. P. C. is mandatory and a suit claiming any of the reliefs therein mentioned must be brought in conformity with its provisions or not at all. AIR (Vol 5) 1918 All 2: 41 All 1: 16 ALJ 841: 48 Ind Cas 94 (DB).

——S. 92 — Object of — Abuse of process of Courts.

The object of Section 92 is not to encourage abuse of the process of the Court by vexatious or improper suits. Its real object being the benefit of persons interested in the trust, the Legal Remembrancer, when applied to for permission to sue should satisfy himself as to the bona fides of the applicants and their proposed suits. AIR (Vol 4) 1917 All 319: 37 Ind Cas 897 (DB).

——S. 92 — Scope of — Suit under.

A suit brought under Section 92 of the C. P. C. is a representative suit. AIR (Vol 4) 1917 Mad 389: 40 Mad 110: 3 LW 305: (1916) 1 MWN 402: 31 MLJ 279: 34 Ind Cas 384 (DB).

——S. 92 — Scope of — Suit for declaration.

The section does not bar a suit for declaration that the plaintiff is a duly constituted mohant. AIR (Vol 3) 1916 All 225: 34 Ind Cas 502 (DB).

——S. 92 (2) — Mandatory provisions — Religious Endowments Act, Ss. 14 and 18 — Scheme suit.

A suit for removal of a trustee and for settling a scheme is governed by Section 92, C. P. C., and not by the Rel. End. Act. The object of Section is to make it clear that the provisions of section are mandatory and the object of the saving clause is to make it clear that Rel. End. Act is still in force. (1913) 24 MLJ 658: 20 Ind Cas 767 (DB).

——S. 92 — Scope of.

A suit is not taken out of the scope of Section 92 because the defendant denies the trust and claims to be the owner of the property. (1911) 13 Bom LR 49: 9 Ind Cas 358 (DB).

——S. 92 (S. 539 Old Code) — Not mandatory — History and scope of section — 'Direction of the Court is necessary for the administration' — 'Such further or other relief'.

Section 539 is not mandatory, but enabling & permissive, cumulative and not restrictive in its effect and does not affect any right of suit which may exist independently of it. If, therefore, a suit is one which would be maintainable prior to the enactment of the corresponding section in the Code of 1877, it may now be instituted independently of the provisions of Section 539, even though it be upon such a cause of action and for such relief as is mentioned in it. The effect of the section is:

It enables certain public officers, who could not take action before, to institute suits. As regards the general public interested, it is enabling in this sense, that two persons may now sue where it would have been necessary before that all should sue or some should obtain leave to sue on behalf of the rest. To this special privilege it annexes a condition to prevent wasteful suits in that it requires sanction to be obtained. As regards relief, it either confers or makes clear the jurisdiction of mofussil Courts to grant certain relief.

Jurisdiction may now be exercised whenever the direction of the Court is necessary, notwithstanding that there may have been no breach of trust. Appointment of trustees may be made in cases of mere vacancy and a scheme may be framed. Claims by trustees against persons who are strangers to the suit and who set up a title hostile thereto, such as alienees and mere trespassers holding adversely thereto, are not within the section.

A suit will lie under the section against a trustee of an express or constructive trust, whether

such a trustee was so de jure or de son tort. But when a person or persons sue not to establish the general rights of the public of which they are a member or members, but to remedy a particular infringement of their own individual right, the suit is not within, or need not be brought under the section.

The directions referred to in the words "direction of the Court is necessary for the administration" are such only as are necessary for the carrying out of the trust and as are given to a trustee, existing and to exist, and do not cover a question as to who is entitled to represent a trust.

The general clause dealing with 'further or other relief' ought to be read with the five preceding specific clauses and the nature of the reliefs which may be properly granted under it is of the same character as the reliefs which may be granted under the preceding clauses. The five specific clauses are not merely illustrative, but furnish an indication of the nature of the relief which may be granted in a suit under this section. (1906) 10 CWN 581: 33 C 789 (801, 803, 804, 807, 810).

——**Ss. 92, 93 (S. 539 Old Code) — Trust — Suit.** A suit instituted for the vindication of the right of management which is vested in and actually being exercised by the plaintiffs and those they represent at the date of obstruction, does not fall within Section 539, C. P. C., merely because those who cause obstruction happen to have been nominated as trustees. (1903) 5 Bom LR 745 : 28 B 20 (55) (DB).

——**S. 92 (S. 539 old Code) — Reference under S. 617 as to whether section 539 is applicable in the matter of an application by a person who claims to be a trustee for grant of lease of trust property.** (1901) 25 Bom 327 (329) : 3 Bom LR 368.

(a) Breach of trust.

——S. 92 — All suits founded upon a breach of trust for public purposes of a charitable or religious nature are not covered by S. 92. (1934) MWN 1256.

——S. 92 — Section 92 applies even when the trust is not admitted & the very existence of the trust is in dispute.

Where there is breach of trust, a suit for declaration that there is a trust and for the preparation of a scheme or removal of the trustees is maintainable only under S. 92. AIR (Vol 19) 1932 Pat 33: 11 Pat 288: 12 PLT 817: 136 Ind Cas 417.

——S. 92 — Section 92 has reference to those cases, and to those cases alone, where there is an allegation of breach of any express or constructive trust created for public purposes of charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust. AIR (Vol 15) 1928 All 33: 50 All 165: 106 Ind Cas 389: 25 ALJ 902 (DB).

——**S. 92 — Suit not under S. 92.** Where a suit is not one under S. 92 of the C. P. Code, the question of the plaintiffs having committed any breach of trust or not does not arise. AIR (Vol 14) 1927 All 526: 49 All 191: 25 ALJ 281: 99 Ind Cas 568 (DB).

——**S. 92 — Breach of trust.**

—Per Boys, J. — Breaches of trust by the predecessor of the existing trustee cannot in themselves be regarded as breaches of trust by the present trustee, but if the present trustee could have taken steps to save the property from the consequences of the breach of trust committed by his predecessor, his neglect to do so might in given circumstances constitute a breach of trust by him himself and naturally this would be still more so, if he continued to reap personally the benefit of his predecessor's breach of trust. AIR (Vol 12) 1925 All 683: 89 Ind Cas 40: 23 ALJ 601: 6 LRA Civ 352: 47 All 770. (DB).

(b) Conditions necessary.

——**S. 92 — Conditions.** Four conditions are necessary in order to invoke the operation of S. 92: (1) the trust must be for public purposes of a charitable or religious nature; (2) the plaint must allege that there is a breach of such trust, or that the direction of the Court is necessary for the administration of the trust; (3) the suit must be, not only in the interest of the plaintiff individually, but in the interest of the public, or in the interest of the trust itself (for where the trust is a public one, the interest of the trust will be the interest of the public); and (4) the relief claimed in the suit must be one of the reliefs mentioned in the section.

Where after reading the plaint as a whole, it appears that what the plaintiff alleges is the breach of trust by acts or omissions on the part of defendants, the second condition, is satisfied. These allegations may have been largely false, but when considering the application of S. 92, it is the allegations in the plaint alone that are to be taken into account. AIR (V 27) 1940 Pat 425 : 6 BR 251 : 21 PLT 155 : 186 Ind Cas 359.

——**S. 92 — Criterion.** The question of the applicability of S. 92, Civil P. C., depends on the prayers in the plaint at the date when the suit is instituted. The provisions of the section cannot be evaded by subsequent amendment of the plaint. AIR (V 23) 1936 Bom 412 : 38 Bom LR 808 : 165 Ind Cas 1001.

——S. 92 — Two conditions are necessary for the application of S. 92: first, there must be an alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, and, secondly the direction of the Court is deemed necessary for the administration of such trust.

A suit brought by a charitable institution to recover the amount due to itself by the defendant's family, who have constituted themselves trustees of the fund liable to pay certain portion of that fund to the institution for the observance of the several festivals in which the institution is interested, does not fall within the provisions of S. 92, because, as soon as the amount is paid by the defendant's family they have no other interest in the administration of the fund so far as the institution is concerned. AIR (V 16) 1929 Bom 153 : 119 Ind Cas 775 : 31 Bom LR 192 (DB).

——**S. 92 (S. 539, old Code) — Applicability — Suit for declaration that property is endowed property.** Section 539, C. P. C., pre-supposes the existence of a trust for the administration of which it is necessary to make provision. That section cannot apply to a suit in which the object of the plaintiff is to obtain a declaration that certain property is endowed property the fact of the endowment being denied on the other side. (1903) 1903 AWN 120 : 25 A 631 (634) (DB).

(c) Public trusts.

——**S. 92 — Applicability — Trust partly public and partly private — Maintainability of suit.** A suit under S. 92, C. P. Code, is competent although a trust is partly for private charities and

partly for public, if a substantial part of the trust is for public purposes and the matter is otherwise covered by the section. AIR (V 38) 1951 Nag 394 : ILR (1950) Nag 50 : 1950 NLJ 545 (DB).

——**S. 92 — Duty of Court.**

In suits under S. 92, C. P. Code, the Court has a duty, once it finds that it is a trust for public purposes to consider what is best in the interests of the public. AIR (V 33) 1946 PC 34 : ILR (1946) Kar (PC) 17 : 1946 AWR (PC) 9 (2) : 1946 OWN 116 : 1946 ALW 93 : 1946 OA (PC) 9 (2) : 222 Ind Cas 521 : 12 BR 332 : 1946 MWN 195 : 59 LW 262.

——**S. 92 — Public right.**

The real test whether S. 92 applies or not is whether the suit is fundamentally on behalf of the public for the vindication of a public right, or on behalf of a private individual for the vindication of his private rights. AIR (V 14) 1927 Mad 338 : 97 Ind Cas 480.

——**S. 92 — Public trust — Mutt.**

The section should be applied to mutts and the public; the Advocate-General and the Courts of justice should have the power to stop the wholesale misuse of the income of a charitable religious institution like a 'matam'. AIR (V 3) 1916 Mad 332 : 38 Mad 356 : 13 MLT 498 : (1913) MWN 581 : 25 MLJ 393 : 19 Ind Cas 694 (DB).

——**S. 92 — Private trusts — Not governed by.**

The provisions of S. 92, C. P. C. apply only to trusts for public purposes and not to private trusts. AIR (V 1) 1914 All 410 : 25 Ind Cas 667.

(d) Suit, maintainability of.

——**S. 92 — Applicability — Suit for possession of property by idol.**

Section 92, C. P. Code, is limited to suits which claim one or other of the reliefs set out in the section. It does not apply to suits against third parties and strangers and certainly not to a suit in which an idol sues for possession of its property or property which it claims. AIR (V 34) 1947 Nag 233 : ILR (1947) Nag 819 : 1947 NLJ 527.

——**S. 92 — Suit — Some issues beyond S. 92.**

Where the plaint under S. 92 undoubtedly contains the allegations necessary to bring the suit within the section and the reliefs granted are all within it, the fact that some issues have been raised which have no direct bearing on the issues which arose under S. 92 does not affect the maintainability of the suit. AIR (V 29) 1942 Bom 291 : 44 Bom LR 643 : 204 Ind Cas 275.

——**S. 92 — Whether suit falls under S. 92 depends on form of suit as revealed by plaint.**

Whether a suit comes within rules of procedure which prescribe the conditions for the valid institution of suits of a particular kind depends on the form of the suit as revealed by the plaint.

In the cause title, the Secretary of State for India in Council was described as the trustee of the endowment. In para. 7 it was alleged that the Government of Bengal purporting to act as trustee under the provisions of the Act of 1863 had been unlawfully and illegally spending the income of the wakf estate on purposes foreign to the trust.

In para. 11 it was averred that the province of Bengal had adopted the position of 'mutawalli' and had become an express trustee. In prayer (b) a mandatory injunction was asked for directing defendant No. 1 Province of Bengal to act in accordance with the express terms of the trust and to stop spending the income on similar objects:

Held, that the suit fell within the purview of S. 92 as the relief of which the plaintiffs were in pursuit pointed unerringly to the Province of Bengal as a defendant by reason of its position as trustee of the 'wakf' according to the plaintiff's case a trustee 'de son tort'. AIR (V 29) 1942 Cal 343 : ILR (1942) 2 Cal 211 : 46 CWN 59 : 201 Ind Cas 248.

——S. 92 — To bring a suit within the purview of S. 92, two conditions are essential: (1) either there must be an alleged breach of an express or constructive trust created for public purposes of charitable or religious nature, or the direction of the Court is deemed necessary for the administration of the trust; and (2) the suit should ask for a decree claiming any of the reliefs mentioned in S. 92, cls. (a) to (h) of the section. AIR (V 19) 1932 Bom 65 : 135 Ind Cas 806.

——**S. 92 — Scope.**

In order to bring S. 92 into operation there must be first of all a suit alleging a breach of some express or constructive trust created for public purposes of a charitable or religious nature or the direction of the Court must be deemed necessary for the administration of any such trust.

A suit praying for any of the reliefs mentioned in S. 92 can only be instituted in accordance with the provisions of S. 92. A claim, therefore, alleging breach of a constructive trust for religious purposes and asking for accounts falls directly under S. 92 (1) and cannot be instituted without the sanction of the Advocate-General. AIR (V 18) 1931 Bom 33 : 32 Bom LR 1435 (DB).

——S. 92 — A suit under S. 92 is not bad on the ground that though it is in accordance with the sanction, an additional prayer which has not been sanctioned was added and subsequently removed. AIR (V 14) 1927 Mad 1033 : 106 Ind Cas 134 : 26 MLW 581 : 1927 MWN 759 (DB).

——**S. 92 — Scope of — Suit against head of mutt — Maintainability.**

A head of a Mutt is not a trustee in the English Law sense. The head of a mutt may be answerable as a trustee, "in general sense" for maladministration and he has to administer as trustee for general pious and religious purposes in view of the duties and obligations attached to his office.

If these are not merely voluntary, viz., if the head is bound to carry them out, he must be answerable if he does not, notwithstanding that he may have a very wide discretion as to the application of the mutt funds and other properties for this purpose.

If the public or a portion thereof are interested in the performance of these duties and obligations which are or ought to be employed at least as to some part of them in the maintenance of a public and religious and charitable endowment, the only way the public can interfere is by a suit under S. 92, C. P. Code.

The head of the mutt may have obligations similar to those of a trustee; he will almost invariably be under a legal obligation to support his disciples and perform the usual ceremonies. Case Law fully discussed. AIR (V 14) 1927 Mad 614 : 52 MLJ 415 : 101 Ind Cas 420 : 25 MLW 461 : 1927 MWN 233 : 50 Mad 567 : 39 MLT 37 (DB).

——S. 92 — The requirement of S. 92 cannot be evaded by asking for a bare declaration under the Specific Relief Act. AIR (V 13) 1926 Mad 1029 : 97 Ind Cas 630 : 24 MLW 286.

——**S. 92 — Admission as to — Existence of trust, if necessary.**

In order to make S. 539, C. P. C., 1882 — (S. 92, C. P. C., 1908) applicable it is not necessary that

the existence of the trust for public, charitable or religious purposes alleged by the plaintiff should be admitted by the defendant. If the trust is disputed the question is decided by the Court upon evidence.

Where a trustee not only mismanages the trust property but sets up a title adverse to the trust, there is no reason why S. 92 cannot be invoked. That section is wide enough and in clause (h), power is given to the Court to grant any relief as the nature of the case may require.

The primary object of the provision is the administration of trust property by removing the trustee, appointing a new trustee or making such directions as may be necessary for the protection and management of the trust property.

In order to secure that object it may be necessary for the plaintiff as a member of the public interested in the preservation and management of the trust property to seek for reliefs, such as a relief of declaratory nature. AIR (V 11) 1924 Pat 657 : 80 Ind Cas 980 : 5 PLT 305 : 3 Pat 842 (DB).

——S. 92 — Suit against former trustee in possession — Applicability.

Section 92 would not apply to a suit in which plaintiffs assert that they have been appointed trustees already by the public, and that the defendants, the former trustees have been properly dismissed and they seek possession on the ground that the defendants are now mere trespassers. AIR (V 10) 1923 All 319 : 71 Ind Cas 767 : 21 ALJ 191 : 45 All 335 : 4 LRA Civ 142 (DB).

——S. 92, restricts the powers of an individual to bring a suit of a particular nature without observing certain formalities, and therefore, when a point is taken that a particular suit is of a nature coming within the provisions of that section, before the Court can bar the suit for want of necessary sanction, the Court must be satisfied that the suit comes within the actual corners of the section.

That section provides very distinctly that only in two cases does the section apply; either there must be an alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature or the direction of the Court must be deemed necessary for the administration of any such trust unless a suit falls clearly within the scope of S. 92 the mere fact that it resembles in certain respects a suit which may properly be brought under S. 92, can afford no good ground for holding that S. 92 should apply. AIR (V 10) 1923 Bom 67 : 64 Ind Cas 353 : 46 Bom 101 : 23 Bom LR 876 (DB).

——S. 92 — Suit between rival claimants to trusteeship — Applicability.

Ordinarily the founder of a trust is entitled to provide for the management of the trust and to reserve to himself and his heirs the power to appoint trustees; but if he exercises that power and appoints a trustee, the trustee cannot be removed except in the manner laid down in S. 92.

Where the settlor has reserved no power to himself by the earlier deed to alter the scheme of management there laid down, the subsequent appointment of other persons cannot be upheld.

The section provides for the institution of a representative suit by the beneficiaries to secure the proper administration of a public trust either by the removal of the existing trustees or by the settlement of a scheme, by which the object of the trust can be properly carried out. But if the suit is between persons who individually claim a right to succeed to the office of trust, S. 92 has no application. AIR (V 9) 1922 All 499 : 68 Ind Cas 786 : 44 All 721 : 20 ALJ 712 (DB).

5. Appointment of trustee.

——S. 92 Muslim waqf — Previous mutawalli dying nominating his successor — Court can appoint such person without recourse to S. 92.

Where a mutawalli, while on death-bed, nominated certain person as a new 'mutawalli' and such person was subsequently appointed by the District Judge as 'mutawalli':

Held, that the Court had power to make such appointment directly without its having recourse to S. 92. AIR (Vol 30) 1943 Oudh 278: 1943 OWN 154: 207 Ind Cas 143.

——S. 92 — Association with institution, of person if factor to be considered in appointing manager of institution.

Previous association of a person and his family with an institution is undoubtedly one of the matters which the Court normally takes into consideration in deciding who the managers of the institution should be. AIR (Vol 28) 1941 Bom 317: 43 Bom LR 706: ILR (1941) Bom 568: 196 Ind Cas 826.

——S. 92 — Suit for appointment of new trustees on ground that there do not exist any lawful trustees.

Section 92 shows that the plea, that in the absence of an allegation of breach of trust in the plaint, the suit is not maintainable, is untenable. A suit under that section lies, not only in the case of any alleged breach of trust, but also where the direction of the Court is deemed necessary for the administration of a trust, if it be a trust for public purposes of a charitable or religious nature.

A suit for the appointment of new trustees on the ground that there do not now exist any lawful trustees falls within the purview of the words "where the direction of the Court is deemed necessary for the administration of any such trust" in S. 92. AIR (Vol 25) 1938 Rang 339: 1938 Rang LR 276: 77 Ind Cas 851.

——S. 92 — Mahant mortgaging debutter property — Mahant removed and new one appointed — Suit by new 'mahant' for possession within 12 years from date of removal of previous 'mahant' — Suit is within time — Section 92 (1) (b) has no application to such a case and it applies to suits relating to headings specified in cls. (a) to (g). AIR (Vol 24)1937 Lah 660: 39 PLR 355: 172 Ind Cas 319.

——S. 92 — Suit by trustee for regulating management and framing scheme.

Assuming that S. 92, has no application to suits whose object is the assertion or vindication of personal or individual rights of persons claiming to be trustees, the mere fact that the plaintiffs may in a sense be trustees will not necessarily preclude the application of S. 92 if the reliefs in the suit relate not to the vindication of their personal rights but to the advancement of the interests of the institution itself by securing more efficient management.

Where owing to the large increase in the members of the trustee's family, a suit was instituted for a decree appointing trustees from among the members of the family and for framing a scheme for the purpose of the charities:

Held, that S. 92 was applicable to the suit. AIR (Vol 22) 1935 Mad 855: (1935) MWN 1079: 42 MLW 364: 69 MLJ 300: 158 Ind Cas 369 (2).

——S. 92 — Order should be in interest of institution.

Once a clear case is made out for the Court's interference under S. 92, the form of the final

order should be governed by what appears to be in the interest of the institution. It is necessary that where a new trustee is to be appointed, arrangements should be made which will prevent such mismanagement as has taken place. AIR (Vol 22) 1935 Pat 111: 16 PLT 35: 14 Pat 379: 1 BR 684: 156 Ind Cas 1099.

——S. 92 — Public trust — Power to override wishes of.

In the case of a public trust the District Judge is not bound to accept the wishes of the founder in the choice of the trustee. His primary duty is to consider the interest of the general body of the public for whom the trust was created. AIR (Vol 18) 1931 All 765: 133 Ind Cas 401. (1931) ALJ 1074.

——S. 92 — 'Direction of Court' — Meaning of — Appointment of Mutawalli — If comprised in framing schemes.

The words 'where the direction of the Court is deemed necessary for the administration of any such trust" must be interpreted as meaning that where the Court has to give direction in the nature of framing a scheme or otherwise for the administration of the trust. The mere appointment of a mutawalli is not such a direction as is contemplated by the section: AIR (Vol 15) 1928 Cal 368: 32 CWN 835: 110 Ind Cas 416: 55 Cal 1254 (DB).

——S. 92 — Reliefs — Appointment of Trustee — Mutawalli for waqf — Applicability.

Where there is no mutawalli, the Court has power to appoint a mutawalli in respect of a wakf even without a suit under S. 92. AIR (Vol 15) 1928 Cal 368: 110 Ind Cas 416: 55 Cal 1284: 32 CWN 835. (DB).

——S. 92 — Power of court to add trustees.

While in cases of disputed succession to hereditary trusteeship or in cases where the office of trustee is to be filled up owing to the death or removal of a trustee, the terms of the dedication or the usage followed, have to receive every consideration and are not to be departed from except for any cogent reasons.

Yet for the proper administration of trusts and the prevention of abuses or opportunities for breaches of trust, the interest of the institution ought to be the prime factor, and where in a suit under S. 92 for the framing of a scheme the interests of the institution demand it, there is nothing to prevent the Court from appointing additional trustees, in the place of a sole trustee, even where the deed of trust enjoins only one trustee at a time so long as the rights of the members of the family to take part in the management can be given due effect to without detriment to the interests of the institution. 108 Ind Cas 649: 1927 MWN 405: AIR (Vol 15) 1928 Mad 955 (DB).

——S. 92 — Suit against for scheme and appointment of trustee — Maintainability.

A suit under S. 92, for settling the scheme and appointing a trustee, will lie against a person who repudiates the trust and sets up a right adverse to it; AIR (Vol 14) 1927 Mad 710: 102 Ind Cas 74: 39 MLT 66: 53 MLJ 183.

——S. 92 — Procedure.

Remedy of the parties interested in a trust, for the modification of a scheme, framed in a suit, by appointing additional trustees is not by an application in that very suit, but by a new suit under S. 92. AIR (Vol 14) 1927 Sind 1: 21 SLR 220: 97 Ind Cas 398.

——S. 92 — Framing of Scheme — Reliefs under Religious Endowments Act, S. 14 — Difference.

The reliefs granted under S. 14 of Act 20 of 1863 are slightly different from those accorded under S. 92 of the C. P. Code. The power of appointing a new trustee and of making a scheme for the administration of the property is restricted to S. 92 only. AIR (Vol 12) 1925 Pat 544: 88 Ind Cas 1035: 4 Pat 741: 7 PLT 4: 1925 PHCC 194 (DB).

——S. 92 — Scheme — Selection of trustees — — Appointment from plff's community on the ground that the trust had largely benefited by its endowment.

In a suit for the framing of a scheme of management for a temple the plff's. community had at great costs made large additions to the temple. The lower Court by the scheme provided for two members of the community being additional trustees. The scheme also provided for additional trustees being appointed from the residents of the village. Held, that there was nothing improper in the appointment of the additional trustees. AIR (Vol 7) 1920 Mad 146: 10 LW 494: 54 Ind Cas 263 (DB).

——S. 92 — Scheme — New trustees — Power to appoint.

Even when a will directs that members of the testator's family are to be appointed members of the committee if suitable persons are not available, the court has power to appoint strangers. AIR (Vol 6) 1919 All 83: 17 ALJ 957: 58 Ind Cas 566 (DB).

——S. 92 — Religious trust — Mahomedan Waqf — Power to appoint mutawalli.

Although a Dt. Judge has the powers of a Kazi under the Md. Law to deal with an application for appointment of a 'Mutawalli' he may relegate the petitioner to a suit under S. 92 of the C. P. C. AIR (Vol 6) 1919 Cal 615: 23 CWN 138 : 49 Ind Cas 799 (DB).

——S. 92 — Scheme — Existing rights — Hereditary rights — Additional trustees.

A Court in framing a scheme regarding a temple is bound to have regard to the existing rights of individuals to the trusteeship of the temple. Courts are averse to the creation of a hereditary right to the office of a public trustee.

Obiter:— Courts in India have the same powers as the Courts of Chancery in England to appoint additional trustees even where there are hereditary trustees. It is desirable to provide for somebody to supervise the administration by the trustees; where there are several trustees all of them should not participate in every detail of the administration but while all should take part in important acts, one should be made responsible for all routine business. (1912) 23 MLJ 134: 12 MLT 269: 16 Ind Cas 225 (DB).

——S. 92 (S. 539 old Code) — Suit for appointment of new trustees — Specific Relief Act, S. 42.

A suit for appointment of new trustees on the ground that the defendants are not the lawful trustees is one falling within Cl. (a) of S. 539, and is not bad for want of a prayer for possession. (1902) 26 Mad 450 (453) (DB).

——S. 92 — Duty of — Discretion of court in appointing trustee.

(1907) 11 CWN 279 : 4 ALJ 30 : 5 CLJ 134 : 9 Bom LR 85 : 17 MLJ 52 : 34 C 118 (128) : 34 IA 46 (PC).

6. Arbitration.

——S. 92(2) — Disputes regarding management of public charities referred to arbitration — Arbitrator also asked to frame scheme for future management — Award passed stating conclusions as to management and framing scheme for future management — Suit by one party to embody award in decree of Court — Suit, whether precluded by S. 92(2).

The parties were descendants of different branches of a family which had founded various public charities in the Circars. Disputes arose between them and as a result, a muchilika referring the disputes to arbitration was executed by the parties. The arbitrator was to investigate the nature of the management of various charitable trusts by the parties in the management thereof and he was also asked to lay down the nature of the scheme regarding the future administration of the institutions.

The arbitrator passed an award and stated it as his conclusion that management of the choultry had not been blameworthy. As regards future management he drew up an elaborate scheme. One of the parties filed a suit for the award being embodied in a decree of the Court:

Held, that the suit was precluded by the terms of S. 92(2), as by embodying the award in a decree of Court, the Court would be practically framing a scheme for the management of the institutions in question and it would be an evasion of the provisions of the section to allow it to be done under the guise of an award when the procedure prescribed by S. 92 has not been complied with.

Held, also that the award not having dealt with matters not covered by the reference, it was not open to the Court to separate one portion of the award from another and limit the decree to portions thereof. AIR (Vol 26) 1939 Mad 170: 48 LW 742: (1938) MWN 1176: (1938) 2 MLJ 972: 183 Ind Cas 170.

——S. 92 — Suit for declaration that certain property was private property — Award that it was public trust and scheme framed.

The plaintiff filed a suit in which he asked for declaration and possession of a certain Tikana property as his own private property. It was contended by the defendants in their written statement that the property was not the private property of the plaintiff, but was a public, charitable and religious trust. Issues were raised and the suit was referred to arbitration. The arbitrators gave an award in which they dealt, not only with the suit property in the plaint, but they set out a scheme of management of the property which they declared was not the private property of the plaintiff, but a public religious trust:

Held, that as the suit was framed, it was not one under S. 92. The arbitrators had no jurisdiction to decide what the Court would not have jurisdiction to decide. So far, therefore, as the award of the arbitrators offended against the provisions of S. 92, Civil P. C. and, in effect, granted reliefs that could only be granted in a suit under S. 92, Civil P. C., the award was without jurisdiction and that, therefore, it must be limited only to the declaration that the property was trust property as this was the only relief which could have been awarded if the Court had heard and decided the suit and passed the decree. AIR (Vol 24) 1937 Sind 174: 30 SLR 478: 170 Ind Cas 102.

——S. 92 — Provision of section, if can be evaded by reference to arbitration.

Where a suit could not be brought under S. 92, Civil P. C., except upon the conditions therein laid down, the provisions of this section cannot be evaded merely by a reference to arbitration upon contentions raised in the written statement and arbitrators cannot decide upon matters of public right which the law provides shall be brought into issue only in a particular manner. AIR (Vol 24) 1937 Sind 174: 30 SLR 478: 170 Ind Cas 102.

——S. 92 — A suit under S. 92 is not a suit for the determination of private rights as between the plaintiffs and the defendants and matters in difference in such a suit cannot be referred to arbitration. Where the law has given jurisdiction to determine a matter to specific tribunals only, determination of the matter by other tribunals is excluded. AIR (Vol 24) 1937 Sind 174: 30 SLR 478: 170 Ind Cas 102.

——S. 92 — Reference to arbitration — Validity of.

Matters in difference between parties to litigation which affect private rights only may be referred to arbitration; a suit under S. 92, C. P. Code, 1908, is not a suit for the determination of private rights as between the plaintiffs and the defendants and matters in difference in such a suit cannot be referred to arbitration. Jurisdiction to try a suit under S. 92 is confined to the District Court or any other Court empowered in that behalf by the Local Government within the limit of whose jurisdiction the whole or any part of the subject-matter of the trust is situated and cannot be exercised by arbitrators. AIR (Vol 10) 1923 Nag 112: 72 Ind Cas 1016: 6 NLJ 7 (DB).

7. Compromise.

——S. 92 — Award in suit under S. 92 — Order refusing or recording compromise is appealable — It can be interfered with even in revision.

The mere obtaining of an award in a case where S. 92 applies will not take away the jurisdiction of the Court to decide whether the award was lawful or not within the meaning of O. 23, R. 3, Civil P. C. An appeal lies from an order recording or refusing to record compromise or agreement under O. 43, R. 1(m). Even if it is assumed that no appeal lies, the High Court has ample jurisdiction in the exercise of its powers of revision to set aside the order if it is satisfied that the interests of the public institution have not at all been considered by the lower Court in passing the order.

The proper course which should be adopted by the Judge, when such a suit is referred to arbitration and award filed is that he should first decide issues with respect to the misconduct and consequent incompetency of the defendant. If it is decided that the defendant was guilty, then the Judge might with the agreement of the parties take the help of arbitrators to settle a scheme and to appoint another trustee or a committee of trustees.

If the scheme for the management of the trust property thus proposed is sound and trustworthy, the Judge can accept it and dispose of that part of the suit under O. 23, R. 3, Civil P. C. It would be then open to him to take further evidence to decide the nature of the objection raised to the personnel of the committee and then he should frame a scheme as provided by S. 92, sub-cls. (f) and (g), Civil P. C., or he can appoint a new trustee by removing the defendant and vesting the property in a trustee or a committee of trustees as provided by sub-cls. (a), (b) and (c). AIR (Vol 31) 1944 Pat 115: 9 CLT 85: 19 BR 435: 212 Ind Cas 35.

——S. 92 — Suit under S. 92 compromised and consent decree passed — Suit by plaintiffs in District Judge's Court for declaration that consent decree was nullity and previous suit did not end as compromise petition was tampered with and decree did not embody real terms of compromise — Suit transferred to Munsif — Amendment of plaint adding prayer that real compromise petition be substituted for alleged false one in record of previous suit and fresh decree prepared accordingly allowed — Decree passed accordingly — Jurisdiction.

A title suit brought by the plaintiffs as members of the public under S. 92, Civil P. C., was compromised and a compromise decree was passed by the District Judge in accordance with the terms of the compromise.

Thereafter, the plaintiffs brought in the Court of the District Judge a declaratory suit asking for a declaration that the terms of the decree and of the compromise petition then found on the record of the District Judge's title suit did not represent the true agreement between the parties.

That a draft compromise petition had been prepared embodying different terms and a petition had been signed and presented to the Court accordingly, but that the petition had been tampered with in the interests of the defendants by substituting different page of typewritten matter for the pages in which some of the terms had been embodied.

The plaint stated that as the compromise petition had been tampered with, the consent decree was a nullity and the previous suit had not ended and prayed for an adjudication to this effect.

The suit was transferred by the District Judge to the Court of the Munsif who had pecuniary jurisdiction to try the suit. Subsequently, the plaintiff moved the Munsif to permit an amendment of plaint adding a prayer that the original compromise petition be substituted for the alleged false petition in the record of the District Judge and a fresh decree prepared accordingly. The amendment was allowed and the reliefs were granted to plaintiff accordingly.

Held, that the Munsif had no jurisdiction to make a new decree in the S. 92 suit that being a matter within the exclusive jurisdiction of the District Judge. For this reason, the final order of the Munsif could not stand in so far as it directed the compromise petition on the record to be reinstated in the form of the copy of the compromise petition which was on the record and which formed a part of the plaint and directed a decree in terms thereof to be drawn up in the place of the decree prepared on the basis of the compromise petition tampered with.

All that the Munsif had power to do was to declare that the facts were what he found them to be and that, in consequence, the decree of the District Judge must be and should stand as vacated. It would then be for the parties to go to the District Judge, ask him to revive title suit and dispose of it according to law after giving the parties a hearing. AIR (Vol 29) 1942 Pat 79: 22 PLT 799: 8 BR 38: 196 Ind Cas 554.

——S. 92 — What is.

Where in a suit under S. 92, C. P. Code, the plaintiffs through their counsel merely approved of the appointment of certain gentlemen as a committee of management:

Held, that this did not make the decree a consent decree, when in other matters decided by the Judge, there was no consent by either party to his conclusions. AIR (Vol 14) 1927 Lah 382: 100 Ind Cas 838 (DB).

——S. 92 — Legality of.

A Judge has jurisdiction to pass a decree on the basis of compromise in a suit brought under S. 92, C. P. Code; O. 23 of the Code of Civil Procedure dealing with adjustment of suits does not exclude suits under S. 92. AIR (Vol 12) 1925 Cal 187: 80 Ind Cas 44 (DB).

——S. 92 — Compromise of suit — Benefit to private parties.

A Court should not sanction a compromise of a suit under S. 92 of the C. P. C. under which any portion of the trust properties is given to any of the parties. AIR (Vol 6) 1919 Mad 659: 37 MLJ 489: 47 Ind Cas 611 (DB).

——S. 92 — Compromise of suit — Validity.

A suit under S. 92 cannot be compromised if it is proved that the endowment is a public one and where the question whether the endowment is public or not is still in dispute, there cannot be a lawful agreement and it cannot be said to be proved to the satisfaction of the Court that the suit had been adjusted by a lawful agreement so long as such a controversy exists. AIR (Vol 2) 1915 Cal 193: 18 CWN 1264: 26 Ind Cas 360 (DB).

——S. 92 — Compromise of suit — Fraud — Advocate-General's consent.

Where a compromise decree in a suit for removal of trustees, accounts, etc., was attacked as fraudulent by a regular suit, held that the consent of the Advocate-General was necessary for such suit, as it involved an allegation of breach of trust, taking accounts, etc. AIR (Vol 1) 1914 Low Bur 169: 7 Bur LT 160: 7 LBR 333: 23 Ind Cas 111 (DB).

8. Construction.

See also N. 12.

——S. 92 — "Trust" and "trustee", meanings of.

The words "trust" and "trustee" in S. 92 have not been used in any technical sense of the term as used in English Law. AIR (Vol 32) 1945 Nag 64: 1944 NLJ 502: ILR (1944) Nag 788.

——S. 92 — "Two or more persons", meaning explained.

The phrase "two or more persons" means, two or more individuals who are named or so described in the consent that they can be identified. AIR (Vol 28) 1941 Sind 88: ILR (1941) Kar 204: 194 Ind Cas 461.

——S. 92 (1), (2) — 'Trust', legal sense of word explained — 'Breach of trust', meaning of — Settlor creating primary trust for benefit of members of his family and secondary trust for charitable and religious purposes — Secondary trust to take effect only when there would be no primary objects or they would not exhaust whole income — Suit against trustee by beneficiaries under primary trust alleging breach of trust.

The word "trust" in its true legal sense denotes that abstract obligation to administer property in a certain defined way which attaches to a trustee in whom property is vested upon trust. A "trust" is really an "obligation" attaching to a trustee which the law or equity will enforce. It is, except in a loose sense, neither the property over which a trust exists nor that condition which results from property being held in trust. It consists of the personal equitable obligation or series of obligations attaching to the trustee.

It is necessarily in this sense that the word "trust" is used when it is found in the context "breach of trust". What is meant is a breach by the trustee of the confidence or duty that the law or equity imposes in him in the particular respect complained of in the case. Therefore under S. 92 (1), there has to be alleged a breach by a trustee of an obligation, or duty, which obligation or duty, is one which exists for the furtherance of a public purpose of a charitable or religious nature. And therefore in each of such cases the true question is whether the particular trust, obligation or duty, a breach of which is alleged, is an obligation or duty of that kind.

A lady created a waqf. By a deed of wakf she appointed a trustee and declared that the trustee should stand possessed of the nett rents and profits of the property upon certain trusts. The benefactions comprised a primary trust for the benefit of the poor members of her, her father's and her grandfather's families and, subject thereto, a secondary trust for the benefit of the wider class of poor comprised in a certain community and certain other objects which were charitable or religious.

The secondary trust was, however, to take effect in the event either of there being no objects of the primary trust or in the event of those objects not exhausting the entire income. Certain persons who described themselves as relatives of the lady and therefore beneficiaries under the primary trust brought a suit against the trustee alleging breach of the trust on the part of the trustee with a prayer for his removal and appointment of a new trustee. The breaches complained of were all breaches affecting the income of the property as opposed to capital:

Held, that the trust of which breaches were alleged was not a trust for public purposes of a charitable nature and the plaintiffs were not persons having an interest in such trust. The case did not therefore fall under S. 92 (1), and the consent of the Advocate-General was not necessary for the institution of the suit. AIR (Vol 26) 1939 Rang 254: 1939 Rang LR 140: 184 Ind Cas 413.

——S. 92 — Scheme embodied in decree and scheme contained in instrument, if distinct.

A scheme or constitution embodied in a decree does not stand on a different footing from a scheme contained in a will or in an instrument of dedication. AIR (Vol 23) 1936 Mad 581: (1936) MWN 673: 44 MLW 93: 71 MLJ 87: 59 Mad 751: 165 Ind Cas 820.

——S. 92 — The words "public trust of a charitable and religious nature" should be given their ordinary meaning and cannot be made to vary according to the classification of trusts which may be adopted in different system of law.

The section does not affect substantive rights except in so far as it prescribes the manner in which they can be enforced. AIR (Vol 15) 1928 All 660: 51 All 30: 26 ALJ 1016: 111 Ind Cas 93 (DB).

——S. 92 — Express or constructive trust — Meaning of — Constructive trustees — Who are.

"Any express or constructive trust" in S. 92 is not confined to what may be called the English Law sense, at all events as regarded the words "constructive trust". It means more than an express or specific trustee taking advantage of his position as such, e.g., to grant leases in his own name or to make profits by means of unauthorized investments of trust property. It embraces all cases where the property is used for the purposes described subject to duties and obligations and a head of a mutt is one of these cases.

The words "constructive trustees" include a person holding a particular fiduciary position whose doings as such can be enforced in a Court of law. This would include Mahants, Shebaits, Mutawallis, as their fiduciary positions "would be that of a manager or custodian of properties held for public purposes of a charitable and religious nature". Case law discussed. AIR (Vol 14) 1927 Mad 614: 50 Mad 567: 25 MLW 461: 1927 MWN 233: 39 MLT 37: 52 MLJ 418: 101 Ind Cas 420 (DB).

——S. 92 — Creation of, by a person out of subscriptions — Right of such person to direct management.

Where a person collects subscriptions from various persons and builds a choultry or a temple he has a right to direct in what manner the institution should be managed and what right the trustees should have in the management of that institution. This is recognised by the Hindu Law.

There is nothing illegal or improper in a person who builds a temple, whether out of his own funds or out of the funds collected by subscriptions or getting donations from people to create a trust and endow it, directing by the deed of endowment, in what manner and by whom it should be managed. AIR (Vol 13) 1926 Mad 1150: 51 MLJ 457: 98 Ind Cas 208.

——S. 92 — Suit to establish existence of trust.

S. 92 regulates suits where there is a breach of an express or constructive trust created for public purpose of a charitable and religious nature; but a suit to establish the existence of the trust itself, where the whole question involved is whether such a trust exists or not, is not within the purview of S. 92. AIR (Vol 13) 1926 Pat 321: 7 PLT 679: 5 Pat 539: 1926 PHCC 145: 94 Ind Cas 433 (DB).

——S. 92 — Rival claimants.

A suit wherein questions as between two rival claimants have to be determined is not within the purview of S. 92. AIR (Vol 11) 1924 Pat 502: 5 PLT 231: 76 Ind Cas 89 (DB).

9. Costs.

——S. 92 — Suit by trustee — Non-compliance with S. 92 — His suit must fail — He is not entitled to costs out of trust estate.

If a trustee brings a suit which he is not entitled to bring according to S. 92 without complying with its terms, he must bear the ordinary consequences for the failure of such a suit, and the fact that he is a trustee bringing a suit against co-trustees should not be allowed to outweigh the ordinary rule that a man who brings a suit in a form not permitted to him which suit must, therefore, necessarily fail, must bear the consequences. He cannot claim costs out of trust estate. AIR (Vol 29) 1942 Bom 125 (2): 44 Bom LR 88: ILR (1942) Bom 293: 200 Ind Cas 371.

——S. 92 — Trustees taking obstructive attitude and not acting up to directions in deed — Trustees, if can be saddled with costs.

It is not customary to make a trustee personally liable unless he has done something that is not merely technically wrong but unreasonable or unrighteous. But where the trustees have failed to carry out the directions in the trust and have taken up an obstructive attitude, the Court is justified in awarding costs against the trustees. AIR (Vol 23) 1936 Mad 495: (1935) MWN 1172: 165 Ind Cas 63.

——S. 92 — Costs — Order as to.

When a Judge decides that there is no misfeasance, he cannot record a decision that the trust is public nor about costs as his power ends with the first decision. AIR (Vol 3) 1916 Pat 306: 20 CWN 1354: 35 Ind Cas 837 (DB).

10. Co-trustees.

——S. 92 — Suit by trustee against co-trustee alleging breach of trust — Consent of Advocate-General not taken.

Where a suit is brought by a trustee against a co-trustee alleging breaches of the trust and asking for some of the reliefs contemplated by S. 92, the consent of the Advocate-General is necesssary, and in the absence of such consent the suit is not maintainable:

Held, on facts, that the plaintiff trustee having alleged a breach of trust created for public purposes of a charitable or religious nature, the case clearly fell within the express words of S. 92, and having asked for some of the reliefs contemplated in sub-heads (a) to (h) he was not entitled to bring that suit without the consent of the Advocate-General, or without joining along with himself some other person having an interest in the trust. AIR (Vol 29) 1942 Bom 125 (2): 44 Bom LR 88: ILR (1942) Bom 293: 200 Ind Cas 871.

——S. 92 — Suit between trustees inter se regarding namam to be put to idols is not barred by S. 9 and is covered by S. 92.

A suit for declaration for breach of trust where plaintiff alleged that the trustees committed the

breach by putting new namams or marks to the idols in or about the temple and by erasing the namams of one sect or by adding those of another sect is not covered by S. 73, Madras Hindu Religious Endowments Act, but comes under S. 92, Civil P. C. and is not barred by S. 9.

No worshipper has a right to maintain an action for any of the reliefs covered by S. 92, Civil P. C., or S. 73, Madras Hindu Religious Endowments Act, except when he seeks to enforce an individual right without securing the necessary sanction from the authorities mentioned in them.

These sections deal with matters which are of civil character and the bars have been obviously created with the object of avoiding unnecessary or frivolous suits against the trustees in regard to trust properties. The prohibition will not apply to a suit by a trustee against his co-trustees or a suit where the plaintiffs try to enforce their civil rights. AIR (Vol 26) 1939 Mad 757: (1939) MWN 418: 189 Ind Cas 190.

——S. 92 — Trustee of public charitable trust dying leaving behind him widow as trustee — Suit by next reversioner to office of trusteeship alleging mismanagement by widow and for appointment of Receiver.

Where a trustee of a public charitable trust dies leaving behind him his widow as trustee and the next reversioner to the office of trusteeship institutes a suit against her alleging mismanagement and waste and prays for appointment of a Receiver, the suit is not one for protection of his own individual or personal right.

The plaintiff is not in the position of a co-trustee, because even in respect of the private properties of the deceased male owner, the position of the presumptive reversioner is merely that of a person with a spes successionis.

The analogy of the action allowed to a reversioner under Hindu Law to maintain a declaratory suit during the lifetime of the widow is not a true analogy; because as regards trusteeship, there is no difference between a male-holder of the office and a female-holder of the office. The suit, therefore, is governed by S. 92, and must be in conformity with its provisions. AIR (Vol 26) 1939 Mad 65: 48 MLW 543: 1938 MWN 1060: (1928) 2 MLJ 1013: 180 Ind Cas 35.

——S. 92 — Suit for accounts by trustee against co-trustee — Applicability.

It was never intended that S. 92 should take away the right of a trustee to launch a suit for an account against a co-trustee, unless he obtained the approval of the Advocate-General. Sub-section (2) of S. 92, though expressed in general terms, must be read along with sub-s. (1) and it follows on such reading that it is not every suit claiming any of the reliefs specified in sub-s. (1) that should be brought with the consent of the Advocate-General, but those suits only which, besides claiming any of those reliefs, are brought by individuals as representatives of the general public.

In a suit for accounts by a trustee against a co-trustee, the relief though it may be of the kind mentioned in S. 92(1), is not sought in the larger interests of the public but is merely for the purpose of vindicating the private rights of one of the trustees and of enabling him to discharge the duties and liabilities which are imposed upon him by the trust.

The section, therefore, does not apply to such a case and no sanction of the Advocate-General is necessary. It, therefore, is not right to make the nature of the relief prayed for in a suit the conclusive and exclusive test in determining the applicability of S. 92. AIR (Vol 25) 1938 Mad 92: 46 MLW 426: (1937) MWN 849: ILR (1938) Mad 39: 176 Ind Cas 26.

——S. 92 — Suit between co-trustees — Necessity for sanction.

A suit by the trustee of a public charity against his co-trustees praying for the settlement of a scheme for the management of the trust properties in rotation by the plaintiff and the other trustees falls within the purview of S. 92, and cannot be instituted without the sanction of the Advocate-General. The decision of the Privy Council in AIR (Vol 15) 1928 PC 16: 108 Ind Cas 361 has set at rest the controversy that existed on this point.

Obiter:—If any relief of this kind is based upon an agreement arrived at between co-trustees or on the terms of a will executed by the founder of the trust or any other descendant of his when he was the sole trustee, the matter would be different.

In order to see whether sub-s. (1) of S. 92 applies to any case, there seem to be two tests. One is, whether the case relates to any breach of an express or constructive trust mentioned therein or whether the direction of the Court is deemed necessary for the administration of any such trust. The second test is whether the relief asked for is one of the reliefs specified in that section. If both those tests are satisfied, the suit is one covered by that section, which must be instituted after satisfying the requisites laid down in that section. AIR (Vol 20) 1933 Mad 70: 36 MLW 633: 63 MLJ 703: (1932) MWN 1340: 140 Ind Cas 197.

——S. 92 — Joint management — Suit to establish right — Applicability.

Where one of the co-trustees sue to establish his joint right of management of the trust and its properties along with the defendants, the case does not fall within S. 92, C. P. Code. 39 MLT 214 : 105 Ind Cas 194 : AIR (Vol 14) 1927 Mad 948 (DB).

——S. 92 — Co-trustees — Suit for declaration of right to trusteeship — Sanction.

S. 92 of C.P.C. has no application to a suit for a declaration that the plaintiff and the defendant are co-mutawallis of waqf property and are entitled to manage it jointly. 52 Ind Cas 628 : AIR (Vol 6) 1919 All 335 (DB).

——S. 92 — Co-trustees — Suit by one executor against co-executor — Charge of misapplication — S. 92 whether applicable.

Where an executor of a Hindu will brought a suit against his co-executor for restraining him from meddling with the property and when the plaint contained no suggestion that there was a charitable trust it was held that S. 92 did not apply and that the suit must be treated as a general administration suit. 40 Bom 439 : 18 Bom LR 335 : 34 Ind Cas 167 : AIR (Vol 3) 1916 Bom 281 (DB).

——S. 92 — Co-trustees — Disputes between parties as to who is to be mutwalli — Applicability of.

S. 92 does not cover suits relating to disputes between parties as to who is to be a Mutwalli on the ground of family relationship. 37 All 86 : 13 ALJ 26 : AIR (Vol 2) 1915 All 25 (DB).

——S. 92 — Co-trustees — Suit for accounts and Scheme — Founder of trust — Exemption.

A suit for accounts and a scheme by one trustee against his co-trustees requires the sanction of Advocate-General or Collector. The founder of trust is not exempt from the operation of S. 92. (1910) 4 SLR 152 : 8 Ind Cas 926.

11. Court-fee.

——S. 92 — In a suit under S. 92, Civil P. C., court-fee payable is under Art. 17(vi), Sch. II and not under S. 7(v)(i)(d) of the Court-fees Act. AIR (Vol 30) 1943 Oudh 186 : 1942 OWN 797 : 18 Luck 738 : 204 Ind Cas 314.

——S. 92 — Valuation of suit — Suit under S. 92 not for possession of immovable property but to assert certain rights of public — Suit to be valued according to value of relief and not value of property involved in it — Objection cannot be allowed in second appeal.

A suit brought by the plaintiffs under S. 92 as members of the public not for possession of immovable property but with a view to asserting certain rightss of the public which are not rights of ownership is to be valued for the purposes of jurisdiction according to the value of the relief & not in accordance with the value of the properties with which it is concerned.

Although such rights may be difficult to be valued accurately, yet where the lower Courts have held that the valuation placed on the suit was not unreasonable, a contention that the suit should have been differently valued cannot be given effect to in second appeal. AIR (Vol 29) 1942 Pat 79 : 22 PLT 799 : 8 BR 38 : 196 Ind Cas 554.

——S. 92 — Suits under S. 92 fall under cl. (vi) of Art. 17, Sch. II, Court-fees Act, which prescribe a court-fee of Rs. 10. AIR (Vol 28) 1941 Lah 97 : 43 PLR 106 : ILR (1941) Lah 451 : 193 Ind Cas 641 (FB).

——S. 92 — Where the suit instituted was one under S. 92, C. P. Code, and the relief claimed was: (1) that the present Mahant may be removed and a new Mahant may be appointed in his place, and (2) that along with the Mahant so appointed a committee may be formed to fulfil the objects of the trust, the property of the trust may be made over to the new Mahant and the newly appointed committee and the list of the said property may be prepared.

Held, that Art. 17, Cl. (vi), Sch. 2, Court-Fees Act, applied to the case as it was brought under the provisions of S. 92, C. P. Code, and there was nothing in the relief claimed which would take the case out of the purview of Art. 17, Cl. (vi) and so the Court-fee stamp of Rs. 10 was sufficient. 10 Cal 559, Diss. 110 Ind Cas 264: 8 Lah 730: 29 PLR 97: AIR (Vol 15) 1928 Lah 113 (DB).

——S. 92 — The Madras High Court Fee Rules 1925 do not exempt the payment of fees in respect of suits under S. 92 C. P. Code. 26 MLW 378 : 105 Ind Cas 119 : AIR (Vol 14) 1927 Mad 940 : 53 MLJ 457.

——S. 92 — No beneficial interests claimed by plaintiff — Court fees.

Where in a suit under C. P. Code, S. 92, the plaintiff did not claim any beneficial interest in the properties but only said that on going through his accounts a sum which he estimated at a certain amount would be found due by the trustees to the trust and that the trustees should be asked to make good to the trust itself that amount of money and hand over possession of the immovable property.

Held, that these reliefs could not be treated as being part of the subject-matter in dispute between the parties; that they were merely ancilliary reliefs, and that the relief claimed clearly fell under Art. 17(6) of the 2nd Schedule of the old Court Fees Act. 11 M. 148, Diss. 87 Ind Cas 25 : 1925 MWN 104 : AIR (Vol 12) 1925 Mad 722 : 48 MLJ 514.

——Ss. 92, 115 — Court-fee — Jurisdiction — Suit with Advocate-General's sanction in respect of public charities — Court-fees Act (VII of 1870) Sch. II, Art. 17, Cl. (6) — Striking off a prayer of relief — Advocate-General's sanction if necessary — Interlocutory order — Revision by High Court.

A plaint in suit under S. 92 of the Civil Procedure Code (relating to public charities) should bear a Court-fee stamp of Rs. 10 only as required by Art. 17, Cl. (6) of Sch. II of the Court-Fees Act.

Where the plaintiffs in such a suit paid the Court-fee on such value and moved the High Court without waiting for dismissal of the suit for non-compliance with the order.

Held — That the order in effect amounted to a denial of jurisdiction, and though interlocutory, was a fit one for interference in revision by the High Court. A prayer for relief in a plaint in such a suit not covered by the provisions specified in S. 92 may be struck off on the application of the plaintiff, the sanction of the Advocate-General for striking off such prayer being unnecessary. (1910) 14 CWN 932 : 12 CLJ 211 : 7 Ind Cas 92(93) (DB).

12. Interpretation.

See also N. 8.

——S. 92 — "Two persons".

The two persons referred to in S. 92, Civil P. C., are two individuals and the fact that the two persons were father and son and members of a joint Hindu family would not convert them into one person for the purposes of that section. AIR (Vol 31) 1944 All 1 : 1943 ALJ 535 : 1943 AWR 269 : ILR (1944) All 20 : 211 Ind Cas 157.

——S. 92 — Amendments of 1882 and 1908 of S. 92 as it originally stood, if retrospective.

The amendments in 1882 and 1908 of S. 92 as it originally stood were intended to be retrospective and affected existing rights. AIR (Vol 29) 1942 Cal 343 : ILR (1942) 2 Cal 211 : 46 CWN 59 : 201 Ind Cas 248.

——S. 92 — Applicability, whether depends upon whether defendants had or had not objected to form of suit.

The applicability of S. 92 does not depend upon whether defendants had or had not taken objection to the form of suit. The form of the suit is laid down by law. The Legislature requires that if a suit of this kind is to be instituted, it must be instituted, in a particular way, and it is not open either to the plaintiffs or to the defendants as it were, to contract themselves out of this section and to say in effect "we do not mind if the law in this matter is or is not observed". AIR (Vol 28) 1941 Sind 88 : ILR (1941) Kar 204 : 194 Ind Cas 461.

——S. 92 — Exclusion of individual worshipper from particular position during worship in temple does not bar the right of whole community to worship in that position. AIR (Vol 26) 1939 Mad 102: 48 MLW 722: 1938 MWN 106: (1939) 1 MLJ 124 : 183 Ind Cas 258.

——S. 92 — Mutwallis of wakf property.

The persons who are mutwallis of a wakf property are not trustees in the technical sense within the meaning of S. 92, but are merely superintendents or managers. AIR (Vol 25) 1938 Rang 339 : 1938 LR 276 : 167 Ind Cas 851.

——S. 92 — Limitations arising out of conflict of jurisdiction in Chancery Courts, whether applicable.

Section 92 has no doubt been modelled on the practice of the Chancery Courts, but as that division of jurisdiction is not part of the Law of India, limitations arising out of that conflict of jurisdic-

tions have no direct application here. AIR (Vol 23) 1936 Mad 449 : 43 LW 409 : 1936 MWN 245(2) : (1937) 2 MLJ 437 : 164 Ind Cas 615.

——S. 92 — The provisions of S. 92 are provisions of a restrictive nature, and, therefore, they must be construed strictly. AIR (Vol 23) 1936 Sind 179 : 30 SLR 104 : 165 Ind Cas 158.

——S. 92 — 'Trust and trustees', meaning of — Public, meaning of.

The words 'trust' and 'trustees' in S. 92, have been used in their ordinary sense and not in any technical sense as used in English Law or in the technical sense in which the word wakf is used in Muhammadan Law. Section 92 contemplates that there is a property burdened with obligations for purposes of a charitable or religious nature. It will apply in all cases whether wakf or not, where there is a clear indication that there is an obligation annexed to the property in favour of religious or charitable objects of a public nature.

The word 'public' in S. 92, Civil P. C., means a section of the public and it is beyond dispute that provisions of maintenance of khankah and for distribution of alms and charities etc., are objects of a public nature within the meaning of the section. AIR (Vol 19) 1932 Pat 33: 12 PLT 817: 11 Pat 288: 136 Ind Cas 417.

——S. 92 — Miscellaneous — Majority of a body cannot alter fundamental objects of that body unless such power is specially reserved.

The majority of a body cannot alter the fundamental objects of the body unless such a power is specially reserved. An association for the uplift of the Madhva doctrine was started in the year 1878 at Chirutanur. The Memorandum of Association and the rules and regulations of the Sabha gave power to make by-laws not inconsistent with the fundamental objects, and to alter or modify them by majority at the annual general meeting.

A resolution was passed in the year 1921 by majority declaring that one of the mutts was superior in the Sabha to others and giving thirtham to the representative of that mutt.

Held, that the resolution giving first thirtham to the representatives of one mutt was ultra vires, and this would not be altered by any practice of giving first thirtham to the representative of that mutt having grown up. Cooper v. Gordon, (1869) 8 EQ 249, Not Appr. AIR (Vol 18) 1931 Mad 12: 59 MLJ 770: 53 Mad 737 (DB).

——S. 92 — Miscellaneous — Cls. (a) and (b) are distinct.

Clauses (a) and (b) are distinct clauses: AIR 1928 Cal 368, Diss. from. AIR (Vol 17) 1930 Mad 226: 1929 MWN 744: 122 Ind Cas 455 (DB).

——S. 92 — Wakf providing maintenance — Mismanagement.

Where a wakf contains a clause for maintenance but the mutawallis in possession and management spend a bulk of the income of the endowment, not for the upkeep of the Durgha but for themselves and treat the property as if it was their own, the wakf is mismanaged and is not carried out in accordance with the intention of the founder. AIR (Vol 16) 1929 Mad 635.

——S. 92 — Claim of private right — Alternative case of trust — Applicability.

Where plaintiffs came to Court, alleging their proprietary title to certain properties in dispute, with an alternative case that these properties were held by them under a private trust.

Held, that this was not a proper suit in which the question of the true nature of the endowment should be determined finally. AIR (Vol 14) 1927 All 526: 49 All 191: 25 ALJ 281: 99 Ind Cas 568 (DB).

——S. 92 — Invalid Trust — Maintainability of suit.

Where the defendant claims under a trust a suit under S. 92 is maintainable even though the plaintiffs challenge the appointment of the defendant as a trustee. AIR (Vol 12) 1925 Cal 1106: 86 Ind Cas 799 (DB).

——S. 92 — Scheme — Interpretation.

No distinction can be drawn between the interpretation of an Act, and that of a scheme under S. 92, C. P. Code. District Court in such a scheme means not the person but the tribunal. AIR (Vol 11) 1924 Mad 369: 47 Mad 139: 18 MLW 237: 1923 MWN 664: 75 Ind Cas 189 (DB).

——S. 92 — A suit by the trustee of a temple is not exempt from the restrictive provisions of S. 92. AIR (Vol 8) 1921 Mad 479: 14 MLW 238: 62 Ind Cas 911 (FB).

——S. 92 — Public trust — Inam — Grant to God and not to archakas — Proprietary right — Usage of — Misappropriation by Archakas for a few years — Effect.

The inams in question were granted absolutely for the benefit and support of a temple as trust properties and not for the limited purposes of the performance of the Archaka duties alone and no usage was proved or recognizable in law, concerning the application of the income to the said limited purpose, and there was no question of prescriptive right in the Archakas in the matter of the user of the trust properties, held that the Archakas were not entitled to proprietary right in the inams and the misappropriation by the Archakas for a few years prior to suit formed merely a breach of trust and no usage. AIR (Vol 4) 1917 Mad 248(2): 31 MLJ 202: 36 Ind Cas 270 (DB).

13. Jurisdiction.

(a) Foreign trusts.

(b) Powers of District and Subordinate judges.

(c) Public trusts.

——S. 92 — Jurisdiction of Court — Breach of trust alleged but not proved.

If a breach of trust is alleged in the plaint that is sufficient to confer jurisdiction under S. 92, C. P. Code. If once a Court has jurisdiction, it is not necessary that a breach of trust should be proved before the reliefs contemplated by S. 92, C. P. Code, or any of them is granted. AIR (Vol 35) 1948 Oudh 203: 23 Luck 193: 1948 OWN 179 (DB).

——S. 92 — Nature of suit — How determined.

It is the allegations in the plaint that determine the nature of the suit and the jurisdiction. The defendant's denial in the pleadings will not in any way affect the nature of the suit under S. 92, C. P. Code. AIR (Vol 33) 1946 Nag 401: ILR (1946) Nag 518: 1946 NLJ 511 (DB).

—— S. 92 — Private trust — Jurisdiction of Court to settle scheme.

The section is applicable to Muhammadan 'wakfs' and to Hindu 'debuttors' where there is no conception of two estates and two ownerships. The question in each case is whether there is a property burdened with obligations for public purposes of a charitable or religious nature. Even if the endowment is considered private, the Court will have jurisdiction to settle a scheme. AIR (Vol 32) 1945 Nag 64: ILR (1944) Nag 788: 1944 NLJ 502.

——S. 92 — Trust — Suit for removal of trustees instituted in Bombay — Object of charity in Jaipur State — Part in Bombay — Jurisdiction of Bombay High Court.

In a suit on the Original Side of the Bombay High Court under S. 92, Civil P. C., in respect of a public charity concerning a hospital in a town in Jaipur State but a part of which was in Bom-

bay, the main ground of the complaint was that the name of the hospital had been changed without authority. The Bombay High Court dismissed the suit:

Held, that the Bombay High Court had jurisdiction to entertain the suit and that it was a correct exercise of discretion by the High Court of Bombay that it should leave the plaintiffs to their remedy from the Courts of the country in which the hospital was carried on and whose poor were the beneficiaries of charity. AIR (Vol 31) 1944 PC 39: (1944) ALJ 172: 48 CWN 448: 10 BR 566: (1944) 1 MLJ 466: 57 MLW 401: 1944 MWN 450: 46 Bom LR 518: 212 Ind Cas 433: 71 Ind App 47: ILR (1944) Kar PC 193.

——S. 92 — Denial by trustee of existence of trust to property in his possession.

A distinction ought to be drawn between a case when an absolute stranger in possession of property alleged to belong to the trust either denies the trust or pleads adverse possession against the trust, and one in which a person who has come into possession of the alleged trust property through or in the right of the settlor or of a trustee, denies the existence of the trust or the title of the trust to the property in his possession.

It is not right to assimilate the position of the latter to that of a trespasser. The mere fact of a trustee 'de jure' or 'de facto' denying the existence of the trust or the title of the trust to the property in his possession does not oust the jurisdiction of the Court under S. 92: AIR (Vol 23) 1936 Mad 449: 43 MLW 409: (1936) MWN 245 (2): (1937) 2 MLJ 437: 164 Ind Cas 615.

——S. 92 — Suit under, where to be brought.

A suit under S. 92 should be brought where the subject-matter of the trust, that is to say, the trust property or the trust money or any part of it, is situate. AIR (Vol 22) 1935 Mad 983: (1935) MWN 627: 69 MLJ 274: 42 MLW 505: 161 Ind Cas 177.

——S. 92 — Powers under — Whether can be exercised in respect of excepted temples — Madras Hindu Religious Endowments Act, 1925.

In respect of excepted temples, the Board does not possess the powers which the Court has under S. 92, except with regard to the two matters referred to in S. 59 (1), Madras Hindu Religious Endowments Act, namely, the framing of a scheme and calling for accounts. AIR (Vol 22) 1935 Mad 762: (1935) MWN 382: 68 MLJ 722: 58 Mad 862: 156 Ind Cas 963.

——S. 92— Letters Patent (Calcutta), 1865, Cl. 12 — No part of subject-matter of trust within jurisdiction — Money standing to the credit of a person in another's books — Jurisdiction for suit for recovery of.

Section 92 must be taken as overriding cl. 12 of Letters Patent, Calcutta High Court. The High Court has no jurisdiction to try a suit instituted under S. 92 when no part of the subject-matter of the suit trust was within the local limits of the jurisdiction of the Court at the time when the suit was instituted although the defendants all reside or work for gain within the local limits of the Court.

Where the moneys stand to the credit of anybody in the books of another, it would be open to such person, apart from any special contract, to demand payment wherever the person with whom the money was deposited was carrying on business. AIR (Vol 19) 1932 Cal 444: 69 Cal 357: 137 Ind Cas 808.

——S. 92 — The Court has undoubted power under S. 92, to direct by its decree the payment of moneys or the delivery of trust property to the new trustees. Such a decree is not merely directory and can be executed by the new trustees. At any rate the executing Court has no power to question the validity of such directions in the decree. AIR (Vol 19) 1932 Mad 41: 60 MLJ 173: 54 Mad 345: 33 MLW 149: 1931 MWN 586: 134 Ind Cas 60.

——S. 92 — Suit for removal of trustee — Question whether trust was public or private — Stay of suit pending decision by competent Court, legality of.

A suit was instituted in the Court of a District Judge with the permission of the Legal Remembrancer asking for the relief that the defendants should be removed from being 'pujaris' or trustees of a certain public trust and that other trustees should be appointed and other reliefs given.

With the consent of the parties, the District Judge ordered stay of the suit pending a final decision by a competent Court whether the trust was a public trust or not:

Held, that the District Judge had jurisdiction to try the suit and his order requiring the parties to have the decision of a competent Court was erroneous. AIR (Vol 18) 1931 All 332: 130 Ind Cas 299.

——S. 92 — Charitable Trust — Corporation being trustees of the corporate properties are subject to jurisdiction of Court.

As charitable corporations exist solely for the accomplishment of charitable purposes, they are necessarily trustees of their corporate property, whether the beneficiaries are members of the corporation, as in the case of hospitals and colleges, or not. Accordingly, like other trustees charitable or otherwise, they are subject to the jurisdiction of the Court. AIR (Vol 18) 1931 Mad 12: 53 Mad 737: 59 MLJ 770 (DB).

——S. 92 — Religious Trust — Wakf — Applicability to.

Under Mahomedan Law, Court has power of appointing a trustee directly without his having recourse to S. 92. AIR (Vol 17) 1930 Mad 226: 1929 MWN 744: 122 Ind Cas 455 (DB).

——S. 92 — Personal right of worshipper — Suit for infringement — Necessity for sanction.

A purely personal right of worshippers and an infringement of such a right gives them a cause of action to sue without the necessity of impleading any other worshippers or getting sanction under S. 92, C. P. Code, or the Religious Endowments Act.

One consideration which is relevant in coming to a conclusion whether a personal right has been infringed so as to entitle a party to sue without reference to the other members of the community and without leave under S. 92 of the C. P. Code, or S. 14 of the Religious Endowments Act is whether, apart from the infringement of the right of the general body of worshippers, there is some damage to the plaintiff, special to and in which the other worshippers have no concern apart from the interest of every worshipper to see that a trustee performs his duties properly.

The mere fact that in and for the purposes of giving relief to a plaintiff who has a cause of action personal to himself, the Court has to issue a mandatory injunction or give direction to the trustees, would not put the case within S. 92, C. P. Code, or S. 14 of the Religious Endowments Act. AIR (Vol 14) 1927 Mad 551: 52 MLJ 541: 38 MLT 288: 25 MLW 575: 102 Ind Cas 328 (DB).

——S. 92 — Suit for charge of management — Views of majority — Original purposes of trust — Guide.

The identity of a religious community described as a Church consists in the identity of its doctrines, creeds, confessions, formularies and texts. The bond of union of a religious association may con-

tain a power in some recognized body to control, alter or modify the tenets or principles at one time professed by the association, but existence of such power must be proved.

Although any man having a right to worship can bring a suit under S. 92, the right to worship connotes the profession by the would-be worshipper of the religion practised in the place of worship, and even though the views of the majority of the worshippers may change and develop to such an extent that they may wish to alter and even to make a radical change in the form of worship, they have no right to do so, and the minority, however small, which adheres to the original practices, retains the control and possession of the place of worship and its endowments.

No question of the majority of persons can affect the question but the original purposes of the trust must be the guide. AIR (Vol 13) 1926 Lah 100: 7 Lah 275: 27 PLR 115: 94 Ind Cas 695 (DB).

——**S. 92 — Hereditary trustee.**

Where a hereditary trustee has been appointed it is not for the Court because it may think that it is undesirable that charitable funds should be administered by one man without control or even audit, to impose a control which was not a part of the original trust. But the Court has very wide powers under S. 92. AIR (Vol 9) 1922 Mad 409: 70 Ind Cas 87: 1922 MWN 620 (DB).

——**S. 92 (S. 539 Old Code) — Public Charities — "Civil jurisdiction"; meaning of jurisdiction of High Court over scheme suit in respect of Mofussal temple — Statute, construction — Letters Patent — High Courts Act, S. 9.**

The words "civil jurisdiction" in Section 539 of the Civil Procedure Code of 1882 mean "Ordinary Original Civil Jurisdiction" and not "Appellate Civil Jurisdiction" and the High Court of Madras has no jurisdiction to try a suit for a scheme under Section 539, C. P. C. (1882) in respect of a temple in the mofussal (e. g., Rameswaram).

Obiter.— The question is not merely one of jurisdiction but also one of private rights; and unambiguous words in the statute are necessary to take away private rights or to extend or curtail the jurisdiction of Courts like the High Court. The presumption is generally against the extension of the original jurisdiction of the High Court.

The Letters Patent contemplate that all the provisions therein contained should be subject to alteration by the Indian Legislature & it would not be inconsistent with the Letters Patent for the Indian Legislature to confer upon the High Court original jurisdiction in a particular class of suits arising outside the limits of its ordinary original jurisdiction. A provision by the Indian Legislature conferring such a power on the High Court will not be opposed to Section 9 of High Courts Act. (1910) 5 Ind Cas 729 (732): 20 MLJ 387.

(a) Foreign trusts.

——**S. 92 — Jurisdiction — Foreign trust — Suit for accounts and for recovery of moneys — Misappropriated by trustee — Jurisdiction of High Court — Administration of trust property — Forum — Letters Patent (Bom), Cl. 12.**

The High Court has jurisdiction to entertain & try a suit against a trustee for accounts of his management of the trust property belonging to a charity to be administered in a foreign state. The Court in the exercise of its jurisdiction will compel the trustee of the foreign trust who has made defalcations to restore the original trust property as also property which is not the original trust property but is the result of its sale proceeds. The Court has also jurisdiction to order accounts to be taken and to order payment of moneys due on the foot of that account, so that the moneys belonging to the trust may be recovered and preserved. But the administration of that property must be left to the foreign Court in whose jurisdiction that property is situate, and the High Court will not make the slightest attempt to determine how that property is to be administered. AIR (Vol 36) 1949 Bom 351: ILR (1949) Bom 620: 51 Bom LR 471.

——**S. 92 — Suit under, in respect of trust property situate in British India — Suit is maintainable in British Indian Court though actual charity is to be carried out of British India.**

A suit under Section 92 was filed in a British Indian Court within whose jurisdiction the temple and the properties in respect of which the public charity was constituted were situate. The actual charity was, however, to be conducted at a place in French India on the occasion of a certain festival. One of the reliefs claimed in the suit was the setting aside of alienations of trust property by the trustee:

Held, that the Court in British India had jurisdiction to entertain the suit. The relief in respect of the trust property could not have been obtained except from a British Indian Court. AIR (Vol 33) 1946 Mad 416.

——**S. 92 — Court, when can exercise jurisdiction over trustees in respect of foreign lands and otherwise in connection with rights to property situated abroad.**

As a Court of Equity acts in personam, it may and sometimes does exercise its jurisdiction over trustees and others in respect of foreign land otherwise in connection with rights to property situated abroad.

That the Court will protect and preserve the funds of the charity by the exercise of its jurisdiction over the trustees or other persons is very certain. But the proper conduct of the charity and the giving of any necessary directions for that purpose are another matter.

It would be plainly inconvenient if not intolerable that the Courts of a foreign country should interpose their authority upon particular question arising in the course of administering a trust, acting intermittently according as they may be invoked by particular complaints in preference to the Courts of the country in which the charity was meant to operate, and enforcing their orders by removing the trustees and entrusting to others the management of all the charity and its affairs. AIR (Vol 31) 1944 PC 39: 1944 ALJ 172: 48 CWN 448: 10 BR 566: (1944) 1 MLJ 466: 57 MLW 401: 1944 MWN 450: 46 Bom LR 518: 212 Ind Cas 433: ILR (1944) Kar PC 193: 71 IA 47.

(b) Powers of District and subordinate judges.

——**S. 92 — Jurisdiction of District Court and subjudges, 1st Class, to hear suits under S. 92.**

The jurisdiction originally vesting in the District Court to entertain and try suits under Section 92, Civil P. C., is not affected by its having been also conferred on the First Class Subordinate Judges by the amendment of Section 92. The intention seems clearly to be that both the District Court and any other Court empowered by the Provincial Government should have concurrent jurisdiction to entertain and try suits under Section 92. AIR (Vol 31) 1944 Bom 300: 46 Bom LR 653: 218 Ind Cas 504.

——**S. 92 — Suit instituted in District Court — Subsequent Government notification empowering First Class Subordinate Judge to hear such suits.**

Subsequent to the institution of a suit under S. 92, in a District Court, the Local Government

passed a notification that a certain First Class Subordinate Judge was empowered to hear such suits and the District Judge transferred the case to such Subordinate Judge:

Held, that the notification did not deal, as it should with the institution of suits, but merely with the hearing of suits properly instituted, and was ultra vires and had no effect under S. 92.

Held, also that upon any construction, the notification did not authorize the Subordinate Judge to hear suits which had already been instituted. therefore the notification cannot be relied upon as a justification for the transfer of the suit and apart from the notification, the District Judge had no power to transfer the suit. AIR (Vol 22) 1935 Bom 172: 37 Bom LR 120: 59 Bom 412: 157 Ind Cas 1086.

——S. 92 — Notification empowering Mr. H., Subordinate Judge, to hear suits under S. 92.

By a notification, the Bombay Government empowered Mr. H., First Class Subordinate Judge, Dharwar, to hear suits which may be instituted for any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust.

A suit under Section 92 was filed in his Court and it was argued that the notification did not satisfy the requirements of the statute and that the empowering of an individual judge to hear suits of a certain class which may be instituted, had not the effect of making the Court over which that Judge presides, a Court duly empowered in that behalf within the meaning of Section 92 so that a suit may be lawfully instituted there:

Held, that it was not necessary for the notification to mention the power to entertain plaints, for, that power is included in the general grant of jurisdiction, and is nowhere expressly mentioned in the Code and that the Court of the First Class Subordinate Judge presided over by Mr. H., was a Court duly empowered in that behalf within the meaning of Section 92 (1). AIR 1937 Bom 275: 39 Bom LR 548: ILR (1937) Bom 655: 170 Ind Cas 1 (FB).

——S. 92 — Additional District Judge — Bengal Civil Courts Act, S. 8 (2).

An Additional Judge to whom, under Section 8 (2) of the Bengal Civil Courts Act (XII of 1887), is assigned the function of a District Judge relating to all suits cognizable by the District Judge under any Act in force for the time being is empowered to exercise the same power as the District Judge in suits under S. 92 of the Civil Procedure Code.

In such cases it is not necessary that the Court should be empowered by the Local Government, and "any other Court empowered" in that behalf by the Local Government" in S. 92 of the Code, probably refers to Courts such as the Subordinate Judges' Courts. AIR (Vol. 8) 1921 Cal 210: 48 Cal 53: 62 Ind Cas 115 (DB).

——S. 92 — Forum — Suit — Transfer by District Judge to Court of Additional Judge — Oudh Civil Courts Act (XVIII of 1879), S. 7.

If the assignment of the duties referred to in Section 7 of the Oudh Civil Courts Act has been sanctioned in the manner required by law, suits instituted under S. 92 of the C. P. C. can be transferred for trial by a Dt. Judge to the Court of an Additional Judge. AIR (Vol 6) 1919 Oudh 311: 22 OC 93: 52 Ind Cas 45.

——S. 92 — Forum — Sub-court — Effect of notification.

A Sub-Judge, to whom was transferred by the Dt. Court a suit under S. 92, being empowered by Government notification to try suits under S. 92, is not deprived of his jurisdiction by a subsequent modification confining the jurisdiction to a specified local area. AIR (Vol 3) 1916 Mad 960 31 Ind Cas 397 (DB).

——Ss. 92 and 24 — Forum — Bengal, N. W. P. and Assam Civil Courts Act (XII of 1887), S. 8 — Additional Judge — Powers.

An additional Judge appointed under S. 8 of Act (XII of 1887) but not empowered by the Local Government to receive suits under S. 92 C. P. C. and not having the functions of a District Judge assigned over in his favour, cannot try a suit under the said section transferred to him under S. 24 C. P. C. from the file of a District Judge. AIR (Vol 1) 1914 Cal 616: 41 Cal 866: 18 CWN 612: 22 Ind Cas 951 (DB).

——S. 92 — Forum — Sub-judge — Notification by Local Govt.

A notification by a Local Government empowering a Sub-Judge to try a particular suit pending before the District Judge is not one contemplated by S. 92 of the Code. (1912) 39 Cal 146: 16 CWN 44: 13 Ind Cas 243 (DB).

(c) Public trusts.

——S. 92 — Public religious or charitable trust — Settlement deed — Bequest of funds for performance of festival of deity and charity — Direction to pay maintenance to specified relatives out of surplus income — Effect — Trust for charity or gift to relatives subject to charge for charity — Part of charity to be performed outside British India — Jurisdiction. See (1946) 1 MLJ 181: AIR (Vol 33) 1946 Mad 416.

——S. 92 — Jurisdiction of District Judge as Chief Kazi — Suit relating to private waqf — Jurisdiction to entertain.

Question of jurisdiction is a question of procedure and not of substantive law. By virtue of the abolition of the office of 'qazis', the functions and duties of 'qazis' under the Muslim Law must be taken to have been transferred collectively to British Indian Courts. Subject, therefore, to any express statutory provision to the contrary, such as, for instance, one embodied in S. 92, Civil P. C., the question as to the proper Court in which suits for administration of 'wakfs', public or private, will have to be instituted must be determined according to the procedural law now in force in British India.

Thus, if there was a gradation or heirachy of 'quazis' in Muslim Law, it is not possible to postulate a corresponding heirarchy among the Courts established in British India and to say that the District Judge as the Principal Civil Court of original jurisdiction, or a Court specially empowered under S. 92, must correspond to the chief 'qazi'. As to which Court is competent to entertain the suit must be determined by the Civil P. C. Accordingly, a suit relating to a private 'waqf' must be entertained by a Court of Subordinate Judge and not District Judge. AIR (Vol 32) 1945 Cal 328: 49 CWN 273.

——S. 92 — Religious endowment — Mahant having two capacities secular and religious — Both offices interdependent and inseparably blended — Suit falls within the jurisdiction of Civil Courts and S. 92 is no bar. AIR (Vol 27) 1940 PC 24: 44 CWN 177: 6 BR 291: 51 LW 49: 21 PLT 91: 1940 OWN 104: 1940 MWN 172 (2): 42 PLR 158: 71 LCJ 1: 42 Bom LR 295: (1940) 1 MLJ 371: ILR (1940) 1 Cal 266: (1940) ALJ 409: ILR (1940) Kar

(PC) 47 Sup: 1940 AWR 33: 67 IA 32: 185 Ind Cas 616.

——S. 92 — Temple, a trust within purview of S. 92 — Office of mahant is indivisible — Suit for only religious part of mahant's duties.

Where the 'mahant' of a temple which is a trust for public purposes of a charitable or religious nature within the purview of S. 92 of the Civil P. C., has two capacities secular as well as religious the entire office of 'mahant' held by the same individual is indivisible and falls within the operation of S. 92.

No words are to be found either in S. 92 or elsewhere excluding the religious part of the 'mahant's' duties from the operation of that section. The only limit to the Court's jurisdiction to entertain suits under that section is to be found in the provisions of S. 9 of the Civil P. C., but, spiritual portion of the office being intimately connected with the exercise of the rights to property a suit relating to it cannot be said to be outside the purview of S. 9. AIR (Vol 27) 1940 PC 24: 44 CWN 177: 6 BR 291: 51 LW 49: 21 PLT 91: 1940 OWN 104: (1940) MWN 172 (2): 42 PLR 158: 71 CLJ 1: 42 Bom LR 295: (1940) 1 MLJ 371: ILR (1940) 1 Cal 266: (1940) ALJ 409: 1940 AWR 33: ILR (1940) Kar PC 47 Sup.: 67 AI 32: 185 Ind Cas 616.

——S. 92 — Suit for declaration that plaintiffs alone have right to recite 'vedam' and entitled to certain incomes, falls within the cognizance of Civil Court and would not be barred by S. 92. AIR (Vol 26) 1939 Mad 757: (1939) MWN 418: 189 Ind Cas 190.

——S. 92 — Jurisdiction of Civil Court.

In absence of an express or constructive trust created for public purposes of a charitable or religious nature a Civil Court can take no action under the provisions of S. 92. AIR (Vol 14) 1927 Oudh 604: 101 Ind Cas 54 (DB).

——S. 92 — Private trust — Suit in respect of.

S. 92 applies to a public trust and a suit relating to a private trust is not maintainable in the Dist. Court but in an ordinary Civil Court. AIR (Vol 1) 1914 All 394 25 Ind Cas 661 (DB).

——S. 92 (S. 539 old Code) — Public charitable trust — Breach — Suit — Jurisdiction — Court in which suit should be brought.

Under S. 539 of the Civil Procedure Code one of two conditions must exist in order to bring a suit within its purview. Either there must be an alleged breach of any express or constructive trust and created for public, charitable or religious purposes, or there must be some direction of the Court deemed necessary for the administration of such trust.

If in any suit one of these two conditions exists it must be filed in the Court (mentioned in the section) either by the Advocate-General or by two or more persons interested in the trust with the sanction of the Advocate-General previously obtained. It is necessary to such suit that relief should be claimed of the description of the Cls. (a), (b), (c), (d) and (e) in that section. These reliefs are not exhaustive and any other relief may be claimed in such a suit. (1908) 10 Bom LR 87 (88, 89) (DB).

14. Limitation.

——S. 92 — Public trust — Cause of action — Fresh breach.

In the case of a public trust, every fresh breach of trust affords a fresh cause of action and every time the direction of the Court is deemed necessary, a fresh cause of action arises. AIR (Vol 32) 1945 Sind 177: ILR (1945) Kar 224.

——S. 92 — Limitation Act, S. 10.

Suit under S. 539 of old Civil P. C., (1882), corresponding to present S. 92 for appointing a new trustee for temple and for vesting property in trustee in trust for temple — Decree in terms of section — Person appointed trustee according to scheme given in decree — Property in temple vested in him — Such person is a trustee within the meaning of S. 10, Limitation Act. AIR (Vol 28) 1941 PC 130: 8 BR 151: 22 PLT 981: 1941 OWN 1367: 1941 AWR PC 107: 74 CLJ 440: (1942) 1 MLJ 8: 1942 ALJ 53: 55 MLW 31: 1942 MWN 106: 21 Pat 96: 46 CWN 377: 44 Bom LR 183: 44 PLR 200: ILR 1941 Kar (PC) 176 Sup: 196 Ind Cas 696: 68 IA 130.

[Reverses AIR (Vol 25) 1938 Pat 273 : 176 Ind Cas 209.]

——S. 92 — Scheme — Procedure — Decree in scheme suit — Appeal not represented in time — Application by interested persons to prosecute — Limitation.

In a representative suit about a temple property certain persons, on behalf of the temple, filed an appeal which was returned for representation. It was not represented in time. Certain other persons interested in the temple property and in the result of the appeal then applied to the Appellate Court for taking the appeal on file and also paid fresh Court-fee. It was found that the non-representation of the appeal by the original appellants was not bona fide.

Held, that the fresh appellants should be considered as constructive parties and thus entitled to continue the appeal, and even assuming the representation was a fresh appeal, time should be excused under S. 5, Lim. Act. AIR (Vol 15) 1928 Mad 456: 28 MLW 279: 108 Ind Cas 298: 54 MLJ 629 (DB).

15. Nature of trust.

(a) Charitable and religious purpose, endowment of.

(b) Powers of court.

(c) Private and Public trust, distinction.

——S. 92 — Public trust — Wakf for public purposes — Test — Classification as wakf-al-al-aulad — Significance of — Bengal Wakf Act, S. 6 (11).

The question whether a particular wakf comes within the definition of a Wakf-al-al-aulad in S. 6 (11) of the Bengal Wakf Act is of no significance whatever, in determining whether it is a wakf for public purposes or not within the meaning of S. 92, C. P. Code.

In considering a wakf of a mixed character, it will not do always to apply an arithmetical test and try to find out whether a certain percentage of a given income is allotted to admittedly public purposes. What has got to be looked at is the governing purposes of the endowment.

If there are genuine provisions made for public charity, there can be no reason to hold that the public are not sufficiently interested in it to be able to maintain a suit under S. 92.

Whether the public are sufficiently interested in the endowment to be able to maintain a suit for its protection or for any of the other reliefs mentioned in that section concerning the endowment, will undoubtedly depend upon the nature and extent of the interest which the public may claim to possess in it.

From that point of view, a mere arithmetical standard may not always be found to be a safe or sound rule to act upon. 1948 ILR (1948) 1 Cal 241 (DB).

——S. 92 — Applicability — Public trust — Temple constructed by subscriptions or donations by worshippers — If public.

There is nothing to prevent worshippers of a private temple from giving donations or subscriptions for improving temple property or for constructing a temple. Hence evidence tending to show that a temple was constructed by worshippers who contributed or subscribed to the expenses does not lead to the conclusion that the temple is a public temple or a trust created or existing for a public purpose of a charitable nature falling within S. 92, C. P. C. AIR (Vol 34) 1947 Sind 74: ILR (1946) Kar 358: 227 Ind Cas 61.

——S. 92 — Change of name of charity — Effect.

A charity does not change its nature merely by a change of name.

The change of name, held was not such a serious breach of trust as to justify the removal of trustees. AIR (Vol 31) 1944 PC 39: 1944 ALJ 172: 48 CWN 448: 10 BR 566: (1944) 1 MLJ 466: 57 MLW 401: 1944 MWN 450: 46 Bom LR 518: ILR (1944) Kar PC 193: 71 IA 47: 212 Ind Cas 433.

——S. 92 — Proof of — Inam proceedings.

Inam proceedings are of great importance in deciding the question as to whether a temple is public or private. AIR (Vol 15) 1928 Mad 879: 113 Ind Cas 635 (DB).

——S. 92 — Fraudulent withdrawal of suit — Binding nature of decree.

Where the trust is a public trust, persons interested in it cannot be bound by the result of a prior suit in which no decision was arrived at and which was withdrawn fraudulently. AIR (Vol 15) 1928 Mad 268: 108 Ind Cas 199 (DB).

——S. 92 — Nature of.

S. 92 speaks of "any express or constructive trust created for public purposes of a charitable or religious nature." It does not signify whether it is of a charitable nature or of a religious nature provided that it is one of these two and also that it is a public purpose. AIR (Vol 10) 1923 Mad 376: 17 MLW 31: 32 MLT 47: 1923 MWN 111: 46 Mad 300: 73 Ind Cas 991 (DB).

——S. 92 — Public trust — Test of.

Apart from its history the court may consider the nature of the traditions or the usages of an Asthal to determine whether the trust is a public or a private trust. In a suit under the section for the removal of a mahant, the consent of some of the plff. respts. in appeal, to the management of the property by the original mahant cannot affect the validity of the suit on the date of institution or the jurisdiction of the Court to hear the appeal.

If no member of the cult of the founder of the Asthal can be trusted to take charge of the Asthal property without the possibility of recurrence of mismanagement, it is proper that an independent committee should be appointed who will appoint a person to manage. 20 OC 49: 38 Ind Cas 800: AIR (Vol 4) 1917 Oudh 375 (DB).

——S. 92 — Private trust.

The court should pause before interfering under S. 92, with a matter which is more a family matter than of a public nature. Where A set apart a certain portion of his property, to be devoted entirely at the discretion of the trustee for the time being and the will contemplated that one of the testator's descendants should always be trustee, it is questionable whether this is a public trust. A direction for accounts in a suit in which the administrator of an estate is not made a party is useless. 28 Ind Cas 116: AIR (Vol 2) 1915 Low Bur 67 (DB).

——S. 92 — Public trust — Test of — Grant to Nanaksahi gaddi by Muhammadan ruler for charitable purpose — Evidence necessary.

(Per Chamier J. contra Karamat Hussain J.)— A grant by a Muhammadan ruler to a Nanaksahi gaddi of villages for charitable purposes which for over 100 years have been carried out by means of providing for the maintenance of the trustee, of fakirs to go about preaching the faith of the Guru and for the visitors, is a grant for public trust within the meaning of S. 92.

A trust to be a trust for a public purpose, it is enough to show that it is for the benefit of a section of the public. Per Karamat Hussain J. (Obiter dicta) :—(I) The creation of a public or private trust save by making a wakf is unknown to Muhammadan law. (II) A Muhammadan ruler could not make a wakf in respect of property which could not be a subject of wakf.

(III) A public trust must be proved by strong evidence; the mere fact that the income of certain property has for a long time been spent to support fakirs and visitors is not sufficient evidence of such a public trust.

(IV) A grant to a mahant (the income of which he is not bound to spend on a public charitable purpose) does not mean that a public charity was created. All the legal requisites essential for the constitution of a public charity must be established by strong and clear evidence to enable the court to declare that certain property is a public charity.

An institution which encourages celebacy and parasitism and offers temptation to crime and vice cannot be an institution for public purposes of a charitable or religious nature. (1911) 11 Ind Cas 166 (All) (DB).

(a) Charitable and religious purpose, endowment of.

——S. 92 — Public endowment for religious uses defined.

A public endowment for religious uses is one which distributes its benefits to all men of all classes professing a defined form of religion. AIR (Vol 29) 1942 Cal 343: ILR (1942) 2 Cal 211: 46 CWN 59: 201 Ind Cas 248.

——S. 92 — Library.

Where a testator in his will sets apart certain portion of his building for a library to be used by general public and dedicates part of his property for the up-keep of the library and appoints a committee for its management, the library is a trust for public purposes of a charitable nature within the meaning of S. 92. AIR (Vol 28) 1941 Cal 68: 72 CLJ 362: 194 Ind Cas 874.

——S. 92 — Gift for charitable purposes — Charity for public purpose — This purpose, whether defeated by direction that members of settlor's family would be eligible to benefit with members of public.

Where the words used are "charitable and benevolent purposes" any object to be benefited must possess both characteristics. Accordingly, these words will constitute a good charitable trust, that is to say, a charitable trust of a public character. But, where the words used are "public, benevolent or charitable purposes," the gift is expressed in another form admitting non-charitable objects, for example objects of private benevolence only, or public non-charitable purposes and the trust will fail.

A bequest to charitable purposes may by its very terms show that those purposes are of a private nature and in such a case the bequest would not fall under S. 92. But where a gift is to purposes which are charitable, whatever else they may be in addition, then unless the charitable purposes expressed are clearly stated to be of a private

nature, the Courts will administer the trust as one for public purposes of a charitable nature.

When an intention of a testator is to benefit only the members of his own family who are poor, this is not a "public purpose of a charitable nature" within the meaning of S. 92. Where, however, charity prima facie, for public purposes is the expressed object of the settlor, these purposes are in no way defeated by the reminder that members of his own family are eligible to benefit with other members of the public at large. AIR (Vol 26) 1939 Rang 203: 1939 Rang LR 520: 184 Ind Cas 333.

——S. 92 — **Facts showing temple to be for public charitable purposes.**

A trust according to the definition in the Trusts Act means an obligation attached to the ownership of property. Section 92 is not limited to trusts in that sense but must certainly include them. Public user for a long period without objection can be relied on as strong evidence of a public trust. When properties have been acquired by a sadhu and have descended from chela to chela, there is a presumption that they have been dedicated to religious uses.

Even if the use of the temple is apparently restricted to persons professing a particular panth, the temple might still be a public temple.

The authors of the trust and his successors by their acts and declarations showed that the properties acquired by them were to be used not for their own purposes but for the benefit of the institution.

The purpose of the trust was the maintenance of the institution as a means of perpetuating the teaching of its founder. The beneficiaries were primarily the followers of the panth and in addition, all Hindus who by the customs of the institution from the beginning had been permitted to use the temple as a public temple :

Held, that the mahant for the time being received and held all the properties, movable and immovable subject to the obligation to use them for the benefit of the temple and the faith and for purposes which could only be regarded as public charitable purposes within the meaning of S. 92, Civil P. C. AIR (Vol 25) 1938 Bom 471: 40 Bom LR 1041: 178 Ind Cas 926.

——S. 92 — **Substance of trust and intention of creator must be looked to — Only Rs. 353 out of income of Rs. 1,300 dedicated in favour of public.**

There is no hard and fast rule that merely because there are certain provisions in favour of private individuals and certain others in favour of the public, that therefore, the case falls within or without the class of public trusts to which S. 92, applies.

The words "public trust of a charitable or religious nature" should be given their ordinary meaning and the real substance of the trust and the primary intention of the creator of the trust must be looked to in every case.

Where a wakf under which Rs. 353 were to be used for public purpose out of an income of Rs. 1,300 a year from wakf property :

Held, that there was public trust under S. 92. AIR (Vol 25) 1938 Cal 278: 42 CWN 345: 176 Ind Cas 842.

——S. 92 — **Dharmadayam grant — Inam register showing grantee as dharmakartha — Grant subject to condition of tope being preserved and produce applied to charity — Evidence that tope was utilized as place of shelter for villagers' cattle and way-farers.**

Tope inams are a familiar class of charitable grants made by ancient rulers for the benefit of the public or a section of the public, for example, the villagers of a particular locality.

The suit property was a 'tope' inam. A reference to the inam fair register showed that the grant was a dharmadayam grant and the grantee was described therein as dharmakartha. The grant was subject to the condition of the tope being preserved and the produce applied to charity. The evidence also showed that this tope was being utilized as a place of shelter for the villagers, for the cattle and for way-farers :

Held, that both from the nautre of the grant and from the enjoyment in regard thereto, the suit property must be intended to have been dedicated to the use of the public, i.e., the villagers and way-farers who resort thereto during the course of their travel. Section 92, Civil P. C., therefore, applied to it. AIR (Vol 24) 1937 Mad 862: 1937 MWN 1089: (1937) 2 MLJ 505: 46 LW 804: 174 Ind Cas 199.

——S. 92 — **Nair temples in Malabar — Defendant's predecessors throughout treated as managers — Temple property treated separately from private property — Evidence showing public user — Applicability of S. 92 — Presumption regarding ownership of temples in Malabar.**

The plaintiffs brought a suit for declaration that the defendants are the managers of certain Nair temples in Malabar, that the property belonged to temples and constituted public religious trust within the meaning of S. 92, the documentary evidence showed that the predecessors of the defendants had sued and had been sued in their capacity of manager of the temples, and also that the temple property was all along treated separately from the private property :

Held, that the properties standing in the names of the devasom belonged to the temples and that the position of the defendant's karnavan was that of uralan or trustee.

Held, also, that from the evidence as to public user, the temples and their endowments were public religious trusts within the meaning of S. 92. AIR (Vol 21) 1934 PC 230: 11 OWN 1150: 40 MLW 428: 1934 MWN 1055: 67 MLJ 788: 60 CLJ 344: 53 Mad 91: 4 AWR 425: 39 CWN 518: 61 IA 405: 151 Ind Cas 329.

——S. 92 — **Religious Trust — Mosque — Founded to perpetuate memory of departed men — Whether public religious institution — Inam grant.**

A mosque founded to perpetuate the memory of a departed man is a public religious institution if the public use it as a matter of right and an inam has been granted for its upkeep. A suit under S. 92 lies to remove trustees who have been guilty of misconduct.

One of the conditions of the inam was that the grant was to enure till the mosque existed. Held, the condition referred to the keeping of the mosque as a place of public worship and the mere fact that the building was allowed to stand was not a fulfilment of the condition. 5 LW 401: 38 Ind Cas 200: AIR (Vol 5) 1918 Mad 1155 (DB).

——S. 92 — **Religious trust — Trust for public purposes of religious nature.**

The management of the mausoleum mosque and Khangah of a religious Mahomedan who was the founder of a new religious order and to whom there could be no succession under any recognised rules, is a constructive trust of a religious nature for public purposes such as a Civil Court is competent to interfere with. 4 CLJ 174: 40 Ind Cas 101: AIR (Vol 4) 1917 Oudh 81 (DB).

(b) **Powers of court.**

——S. 92 — **Court, if can decide whether trust is public charitable trust — Separate suit for such declaration, necessity of.**

In a suit under S. 92, it is competent for the Court to decide the question as to whether the trust in respect of which the suit is brought is a public charitable trust or not, so as to attract the application of S. 92, and a separate suit for the declaration that the property is a trust property is not necessary. AIR (Vol 22) 1935 Cal 805: 39 CWN 1103: 63 Cal 74: 159 Ind Cas 893.

——**S. 92 — Admitted trusts.**

The provisions of S. 92 are not confined to the case of admitted trusts. In a suit under that section the Court can inquire into and determine the nature of the institution, if there is a dispute. It can decide whether the property in suit is a wakf.

The only doubt would be as to whether a declaration that the property is wakf is binding on persons other than the parties to the suit. AIR (Vol 21) 1934 Bom 257: 36 Bom LR 526: 152 Ind Cas 50.

——**S. 92 — Public trust — Evidence of — Management — Wishes of donor — Powers of court.**

Where there is no express declaration in the deed, the intention of the grantor can be gathered from the surrounding circumstances. If they indicate that the beneficial interest vested in the public and not in one or more individuals although the control and management vested in the members of the family, the Court is entitled to hold that the trust was for public purposes.

Section 92 only contemplates suits brought in a representative capacity for the benefit of the public and to enforce public rights in respect of an express or constructive trust, claiming one or other of the reliefs mentioned in that section.

Suits brought not to establish a public right but to remedy a particular infringement of an individual right are not within the section. Where in the deed there is no provision for joint management by two or more members of the family the Court cannot grant a relief against the intentions of the founder. AIR (V 8) 1921 Pat 511 : 1 Pat LT 428 : 57 Ind Cas 270 (DB).

(c) Private and Public trust, distinction.

——**S. 92 — Distinction between private and public trust — Endowment, held public trust.**

The essential difference between a private and a public trust is that in the former the beneficiaries are definite and ascertained individuals or who, within a definite time, can be definitely ascertained, but in the latter, the beneficial interest must be vested in an uncertain and fluctuating body of persons — either the public at large or some considerable portion of it answering a particular description, the fact that that uncertain and fluctuating body of persons is a section of the public following a particular religious faith or is only a sect of persons of a certain religious persuasion i.e., Shias or even a sub-sect of Shias, would not make any difference in the matter and would not make the 'waqf' a trust of a private character:

Held, on facts that the endowment was a public trust and did not confine the founder's bounty to the sub-sect of Shias to which he happened to belong. AIR (V 29) 1942 Cal 343 : ILR (1942) 2 Cal 211 : 47 CWN 59 : 201 Ind Cas 248.

——S. 92 — Where the testator's intention is to benefit only the members of his own family who were poor, the trust is not for a public purpose of a charitable nature and a suit to remove trustees of such trust is not governed by S. 92. (1936) 14 Rang 575.

——**S. 92 — Proof of — Free use by public.**

Essentially the question whether a temple is public or private is one of fact to be decided on the evidence, evidence that is of dedication, if available, of actual user and of public repute. When all castes of the Hindu public for centuries have been freely using a temple and have never been debarred from using it and there is no evidence that they did so with permission, it would require strong evidence to persuade a Court that the temple is nevertheless intended for the use of one isolate caste or tarwad or family. AIR (V 15) 1928 Mad 879 : 113 Ind Cas 635 (DB).

——**S.92 — Private Trust and Public Trust — Distinction — Temple whether public or private — Comparative evidence of other temples being public or private even if admitted by parties or held by Court to be proved should be excluded.**

In deciding whether a temple is public or private, even when the parties have admitted or when the High Court has judicially held that certain temples cited are public or are private, it is better to exclude such comparative evidence.

If the feature emphasized is a general characteristic of a public temple or of a private temple then it must bear in its own character some indicia of its public or private nature, and in that case these indicia and not the fact that they appear in other temples are the real indicia of the nature of the temple in which they appear. AIR (V 15) 1928 Mad 879 : 113 Ind Cas 635 (DB).

——**S. 92 — Proof of — Use, worship and offerings by public.**

The indicia of a public foundation must be carefully scrutinized and the existence of the obvious tests such as the use by the public, worship by the public and offerings by the public should be found out for determining whether an endowment is a public or private endowment. AIR (V 11) 1924 Pat 502 : 76 Ind Cas 89 : 5 PLT 231 (DB).

——S. 92 — In the case of a temple and idol publicly constituted and publicly accessible in which the appearance may be what one may describe as ambiguous, one would expect and ought to insist upon clear evidence of permission given or license given and permission withheld, because it is equally true that a private individual may construct out of his private purse a private temple and idol retaining the control and management in his own hands and that of his family or some other selected individuals and yet so conduct himself as to provide conclusive evidence of dedication by implication and by conduct.

There is a broad difference, when one comes to construe a dedication, between conduct which shows that the owner of the property is giving express permission from time to time to particular individuals and conduct which shows that he intends certain members of a class whom he desires to benefit to act indiscriminately without permission, that is to say as of right.

A useful test for a Judge to apply to see whether the evidence satisfies the conditions of the private trust, is to ask himself whether any of the acts testified to by the witnesses could have been prevented or penalised by proceedings for trespass. In private trust the beneficial interest is vested absolutely in one or more individuals who are, or within a given time, may be definitely ascertained.

On the other hand public trust has for its object the members of an uncertain and fluctuating body and the trust itself is of a permanent and indefinite character and is not confined within the limits prescribed to a settlement of a private trust. AIR (V 19) 1922 All 519 : 77 Ind Cas 97 : 20 ALJ 789 (DB).

——S. 92 — **Proof of intention of founder — Public purpose.**

"Public purpose" includes purpose, that is, an object or aim in which the general interest of the community as opposed to the particular interest of individuals is directly or vitally concerned. The Court has to find on the facts of each case what the intention of the founders of trust was. The fact that the control and management were vested in the members of the family does not make the trust a private one when the beneficial interest does not vest in one or more individuals. AIR (V 8) 1921 Pat 511 : 1 PLT 428 : 57 Ind Cas 270 : 1921 PHCC 6 (DB).

——S. 92 — **Public Trust — Charitable or religious nature — Essentials.**

Unless a trust is expressly created for a public purpose of a charitable nature, the mere fact that the income of certain property has been for long spent in feeding an idol and in maintaining and taking care of pilgrims will not by itself constitute a trust of such a nature. (Piggott, J. contra.).

The words "any express or constructive trust" in S. 92 of the C. P. C. (1908) should be construed liberally and in a sense as favourable as possible to the assumption of jurisdiction by a Court under that section wherever there is a fair ground for affirming the existence of a trust. (1911) 8 ALJ 1120 : 11 Ind Cas 308 (DB).

16. Onus.

——S. 92 — **Nature of proof required for removal.**

In a suit under S. 92 of the Code, just as much as in all other suits, the onus of establishing a case for the reliefs asked for is on the plaintiffs. AIR (V 24) 1937 Cal 67 : 64 CLJ 341 : ILR (1937) 1 Cal 515 : 170 Ind Cas 290.

17. Parties.

See also N. 23.

(a) Alienee of trust property.
(b) Decisions, how far binding.
(c) Necessary parties.
(d) Parties, some out of many.
(e) Proper party.
(f) Scheme suit.

——S. 92 — **Suit under S. 92 — Third party transferee — Declaration that property is trust property, whether can be granted against him.**

In a suit under S. 92, Civil P.C., third party transferees of the alleged trust property who claim the property in their own right or deny the validity of the trust can be impleaded and a declaration that the property is trust property can be granted against them. AIR (Vol 31) 1944 All 1: 1943 ALJ 535: ILR (1944) All 20: 1943 AWRHC 269: 211 Ind Cas 157.

——S. 92 — **Appeal.**

Per Jai Lal, J.—Order 41, does not apply to cases where several persons have obtained leave of the collector and have consequently instituted a suit because they must be deemed to be one plaintiff

Per Skemp J. It is not right to say that all such plaintiffs constitute one plaintiff, although they have a joint interest. AIR (Vol 22) 1935 Lah 251: 16 Lah 782: 158 Ind Cas 465.

——S. 92 — **Parties — Suit by body in charge of endowment — Statute modifying management of institution — New body whether can continue the suit.**

The right of a trustee to nominate his successor is a right which must be derived from some special provision either in the deed of settlement or in the rules of the foundation or in the custom of the society or otherwise. Where the old S.G. P.C. sued to recover a certain amount from an ex-trustee, and subsequently after the Act came into effect, the committee.

Held, that the suit was not properly framed.

Held also, that the Court cannot order the substitution of the new body on an application which is really an attempt to evade S. 92 C.P. Code. (1930) 52 CLJ 78: 130 Ind Cas 866: AIR (Vol 18) 1931 Cal 281 (DB).

——S. 92 — **Plaintiff trustee.**

A trustee is a person interested in the trust. and there is nothing in S. 92 to prevent his being a plaintiff. 87 Ind Cas 194: AIR (Vol 12) 1925 Mad 820: 48 MLJ 534 (DB).

——S. 92 — **Suit by pujari for share in offerings — Trustees pro forma defendants — Applicability.**

The plaintiff claimed to be one of the hereditary pujaris, and to have certain rights in virtue of his position as such in accordance with the usage of the institution to a certain part of the temple funds. It was common ground that the funds which plaintiff claimed, viz. the offerings laid before the deity, belonged to the temple and were to be managed and administered by the members of the Devasthan Committee. But the plaintiff was the pujari of the temple and the defendants were the temple servants. The trustees were made pro forma defendants.

Held, that S. 92 applied. 45 Bom 683: 23 Bom LR 125: 60 Ind Cas 924: AIR (Vol 8) 1921 Bom 297 (DB).

(a) Alienee of trust property.

——S. 92 — **Alienation by shebait of property belonging to public endowment — Who can challenge.**

In a case of a public endowment, a part of the trust property which had been alienated by the shebait or lost in consequence of his action, can be recovered only in a suit instituted by the shebait.

The only remedy which the members of the public have, in a case of this description, is to secure the removal of the shebait by proceedings under S. 92 and then to secure the appointment of another shebait who would then have authority to represent the idol in a suit to recover the idol's properties. AIR (Vol 25) 1938 Pat 394: 4 BR 556: 175 Ind Cas 218.

——S. 92 — Third party transferees of trust property can be impleaded in a suit under S. 92. 89 Ind Cas 40: 47 All 770: 23 ALJ 601: 6 LRA Civ 352: AIR (Vol 12) 1925 All 683 (DB).

——S. 92, O. 1, R. 3 — **Parties — Alienee a party.**

In a suit for removal of mutwalli for breach of trust in alienating trust property, alienee is a necessary party. 32 Ind Cas 807: AIR (Vol 4) 1917 Cal 594 (DB).

——S. 92 and O. 1, R. 3 — **Parties — Alienee of trust property.**

The alienee of the trust property for the breach of which a mutwalli is sued under S. 92 may be made a party and may be delcared to be trustee of the trust property directing the alienee to convey the same if the court decides against him. 42 Cal 1135: 32 Ind Cas 801: AIR (Vol 3) 1916 Cal 935.

——S. 92 — **Parties — Alienee of trust property — Whether necessary party.**

A alienee of a trust property is not a necessary party to suit under the section and a declaration and decree for possession against him cannot be given in it. 17 MLT 191: 28 MLJ 326: 28 Ind Cas 898: AIR (Vol 3) 1916 Mad 979 (DB).

——S. 92 and O. 1, R. 10 — **Parties — Alienee of trust property.**

In a suit under S. 92 neither a decree for possession nor even for a mere declaration can be

given against the alienees of trust properties. The alienees are proper though not necessary parties to such a suit: O. 1 and 2, C.P.C. providing for the array of parties in suits of every description will govern also the particular class of litigation under S. 92. (1914) MWN 692: 27 MLJ 266: 16 MLT 178: 25 Ind Cas 794: AIR (Vol 2) 1915 Mad 517 (DB).

——S. 92 and O. 1, R. 1 — Parties — Alienees.

It is doubtful whether alienees or trespassers on trust property can be joined as parties to a suit under S. 92. 38 Mad 1064: 33 Ind Cas 45: AIR (Vol 1) 1914 Mad 708 (DB).

——S. 92 and O. 1, R. 10 (2) — Parties — Alienee from trustee — Suit against alienee — Suit for declaration of invalidity of alienation.

In a suit under S. 92 an alienee from a trustee is not a necessary party. A prayer that an alienation of trust property be declared "null and void" cannot be brought under S. 92 and no certificate of Advocate-General is necessary for such a suit. (1911) 5 SLR 103: 12 Ind Cas 668.

——Ss. 92, 93 and O. 1, R. 1 — Parties — Alienee of trust properties.

Where the plaint alleges that the alienee took the property from the trustee with full knowledge of its character as a public trust for religious purposes and that he has for some years paid part of the income to the trust the alienee is a necessary party as the question whether the alienee is a constructive trustee in virtue of the alienation and by reason of his conduct may arise. (1911) 35 Bom 470: 13 Bom LR 690: 12 Ind Cas 30 (DB).

(b) Decisions how far binding.

——S. 92 — Decree in scheme suit — Effect — Right of person not a party to the suit to agitate his claim in respect of the institution and its properties.

A decree in a scheme suit under S. 92. C.P. Code, has the effect of preventing any one, whether a party to the suit in which the decree was passed or not, from asserting any rights vested in him which conflict with or attack the scheme.

Where there is an obstruction when the trustees seek to obtain delivery of possession and the removal of the obstructor is ordered. it is not open to such obstructor to sue for a declaration of his rights in respect of the institution and its properties. ILR (1948) Mad 257: AIR (Vol 35) 1948 Mad 134: 60 LW 438: 1947 MWN 658: (1947) 1 MLJ 395 (DB).

——S. 92 — Addition of Parties — New reliefs added — Change in representative nature of suit — Applicability of C. P. Code, Sec. 11, Expl. 6.

A suit in respect of trust property was instituted by seven persons with the sanction of Advocate-General. It was subsequently amended without his sanction by adding strangers to the trust as defendants and by adding prayers for relief not covered by S. 92. The suit was later on compromised by six out of the seven plaintiffs.

Held, that the nature of the suit was changed, that it ceased to be one of representative character and the decree based on the compromise, however binding as against the consenting parties, cannot bind the rest of the public. S. 11, Expl. 6 has no application to such a case. 55 Cal 519: 55 IA 96: 9 PLT 65: 32 CWN 482: 27 MLW 339: 26 ALJ 464: 108 Ind Cas 361: 30 Bom LR 774: 48 CLJ 55: 1928 MWN 926: AIR (Vol 15) 1928 PC 16: 54 MLJ 609.

——S. 92 — Decree under — How far binding on persons not parties.

Any decree passed in a suit under S. 92, C.P. Code, is binding not only on the trust and the trustees but also on all the worshippers at the temple. 1925 MWN 505: AIR (Vol 12) 1925 Mad 1070 (FB).

——S. 92 — Alienation of property — Transferee of wakf property made a party to suit under — Transferee whether bound by decision.

The transferee of a wakf property who is made a party to a suit under S. 92 of the C.P.C. is bound by decision in the suit and he is barred from going behind it, in a subsequent suit. (1911) 33 All. 752: 8 ALJ 896: 11 Ind Cas 218 (DB).

(c) Necessary parties.

——S. 92 — In a suit requiring trustees to account, all trustees are necessary parties. (1941) 1941 NLJ 587.

——S. 92 — Removal of — Transferee of trustee, if necessary party.

In a suit under S. 92, for the removal of a trustee the transferee of the trustee is not a necessary party. AIR (Vol 25) 1938 Cal 278: 42 CWN 345: 176 Ind Cas 842.

——S. 92 — Suit for adjustment of rights of management of shebaits inter se — Deity, if necessary party.

In a matter in which the deity is vitally interested, the deity should be made a party and if the shebaits have got any interest adverse to that of the deity, it is necessary that the idol should be represented by a perfectly disinterested person. Necessity however, has got to be judged on the facts of each particular case and the controversies to which it gives rise. AIR (Vol 24) 1937 Cal 338: 41 CWN 728: ILR (1937) 2 Cal 105: 172 Ind Cas 161.

——S. 92 — In a suit under S. 92 only the trustee is a necessary party. AIR (Vol 19) 1932 Pat 33: 11 Pat 288: 12 PLT 817: 136 Ind Cas 417.

——S. 92 and O. 1, R. 10 — Parties — Hereditary trustee — Son a party.

In a suit under S. 92 for removal of a hereditary trustee, the son of a deft. is necessary party. 6 LW 9: (1917) MWN 556: 38 Ind Cas 133: AIR (Vol 5) 1918 Mad 1071 (DB).

(d) Parties, some out of many.

——S. 92, O. VI, R. 17 — All persons authorised by Advocate-General to sue under S. 92, must join as plaintiffs — Person left out till stage of argument cannot be impleaded before pronouncing judgment.

There can be no doubt that three plaintiffs cannot institute a suit under the provisions of S. 92, when four have been authorised by the Advocate-General (or the Legal Remembrancer) to do so. The basis of the rule that all those authorised by the Advocate-General to institute a suit must join as plaintiffs is that some alone cannot take it upon themselves to represent the public when all have been authorised to do so.

The person who has been left out till the stage of argument cannot be impleaded before pronouncing judgment. And the fact that the person who was left out was impleaded as plaintiff at the time of pronouncing the judgment cannot validate the institution of the suit and the suit should be dismissed. AIR (Vol 30) 1943 All 74: 1943 AWRHC 197: (1942) ALJ 722: ILR (1943) All 112: 205 Ind Cas 48.

——S. 92 — All plaintiffs to whom sanction to file suits given need not actively continue to prosecute suit.

There is nothing in S. 92, which requires that all the plaintiffs to whom sanction had been given for filing the suit should after filing the suit continue actively to prosecute the suit. AIR (Vol 29) 1942 Sind 137: ILR (1942) Kar 179: 205 Ind Cas 449.

——S. 92 — Consent to institute suit given to certain individuals — Suit instituted by some of them only.

Where consent has been given to two or more persons, only some of those persons, even if they are more than two, cannot institute the suit. A condition precedent to the valid institution of the suits is the fulfilment of the conditions of the consent which has been given. The section does not contemplate that some of those persons should institute a suit as plaintiffs while others who, after consent is given, have changed their minds, should be joined as defendants. AIR (Vol 28) 1941 Sind 88: ILR (1941) Kar 204: 194 Ind Cas 461.

——**S. 92 — Sanction obtained by several persons — One dying — Suit instituted by rest.**

Where several persons have obtained sanction under S. 92, and one of them dies before instituting the suit, the suit instituted by the rest is valid. AIR (Vol 27) 1940 Lah 356: 192 Ind Cas 429.

——**S. 92 — Suit by some only of persons obtaining sanction — Maintainability.**

Where permission or sanction is given by name to more than two persons, that power should be exercised by them all; and a suit by some only of the persons to whom sanction is given under S. 92 will not lie. 30 MLW 954: 1929 MWN 911: 53 Mad 223: AIR (Vol 17) 1930 Mad 129: 58 MLJ 39 (DB).

——**S. 92 — Sanction to three — Suit by two — Maintainability.**

In a suit under S. 92 of the C.P. Code all the persons authorised to institute the suit constitute one plaintiff and all must combine to take any material step in the prosecution of the suit or appeal. 100 Ind Cas 838: AIR (Vol 14) 1927 Lah 382 (DB).

——**S. 92 — Sanction to many — Suit by some, when lies.**

Ordinarily sanction granted to more than two persons cannot be availed of by any two of them without the others. But the death of a single relator or the dullness or dishonesty of one or more of them will not be fatal to the validity of the suit. Therefore in cases of difference between two or more relators the conducting of a suit or an appeal by one of them with the sanction of the Advocate-General will be valid provided the opposing relators are made parties.

Moreover, under O. 1, R. 10, the single relator with the sanction of the Advocate-General can apply to the Court to and another relator to the record; this latter course should be adopted where the number of relators, owing to death or other causes, falls below two. 76 Ind Cas 345: AIR (Vol 12) 1925 Sind 1 (DB).

(e) Proper party.

——**S. 92 — Proper parties — Stranger to the trust.**

As a general rule a stranger to the trust is not a necessary or a proper party to a suit under S. 92, C.P. Code. But where he has received or is in possession of trust funds or property handed to him in breach of the trust, of which he is aware, he is in the position of a constructive trustee of the property belonging to the trust and he can be made a party to a suit under S. 92 relating to that trust. 22 Luck 151: AIR (Vol 35) 1948 Oudh 31: 231 Ind Cas 48: 1947 OWN 259: 1947 OA (C.C.) 107: 1947 AWR (C.C.) 107 (DB).

——**S. 92, O. 1, R. 3 — Person in possession of property as heir of or claiming through settlor or trustee, denying trust, whether proper party.**

In a suit under S. 92, a person who is in possession of the trust property as heir at law of or claiming through the settlor or trustee, but denying the trust, is a proper party and ought to be impleaded as a defendant even though no relief can be granted against him. AIR (Vol 23) 1936 Mad 449: (1936) MWN 245 (2): 43 MLW 409: (1937) 2 MLJ 437: 164 Ind Cas 615.

——**S. 92 — Appeal from order of District Judge by person interested in proceedings — Proper parties — District Judge not to be made a respondent.**

When an appeal is preferred against an order of the District Judge by a person interested in the proceedings, the proper respondents are the parties who started the proceedings and the District Judge must never be called upon as a respondent to support his judgment. AIR (Vol 20) 1933 All 151: 144 Ind Cas 701 (1).

——**S. 92 — Heir-at-law of trustee — If proper party.**

If a trust has been "created for public purposes of a charitable or religious nature" a suit will lie for settling a scheme "where the direction of the Court is deemed necessary for the administration of such trust" and the person who is the heir-at-law and in possession of the property which is impressed with the character of trust property has an interest in and is a proper party to such a suit. A suit against a person in possession of trust property does lie though defendant may not be a trustee either by appointment or de son tort. 73 Ind Cas 991: 17 MLW 31: 32 MLT 47: 1923 MWN 111: 46 Mad 300: AIR (Vol 10) 1923 Mad 376 (DB).

(f) Scheme suit.

——**S. 92, O. 1, R. 10 — Scheme suit — Parties necessary to enable Court to effectually and completely adjudicate upon and settle all questions involved — Considerations in impleading parties to such suits.**

Where a scheme suit is filed and the proposed scheme is objected to by a person who seeks to be impleaded in the suit on the ground that he is a fit and proper person to be made a trustee for the management of the trusts created by his ancestors and that the exclusion of his name from the trustees proposed by the plaintiff in his draft scheme creates a reasonable fear in his mind that the Hindu charitable endowment created by his ancestors will not be properly managed by others.

And that if the Court accepts the draft scheme proposed by the plaintiff in the absence of any counter-scheme proposed by the defendant, who does not wish to oppose the suit, then the draft scheme will go unchallenged and will automatically be accepted by the Court, the case of the applicant can be brought under the terms of sub-s. (2) of O. 1, R. 10, and he should be impleaded in order to enable the Court to effectually and completely adjudicate upon and settle all questions involved in the suit filed under S. 92.

The fact that the applicant was a near relation of founders of the trust and has got the necessary educational qualification which, under the terms of the trust deed, entitles him to be made a trustee of the trusts created by his ancestors, would be an additional point in his favour. AIR (Vol 24) 1937 Oudh 229: 1937 OWN (C.C.) 271: 13 Luck 255: 167 Ind Cas 828.

——**S. 92 — Mutawalli — If necessary.**

In a suit instituted for the settlement of a scheme for Dargha, the mutawalli in possession and management is a necessary party. AIR (Vol 16) 1929 Mad 635.

——**S. 92 — Board of trustees — Suit by one — Maintainability.**

Where under a scheme framed by a Court, the Board of Trustees was given liberty to apply to the Court for directions, the Board as a whole must apply and not one member of the Board. 119 Ind Cas 469: AIR (Vol 16) 1929 Mad 625 (DB).

——**S. 92 — Interested person — Right to apply.**

Where a scheme is settled, it is desirable that in addition to the trustee or any member of the board being at liberty to apply, permission to ap-

ply should be given to any person interested in the trust. 108 Ind Cas 199: AIR (Vol 15) 1928 Mad 268 (DB).

——S. 92 and O. 1, R. 10 — Addition of parties — Power of Court — Addition of Advocate-General as plff. — Frame of scheme.

In a suit for the protection of a trust under S. 92, C.P.C., the most important questions to be settled are those which relate to the administration of the trust and the Court has power under O. 1, R. 10 to add parties for the effectual adjudication of those questions. Under S. 92 a suit may be brought by the Advocate-General himself or by two worshippers to whom he has given his consent in writing to sue or by the Advocate-General in conjunction with those persons. The right of each to sue in his own name is not exclusive of the right of the other. 38 MLJ 201: 27 MLT 100: 11 LW 219: 55 Ind Cas 546: AIR (Vol 7) 1920 Mad 133 (DB).

——S. 92 — Parties — Persons claiming to be trustees.

In a suit for framing a scheme for a public charity, the persons who bona fide allege to be trustees thereto, should be made parties; otherwise their rights would be lost if a scheme were framed. 50 Ind Cas 58: AIR (Vol 6) 1919 Mad 439.

——S. 92 — Addition of parties — Scheme suit — Jurisdiction of Court to add others as parties.

A suit under S. 92 by two worshippers for removal of trustees and for framing a scheme is a representative suit and such a character is not changed by the fact that sanction is given by the Advocate-General and the Court can add other worshippers if the suit is not properly prosecuted. (1911) 10 MLT 514: 13 Ind Cas 232.

18. Relief.

(a) Alienation of trust property.
(b) Declaration, suit for.
(c) Powers of court.
(d) Removal of trustee, suit for.
(e) "Such further relief", meaning of.
(f) Suit, maintainability of.

——S. 92 — Failure to discharge obligation imposed by scheme — Remedy.

When according to the scheme passed under S. 92, the board of trustees are to appoint a manager for the discharge of certain duties, if the board has failed to discharge its obligation under the scheme, the proper remedy is to take appropriate proceedings for the enforcement of such obligation and the High Court cannot direct any more than what has been done by the scheme prepared by it. AIR (Vol 23) 1936 All 97: 1936 ALJ 398: 1935 AWR (HC) 1338: 58 All 538: 160 Ind Cas 1091.

——S. 92 — Plaintiff, a person for whose benefit a trust is created, claiming a right in the suit property—Defendants denying the right — Plaintiff can sue under S. 42, Specific Relief Act — Proviso to S. 42 will not preclude decree being passed — He is not entitled to possession not being a trustee — Nor can he ask for any relief under S. 92 (1), Civil P.C., until he establishes that the property is trust. AIR (Vol 23) 1936 Lah 283: 160 Ind Cas 289.

——S. 92 — Trustee refusing to carry out duties under scheme — Only remedy is a suit to remove him or to have scheme modified.

There is no short cut to a remedy by application to the Court where a trustee refuses to carry out his duties under the scheme, but the only remedy available is a suit to remove him or to have the scheme modified. AIR (Vol 23) 1936 Mad 581: 1936 MWN 673: 44 MLW 93: 71 MLJ 87: 59 Mad 751: 165 Ind Cas 820.

——S. 92 — Allegation that a person is entitled to be trustee of a fund — Suit under S. 92, if proper remedy.

Where the allegation made in a case is that a person is entitled to the office of the trustee of a fund, the allegation brings the reliefs sought within the purview of S. 92 (1) and the proper remedy of the applicants lies in a suit properly instituted under that section not an application under S. 34 or S. 74, Trusts Act. AIR (Vol 21) 1934 Oudh 118 (2): 9 Luck 507: 11 OWN 323: 150 Ind Cas 193.

——S. 92 — Suit for declaration that certain property is charitable trust property and for injunction restraining pujari of temple from alienating such property.

A suit for a declaration that certain property is charitable trust property and for an injunction against the defendant, the pujari of the temple, against alienating the same, is governed by S. 92 as the reliefs for removal of a trustee contemplating a breach and for grant of injunction to prevent the breach are substantially the same.

Section 92 is not limited to cases where the trust is admitted. Where a breach of a public charitable or religious trust is alleged and the relief is one of those contemplated in that section, S. 92 applies. AIR (Vol 18) 1931 Sind 87: 131 Ind Cas 177.

——S. 92 — Relief — Restoration of trust property.

Where the trust property lost can be traced to the possession of the tarwad, then and only then, can the tarward be called upon to restore. 113 Ind Cas 635: AIR (Vol 15) 1928 Mad 879 (DB).

——S. 92 — Reliefs — Addition of claim — Effect of.

In deciding whether the suit is invalidated by reason of an omission as regards certain reliefs which are sanctioned by the Collector to whom an application was made to grant permission to file a scheme suit, the test is whether such an omission is a material omission from which it can be said that it so alters the scope or character of the suit.

That if that matter was before the Collector when the sanction was given he would in all probability not have sanctioned suit in the form in which it is ultimately brought. 11 Mad 148 and AIR 1925 Mad 636, Diss. from. But there is no reason why the mere addition of a claim should render the whole suit liable to be dismissed. It can be no worse than a case of misjoinder where parties will be confined to such portion of the claim as is not open to objection. 107 Ind Cas 130: 39 MLT 628: 27 MLW 42: AIR (Vol 15) 1928 Mad 205 (DB).

——S. 92 — Reliefs — Ultra vires — Settling scheme — Reservation of permission to apply for reliefs.

In a temple scheme settled by the Court reservation by the Court to a person or persons to apply for a relief, which will come within S. 92, C.P. Code, is ultra vires; but if such reservation does not offend in this way, or against any other provision of law, it may be useful or advisable for carrying out the provisions of the scheme already framed. 43 Ind Cas 772 and AIR 1923 Pat 420, Diss. from. 106 Ind Cas 665: 51 Mad 31: 26 MLW 728: 1927 MWN 816: 39 MLT 422: AIR (Vol 14) 1927 Mad 1073: 53 MLJ 792 (FB).

——S. 92 — Reliefs — Decree for damages — Scheme suit.

Although in a scheme suit a decree for account may be passed against the trustee in office, a decree for damages for the loss caused to the devasthanam by the trustee's misconduct cannot be passed. 92 Ind Cas 526: AIR (Vol 13) 1926 Mad 509.

——S. 92 — **Procedure.**

S. 92 is mandatory and the reliefs specified in the section can only be enforced now by resort to the procedure of the section. The cases which before 1908 held to the contrary and decided that the founder of an endowment or his heirs had the right to sue the trustees for the due performance of the trust and to remove them and to appoint new trustees without invoking the aid of S. 92 are no longer good law. 88 Ind Cas 1035: 4 Pat 741: 7 PLT 4: 1925 PHCC 194: AIR (Vol 12) 1925 Pat 544 (DB).

——**S. 92 — Wakf — Constructions on wakf property — Suit by some members of public for demolition.**

Where the defendants had raised some constructions which interfered with the exercise of certain rights to which the public were entitled.

Held, that a suit, by persons who were members of the public affected and some of whom were also trustees of the wakf to which the rights mentioned referred, for the demolition of the constructions should be decreed. 81 Ind Cas 294: 46 All 813: 22 ALJ 747: 5 LRA Civ 603: AIR (Vol 11) 1924 All 850 (DB).

——**S. 92 — Reliefs — Suit by new trustee against old to recover property — Accounts and damages — Old muktessors in possession — Religious Endowments Act, S. 14.**

A suit by a newly appointed muktessor of a temple, against the defts. who were the trustees and the old muktessors of the temple, to recover possesion of land belonging to the temple and the moveable property belonging to the deity and mesne profits and accounts is governed by S. 92 of the C.P.C. because it is a suit for the removal of the defts. from their position as trustees for the restoration of the trust property to the plff. as the Muktessor for taking accounts, and for damages for the wrongful acts of trustees.

The defts, could not be regarded as strangers claiming to hold the lands adversely to the trust though they might not agree as to their obligations under the trust, since they were really trustees and as such they claimed to be entitled to hold the lands from generation to generation subject to the due fulfilment of the trust.

Per Marten, J.—There is much which is common between S. 14 of the Religious Endowments Act and S. 92 of the C.P.C. but the latter is substantially the wider and provides inter alia for settling a scheme which is a jurisdiction of a very wide and beneficial nature.

A plff. may proceed for appropriate relief under either Act; and the opening words in S. 92 (2) only mean that if he elects to proceed under the Religious Endowments Act, he is not to be prevented from so doing by S. 92. 42 Bom 742: 20 Bom LR 954: 48 Ind Cas 514: AIR (Vol 5) 1918 Bom 134 (DB).

——**S. 92 — Alienation by shebait binding trust estate — In discharge of personal decree against shebait — Binding when beneficial to trust estate.**

See (1907) 11 CWN 261: 34 C. 249 (251, 259): 6 CLJ 442.

——**S. 92 — Charitable endowments — Trust — Debts incurred on behalf of trust — Decree, form of — Trust property not to be made liable but only the income.**

Trust property, as such, cannot be made liable by a decree in respect of debts contracted for the purposes of the trust; but only the yearly income thereof can be made liable for its just debts.

(1906) 16 MLJ 412 (412).

(a) Alienation of trust property.

——**S. 92 — Suit on behalf of villagers for declaration that alienations of temple property by pujaris are void.**

A suit by some of the villagers on behalf of all the villagers for a declaration that the suit property is Devadayam Inam land belonging to the temple in that village, and that certain alienations thereof by the pujaris were void and not binding on the institution can be maintained apart from the provisions of S. 92.

Even if the suit is but an indirect attempt by the alienating pujaris themselves to get round their own alienations, it is not open to the Court to take into consideration the motives by which the plaintiffs are actuated in bringing the suit. The mere existence of a more effective remedy can be no answer to such a suit and cannot, therefore, justify its dismissal. AIR (Vol 27) 1940 Mad 81: 50 LW 658: (1939) MWN 1137: (1939) 2 MLJ 923: 189 Ind Cas 749.

——**S. 92 — Declaration of invalidity.**

A relief which prays for a declaration that the alienations made by the trustee, whose removal is prayed for in the suit may be declared void comes under S. 92. 89 Ind Cas 40: 47 All 770: 23 ALJ 601: 6 LRA Civ 352: AIR (Vol 12) 1925 All 683 (DB).

——**S. 92 — Alienation of trustee — Suit for declaration without further relief — Maintainability.**

S. 92, C.P. Code, is intended to be an exhaustive statement of the law applicable to suits based upon any alleged breach of an express or implied trust created for public purposes of a charitable or religious nature. A relief by way of a declaration regarding the validity or invalidity of an alienation made by a trustee comes within the provisions of clause (h) of S. 92.

Where declarations sought are of such a nature that they are not calculated to produce any effect whatever unless it be as a stepping stone to a fresh litigation it would be acting against the general principles governing the proper exercise of discretion in such matters if relief by way of declaration is granted. 67 Ind Cas 659: 44 All 622: 20 ALJ 557: AIR (Vol 9) 1922 All 349 (DB).

——**S. 92 and O. 1, R. 8 — Alienation of trustee — Suit by worshippers to set aside.**

A suit under S. 92 of the C.P.C. is primarily a suit against a trustee and can only be instituted either on the ground that there has been a breach of trust or that direction of the Court is necessary for the administration of the trust. A suit under O. 1, R. 8, C. P. C., by the worshipper to set aside an alienation of mosque property by the mutwalli is maintainable without sanction.

The mere fact that the trustee was a defendant in the suit did not attract the application of S. 92 of the C.P.C. since no relief was claimed against him, nor was the court asked to give any direction for the administration of the trust. 23 CWN 115: 49 Ind Cas 355: AIR (Vol 6) 1919 Cal 179 (DB).

——**S. 92 — Alienation of trust property — Suit by worshipper.**

S. 92 of the C.P.C. is not applicable to a suit by the worshippers at a mosque to set aside an alienation of the wakf property by the trustee as the relief claimed is not one of the reliefs mentioned in the section. 58 PWR 1919: 51 Ind Cas 799: AIR (Vol 6) 1919 Lah 190.

——**S. 92 — Alienation of trust property — Suit by worshippers to set aside.**

It is only where the suit is for one or more of the reliefs in S. 92 (1) that it must be brought under that section; S. 92 is only an enabling section and has not taken away the general power

of suit. A suit by the worshippers of temple for a declaration that certain land is temple land and for an injunction restraining deft. from alienating the same or treating it as his personal property is not within S. 92, C. P. C. 42 Ind Cas 260: AIR (Vol 5) 1918 Cal 483 (DB).

——**S. 92 (2) — Reliefs — Public trust — Charitable trust — Alienation by Hindu widow — Claim of reversioner — Sanction.**

A claim of the reversioners for possession of a public trust on alienation made by the Hindu widow, is not cognisable without sanction under S. 92. 31 MLJ 280: 4 LW 264: 36 Ind Cas 678: AIR (Vol 4) 1917 Mad 214 (DB).

——**S. 92 — Alienation of trust property — Hindu Temple — Offerings by worshippers — Appropriation by Archakas — Illegal custom — Permanent alienation by offerings by Temple Committee in favour of Archakas — Suit for declaration that alienation is invalid by worshippers without sanction.**

The Devasthanam Committee of a Hindu Temple granted a permanent lease of the offerings in money made by the worshippers to the Archakas, in 1893, reserving Rs. 300 a year to the temple. About the year 1825, the Archakas of the temple used to appropriate the small money offerings of the worshippers to their own use as remuneration for their services.

But subsequently the offerings increased in value and the Devasthanam Committee in 1882 laid claim to the same on behalf of the deity. The Archakas thereupon claimed the offerings as their own property relying on the settled usage of nearly a century and finally an arrangement was made between the Archakas and the committee by which the permanent lease of 1898 was granted.

In 1911, two worshippers, acting on behalf of themselves and the others but without sanction of the Advocate-General by S. 92, C. P. C. or of the Court under S. 18 of the Rel. Endowments Act, brought a suit against the Devasthanam Committee and the Archakas for a declaration that the permanent lease of 1893 was void and beyond the powers of the committee and for a direction that the trustee of the temple should retain the right of collecting the offerings.

Held, by the Full Bench, that the suit was maintainable. Suits against strangers to a trust whether alienees from trustees or trespassers are not governed by S. 92. A permanent alienation of the offerings to a deity is illegal. The expression 'granting further or more relief' must be read along with the specified reliefs and those that should be granted under this clause should be of the character, as those expressly mentioned. 40 Mad 212: 31 MLJ 777: 20 MLT 490: 5 LW 625: (1917) MWN 400: 38 Ind Cas 73: AIR (Vol 4) 1917 Mad 112 (FB).

——**S. 92 (h) (S. 539 (e), old Code) — "Such further or other relief" — Recovery of trust property improperly alienated by the trustee — Court fee.**

Under S. 539, C. P. C., the Court can determine of what the trust properties consisted or find that particular alienations of them could not be maintained, provided all proper parties are represented before it.

Semble:— If transferees or mortgagees who have been impleaded in a suit instituted under S. 539 do not accept the findings of the Court in that suit, it may be necessary for the trustee appointed by the Court to manage the trust-property to institute a suit for recovery of possession. A decree merely directing the new mutawalli to get in the trust property as ascertained by the District Judge is a proper decree.

Per Stanley, C. J.:— The Court has power under the section to direct a trustee who is being removed to make over the trust property to the new trustee or trustees. As the decree works no change in the beneficial ownership of the property, it will be a hardship to levy Court fee as on a hostile suit for the recovery of land on title.

Per Burkitt, J.:— A suit for recovery of trust property improperly alienated by the trustee does not fall within S. 539, C. P. C., and a District Judge is not competent, when hearing a suit under S. 539, to pass a decree for recovery of possession of such property. A plaintiff praying for recovery of possession of immoveable property should pay the Court fee usually chargeable on that relief. (1905) 2 ALJ 591: 1905 AWN 208: 28 A 122 (117, 118) (DB).

(b) **Declaration,** suit for.

——**S. 92 — Suit under — Declaratory relief against third party — If can be granted.**

Though a declaratory relief 'simpliciter' against a third party cannot be properly granted in a suit under S. 92, C. P. Code, yet some of the reliefs properly claimed in such a suit, such as declarations as to nature of the property, may be implicit and inevitable. 22 Luck 151: 1947 OWN 259: 1947 OA (CC) 107: 231 Ind Cas 48: AIR (Vol 35) 1948 Oudh 31: 1947 AWR (CC) 107.

——**S. 92 — Suit against Acharya of temple — Property found to belong to wife of prior Acharya — Heirs of latter not known — Declaration that it is private property of defendant — Propriety — Proper declaration.**

Where in a suit under S. 92, C. P. Code, it is found that certain items of property do not belong to the institution and that they were the property of the wife of a prior Acharya, whose stridhan heirs are unknown, the Court should only declare that the property does not form part of the property of the institution on behalf of which the suit is brought.

A declaration that it is the private property of the Acharya should not be made as it goes too far. ILR (1946) Kar (PC) 87: 81 CLJ 306: 224 Ind Cas 554: 1946 ALJ 382: 1946 OA (PC) 171: 1946 AWR (PC) 171: 12 BR 568: AIR (Vol 33) 1946 PC 100.

——**S. 92, O. II, R. 1 — Declaration as to validity of waqf and that suit property belongs to waqf — Jurisdiction of Court to give reliefs when some of them could only be obtained under S. 92.**

The reliefs by way of declaration as to the validity of a 'waqf' and that the suit property belongs to the 'waqf' are matters beyond the scope of S. 92, and the Court has jurisdiction to grant relief in respect of the same even if some of the reliefs claimed by the plaintiffs could only be obtained in a properly constituted suit under S. 92 of the Code. AIR (Vol 29) 1942 Cal 1: 73 CLJ 475: ILR (1941) 2 Cal 434: 200 Ind Cas 822.

——**S. 92 — Reliefs — Declaration — Sanction if necessary.**

A prayer for a declaration that the property in suit is a public charitable property & not the personal property of the defendant is a prayer for relief not covered by S. 92. Such a suit therefore, though filed without the consent of the Advocate-General is maintainable. 32 Bom LR 205: AIR (Vol 17) 1930 Bom 167.

——**S. 92 — Declaration as to trust property.**

A declaration that the properties specified are 'waqf' properties is clearly within S. 92. 89 Ind Cas 40: 47 All 770: 23 ALJ 601: 6 LRA (Civ.) 352: AIR (Vol 12) 1925 All 683 (DB).

——**S. 92 — Suit for declaration of right for joint possession by an heir of founder against another**

in possession — No prayer for scheme — Maintainability of suit.

The fact that the persons entitled to the office of the trustee may not be able to work harmoniously together is not a ground for dismissing a suit by one of the heirs of the founder for a declaration of his right to share in the management and for joint possession of the trust properties with the heir who is in present possession and management.

If it is found that a scheme of management is necessary in the interests of the institution, such a scheme may be settled either by the heirs themselves or by resort to the Court. In the absence of such a scheme the plaintiff is entitled to the rights of the joint management and possession claimed in the plaint. 59 Ind Cas 464: 44 Mad 205: AIR (Vol 8) 1921 Mad 388 (DB).

——S. 92 — **Scope of — Suit for declaration that property should be declared to be 'waqf'.**

A suit for a declaration that a certain property should be declared to be 'waqf' is not covered by S. 92. 2 Lah LJ 457: 99 Ind Cas 755: AIR (Vol 7) 1920 Lah 455.

(c) **Powers of Court.**

——S. 92 -- **Test — Court can go beyond relief sought and have regard to capacity in which plaintiffs are suing and to purpose of suit.**

It is not every suit claiming any of the reliefs specified in sub-s. (1) of S. 92, Civil P. C., that should be brought with the consent of the Advocate-General, but those suits only which, besides claiming any of those reliefs, are brought by individuals as representatives of the general public.

In deciding whether a suit falls within S. 92, the Court must go beyond the reliefs and have regard to the capacity in which the plaintiffs are suing and to the purpose for which the suit is brought, and it cannot be said that it depends, not upon the character of the plaintiff's suit, but on the nature of the relief sought.

The trustees of a certain temple, who qua trustees had the right of recovering from the trustees of another temple moneys which the latter had collected on behalf of the former temple, brought a suit against the latter to compel them to render an account of the receipts and to deliver them:

Held, that the right to recover the collections was entirely independent of S. 92. The plaintiffs were not seeking to control the manner of collection or the duties of the defendants which were peculiarly theirs. They were merely seeking to get from the defendants what the defendants held on behalf of the plaintiffs. In these circumstances, S. 92 had no application.

Obiter:— Section 539 of the Code of 1882 did not take away rights in trustees then existing. AIR (Vol 30) 1943 Mad 466: 1943 MWN 293: 56 LW 269: (1943) 1 MLJ 388: ILR (1943) Mad 619: 208 Ind Cas 47 (FB).

——S. 92 — **Question whether particular property appertains to public trust or whether trustee has been validly appointed or not, when can be determined in suit under S. 92.**

Mere declarations are outside the scope of S. 92. But where reliefs contemplated by the section are claimed and such reliefs cannot be granted without the determination of the question whether a public trust exists or whether particular property appertains to a public trust, the Court, in a suit under S. 92, can determine the question whether a public trust exists or a particular property appertains to such public trust.

A suit for a mere declaration that a trustee has not been validly appointed may be outside the scope of S. 92. But, in a suit under S. 92, the Court has to determine whether a trustee has been validly appointed or not if determination of a such a question is necessary for giving relief claimed in the suit which properly comes under that section. AIR (Vol 28) 1941 Cal 68: 72 CLJ 362: 194 Ind Cas 874.

——S. 92 — **Public or private trust — Evidence of public nature — Power to pass decree for delivery of possession and payment of moneys.**

In a suit under S. 92, a decree can be made directing the removed trustee to deliver possession of the trust property to the newly appointed trustee. The relief for delivery of possession in such case would fall within cl. (h) of S. 92 (1). But a decree for payment of such sums of money as may be found due cannot be passed. AIR (Vol 21) 1934 Nag 48: 144 Ind Cas 506.

——S. 92 — **Amendment of plaint.**

A prayer for ejectment cannot be entertained by the Court in suit instituted under S. 92. But the Court may allow the plaintiff to make the necessary amendment in the plaint and, in lieu of the prayer for ejectment of the defendants as trespassers, to insert a prayer for declaration of title. AIR (Vol 20) 1933 Lah 395: 144 Ind Cas 168.

——S. 92 — **Reliefs — Power of Court — Third parties.**

The Legislature does not intend to include relief against third parties in cl. (h) under the general words "further or other relief". 108 Ind Cas 361: 55 Cal 519: 55 IA 96: 9 PLT 65: 32 CWN 482: 27 MLW 339: 26 ALJ 464: 30 Bom LR 774: 48 CLJ 55: 1928 MWN 926: AIR (Vol 15) 1928 PC 16: 54 MLJ 609.

——S. 92 — **Reliefs — Possession — Procedure — Execution.**

In a scheme suit Court passed a decree that a particular field to be declared to be under trust for the benefit of the villagers and that the proprietary body of the village had a right of management as trustees. The plaintiff applied that a particular tenant was given a lease as per condition in the scheme and that he be put in possession as against the defendants.

Held, that a scheme once settled by a Court cannot be altered except by the Court & that this would preclude suits between parties to establish a private right, which if established would interfere with a charitable scheme settled by the Court.

Where a scheme has been settled by the Court, it is absurd to suppose that yearly suits must be brought to carry out that scheme. The direction in the scheme of this nature may be enforced in execution application by persons interested. 94 Ind Cas 326: 9 NLJ 45: AIR (Vol 13) 1926 Nag 326.

——S. 92 — **Claim for — Procedure.**

Where a suit under S. 92 includes a claim for possession, though no relief for recovery of possession can be granted in a suit under S. 92, the Court will not be justified in returning the plaint altogether. The Court may call upon the plaintiffs to amend the plaint by striking off the claim for possession or it may wait till it pronounces its judgment and may dismiss the claim with regard to that particular relief. 89 Ind Cas 40: 23 ALJ 601: 6 LRA Civ. 352: 47 All 770: AIR (Vol 12) 1925 All 683 (DB).

——S. 92 — In a suit under S. 92 a decree for actual possession against transferees from the trustee cannot be properly passed. The words "granting such further or other relief as the nature of the case may require" refer to reliefs 'ejusdem generis' and not to every possible relief which a Civil Court may grant. 24 Cal 418, Diss. 89 Ind

Cas 40: 47 All 770: 23 ALJ 601: 6 LRA Civ. 352: AIR (Vol 12) 1925 All 683 (DB).

——S. 92 — Reliefs — Delivery of property.

A Court has inherent power to pass a decree in a suit relating to trust, under S. 92 (h) appointing new trustees and directing old ones to deliver the properties to them. 17 ALJ 957: 58 Ind Cas 566: AIR (Vol 6) 1919 All 83 (DB).

——S. 92 — Reliefs — Not allowed by the sections — Grant of.

A suit brought under S. 92 of the C. P. C., must be limited to matters included in the section and it is not competent to the Court to enlarge the scope of the suit and to grant reliefs other than those included in the terms of the section. 50 PWR 1919: 144 PR 1919: 51 Ind Cas 611: AIR (Vol 6) 1919 Lah 82 (DB).

(d) Removal of trustee, suit for.

——S. 92 — Relief.

In a suit for removal of the defendant from trusteeship and framing a scheme, a scheme can only be framed if it is held that the trust is public. Where in their plaint after reciting the circumstances which would give them a right to ask the Court to form a scheme for the management of the trust, the plaintiffs make this prayer, the fact that the prayer is mentioned in the last sub-clause of the last para of the plaint does not make any difference whatsoever. AIR (Vol 21) 1934 All 315: 1934 ALJ 531: 4 AWR (HC) 565: 148 Ind Cas 882.

——S. 92 — Remedies under S. 92, Civil Procedure Code, and S. 18, Religious Endowments Act (20 of 1863) against Sajjadanashin.

In a suit against the 'Sajjadanashin' and 'Mutawalli' of a religious endowment, charging him with not having discharged his duties, the plaintiffs are not entitled to proceed either under S. 18, Religious Endowments Act, or under the wider alternative of S. 92, Civil P. C. AIR (Vol 21) 1934 Pat 443: 1 BR 205: 153 Ind Cas 557.

——S. 92 — Encroachment by trustees — Removal not prayed — Suit for preservation and administration by beneficiaries.

Where a committee is appointed to look after the properties of a temple, the legal ownership of the properties appertaining to the temple is in the managing committee, and ordinarily it is that committee that can sue with respect to encroachments on trust properties; but where the encroachments are made by the trustees themselves over the trust property, the beneficiaries are entitled to sue the trustees in respect of the encroachments.

It may be that the primary right of the beneficiaries under such circumstances is to seek removal of the trustees by a suit under S. 92, but there is no reason why they should not be allowed to waive that larger right, and while not seeking the removal of the trustees, claim for the preservation and due administration of the trust properties by those very trustees. 101 Ind Cas 744: AIR (Vol 14) 1927 All 518.

——S. 92 — Scope of — Religious Endowments Act (1863), S. 14 — Removal of trustee.

S. 92 is mandatory and no suit could be brought for any of the reliefs specified in the section except under the conditions laid down therein for the removal of trustees. It is not necessary to obtain sanction under the Rel. End. Act, and without such sanction a removal could be ordered.

It is enough, if sanction under S. 92 is obtained. S. 92 (2), C. P. C. saves the special jurisdiction of the District Court under Rel. End. Act, so that a person desiring to sue for removal of a trustee or for such other specific relief as can be given under that Act, can do so without complying with S. 92. A Court is not bound to decide in a scheme suit whether the alienations of the trust property were binding on the institution. (1916) 2 MWN 351: 4 LW 444: 37 Ind Cas 688: AIR (Vol 5) 1918 Mad 1179 (DB).

——S. 92 — Scope of — Form of relief — Suit for removal — Consent of Collector — Religious Endowments Act, S. 14 — Difference between the two sections.

S. 92, C. P. C. and S. 14 of Act XX of 1863, in so far as the forms of relief to which they relate are the same, appear to offer a choice to persons interested in the trust of proceedings under either of the sections, but they are not bound to proceed under both.

Where a suit praying for reliefs contemplated by S. 92, C. P. C. was instituted after the new Code came into force, but the consent of the Collector in respect of those reliefs had been obtained before the new Code came into force, held, that the consent was nevertheless valid. 37 Mad 184: 14 MLT 44: 24 MLJ 697: 20 Ind Cas 515: AIR (Vol 1) 1914 Mad 593 (DB).

——S. 92 — Removal of trustee — Nature of relief.

When the plaintiffs in a suit for the removal of the trustee are not trustees they can sue for removal of the trustees without asking for possession. (1911) 1 MWN 142: 9 MLT 301: 21 MLJ 450: 9 Ind Cas 168 (DB).

——S. 92 — Scope of — C. P. C. 1882, S. 539 — Suit for assertion of right to trusteeship — Removal of trustee.

A suit under S. 539 C. P. C. (1882) must be against a trustee or a trustee 'de son tort', by persons having interest in the trust and must ask for one of the reliefs specified in that section.

S. 539 C. P. C. is no bar to the assertion of private rights nor was it intended as a means of ascertaining them.

A prayer for the removal of a trustee is not covered by S. 539, C. P. C. (1882). Suits under S. 539, C. P. C. (1882) are not governed by the corresponding S. 92, C. P. C. (1908) as these provisions deal with the right of suit as well as procedure. (1910) 7 MLT 45: 5 Ind Cas 515.

(e) "Such further relief", meaning of.

——S. 92 (1) (h) — Expression "further or other reliefs" in S. 92 (1) (h) — Relief to compel trustee to cease spending waqf income on secular objects and to apply entire income to religious purposes falls under S. 92 (1) (h) as it is of same nature as contemplated in S. 92 (1) (e).

The expression "further or other reliefs" in S. 92 (1) (h) must on general principles of construction, be taken to mean relief of the same nature as cls. (a) to (g).

The reliefs embraced in cl. (h) are limited not only by what was laid down in AIR (Vol 15) 1928 PC 16 but also by the qualifying phrase "as the nature of the case may require" in sub-s. (2) read with the opening words of sub-s. (1). These limitations have narrowed down the possible reliefs under cl. (h) to reliefs of a very definite order, and it cannot be said that it would be a misnomer to apply the word "specified" to those reliefs.

But it cannot be said that a relief to come under S. 92 (1) (h) must be an additional relief to some other relief prayed for, which also must fall within S. 92 (1) (a) to (g). A relief to compel the trustee to cease spending the 'waqf' income on secular objects, to apply the entire income to religious purposes upon which only a portion of that income was being expended, falls within S. 92 (1) (h) because it is of the same nature as that contemplated in S. 92 (1) (e) which involves

direction and control of benefits which are capable of flowing in different directions. AIR (Vol 29) 1942 Cal 343: ILR (1942) 1 Cal 211: 46 CWN 59: 201 Ind Cas 248.

——**S. 92 — Words, 'such further or other relief' in S. 92 (h) meaning of — Permission and prohibition — Prayer for prohibiting sale of property.**

The words "such further or other relief" in cl. (h) do not imply necessarily some relief in addition to the reliefs specified in cls. (a) to (g), for to do so would be to permit a fraud upon the section and to place upon the words of cl. (a) a limitation, not intended by the Legislature.

The word "or" at the end of cl. "(g)" is used in the disjunctive sense. It is true that cls. (a) to (f) contemplate the existence of a trust, and that cl. (g) refers to the settling of a scheme, but cl. (h) clearly indicates a relief which, while falling under this clause, does not fall under any of the cls. (a) to (g). A prayer asking that trustee be restrained from alienating trust property is included within cl. (h).

"Permission" and "prohibition" are generally regarded as supplementary terms, and it is not unreasonable to held that while a prayer asking for permission to sell a trust property falls within cl. (f), a prayer asking that property should not be permitted to be sold falls within the provisions of cl. (h). AIR (Vol 23) 1936 Sind 179: 30 SLR 104: 165 Ind Cas 158.

——**S. 92 — Reliefs — Interpretation.**

The words "further or other relief" in cl. (h) must on general principles of construction be taken to mean relief of the same nature as in cls. (a) to (g) and they do not mean any relief other than those in (a) to (g) that the case of an alleged breach of an express or constructive trust may require in the circumstances of any particular case.

Where a suit relating to religious endowment does not claim any such relief as is specified in sub-s. (1) of S. 92, the section is no bar to the maintainability of the suit without the sanction of the Advocate-General and in the Court of the Subordinate Judge instead of the Court of District Judge. 108 Ind Cas 361: 55 Cal 519: 55 IA 96: 9 PLT 65: 32 CWN 482: 27 MLW 339: 26 ALJ 464: 30 Bom LR 774: 48 CLJ 55: 1928 MWN 926: AIR (Vol 15) 1928 PC 16: 54 MLJ 609.

——**S. 92 — Reliefs — "Such further relief" — Meaning.**

In S. 92, C. P. C. the words "such further relief as the nature of the case may require" cover every subsidiary order or direction on any matter of detail necessary for carrying out the main purposes of the section. 40 Ind Cas 182: AIR (Vol 4) 1917 All 336 (DB).

——**S. 92 — (S. 539, old Code) — Public charities — Religious or charitable trust — "Further or other, relief" — Construction of 'esujdem generis'**

Per Davar J.: A suit brought not to establish a public right in respect of a public trust, but to remedy a particular infringement of an individual right is not within S. 539 of C. P. C., 1882. S. 539 contemplates a suit either in the name of the Advocate-General at the instance of relators or a suit in the name of parties "having an interest in the trust" with the consent of the Advocate-General. The 'interest' of the parties here contemplated must be the "interest" that is threatened or infringed.

A well established and ancient usage prevailing amongst a community must override such of the tenets of its religion as are shown to have fallen into desuetude and conflict with ancient usage prevailing in the community.

Held, by Beaman J.: The decision of a suit under S. 539 of C. P. C., 1882, is not only binding on the parties to it, but on all persons affected by it. The expression "such further or other relief" in the section means such further or other relief as from the nature of the introductory words and the exemplificatory clauses, appears to the Court to be appropriate in such a suit, e.g., removing fraudulent trustees, restraining a breach of trust, and so forth.

Any extension or limitation of the scope of a trust, so as to exclude those who are intended to be included or to include those who were intended to be excluded is a breach of trust. (1909) 11 Bom LR 85: 33 Bom 509: 2 Ind Cas 701 (734, 780, 781) (DB).

(f) Suit, maintainability of

——**S. 92 — Suit for relief not covered by section — Matter covered by section — Whether can be litigated.**

If a plaintiff is entitled to a particular relief independently of S. 92, C. P. Code, he can seek it outside that section, and in doing so can litigate matters which would also arise in a suit under S. 92. But a plaintiff cannot evade the provisions of S. 92 by asking for a relief which is not covered by that section and then evade its provisions by litigating matter 'which is foreign to the relief sought' and which would be covered by that section had the suit been framed otherwise. AIR (V 34) 1947 Nag 233 : ILR (1947) Nag 819 : 1947 NLJ 527.

——**S. 92 — Suit to declare that plaintiff gadesar of plaint property — No allegation or proof that property is trust property of public or charitable nature — Reference to arbitration — Validity.**

A suit in which the plaintiff prays for a declaration that he is the 'gadesar' of a property which is neither alleged nor proved to be a trust property created or existing for a public purpose of a charitable or religious nature, is not a suit falling within S. 92, C. P. Code, because neither the subject-matter nor the reliefs claimed are such as are contemplated by S. 92, C. P. Code. Hence a reference to arbitration in such suit is not invalid or prohibited. AIR (V 34) 1947 Sind 74 : ILR (1946) Kar 358 : 227 Ind Cas 61.

——**S. 92 — Trust for public purposes — Suit founded upon breach of, need not be brought in accordance with S. 92 unless relief sought falls under S. 92 (1) (a) to (h).**

Suits founded upon any breach of trust for public purposes of a charitable or religious nature do not require to be brought in accordance with the provisions of S. 92 unless the reliefs sought fall within cls. (a) to (h) of sub-s. (1) of S. 92. AIR (V 29) 1942 Cal 343 : ILR (1942) 2 Cal 211 : 46 CWN 59 : 201 Ind Cas 248.

——**S. 92 — Appointment of new trustee — Suit by new trustee for declaration of right to trusteeship and injunction without prayer for possession — Necessity of prayer for possession — Specific Relief Act, Ss. 56 (1), 42.**

Where a suit was instituted by certain persons as trustees of a trust for declaration that they were the lawfully appointed trustees and the defendants, the previous trustees, had been removed from the trusteeship by competent authority and for direction that the defendants should be made to restore the office of trustee to the plaintiffs and for an injunction restraining the defendants from interfering with the exercise by the plaintiffs of their duties as trustees but there was no prayer for possession of the trust pro-

perties which were admittedly in the possession of the defendants:

Held, (i) that the suit was not one covered by S. 92;

(ii) that the plaintiffs being out of possession the prayer for an injunction was barred by S. 56 (1) of the Specific Relief Act;

(iii) that the suit for declaration without a prayer for possession of the trust property was barred under S. 42, Specific Relief Act. AIR (V 18) 1931 Rang 322 : 9 Rang 459 : 135 Ind Cas 332.

——S. 92 — Reliefs — Enforcement of rights — Public and Private — Enforcement of.

Where the relief sought is of one of the kinds enumerated under S. 92, whether the distinction between the enforcement of public and private rights is still maintainable. AIR (V 15) 1928 All 660 : 111 Ind Cas 93 : 51 All 30 : 26 ALJ 1016 (DB).

——S. 92 — Suit for, without prayer for further relief — Maintainability.

Where a suit was brought by the plaintiff in a representative capacity on behalf of other members of the community for a declaration that a certain temple and lands dedicated to it constituted a public trust but without any consequential relief, although it was admitted that the temple and the lands in question were in the possession of the defendants and a relief claiming them could have been prayed for.

Held, that mere declaratory decree cannot be granted. AIR (V 15) 1928 Rang 143 : 110 Ind Cas 595 : 6 Rang 188 (DB).

——S. 92 — Claim on personal right to possession — Applicability.

Where, what the plaintiff claimed in his plaint did not altogether contemplate merely matters comprised in section 92, but he also claimed, as in his own right of succession, possession of the properties as well as the position of 'mohunt' on the ground that the defendant had forfeited them owing, amongst other reasons, to the fact that he had married,

Held, that a claim for ejectment and possession of this character, being based upon an alleged personal right of the plaintiff, cannot be regarded as falling within the purview of S. 92. AIR (V 10) 1923 Pat 309 : 67 Ind Cas 464 (DB).

——S. 92 — Reliefs — Omission of — Maintainability of suit.

Where sanction was obtained from the Collector under S. 93, C. P. Code, to file a suit not only for removing the trustee, but also "for declaring the alienations made by him null and void" and for recovering the trust properties from the alienee, but later the plaint omitted the two latter reliefs and asked only for the removal of the trustee, who was made the sole defendant in the suit,

Held, that since the relief asked for, in the plaint did not precisely correspond with the reliefs mentioned in the sanction order, or in other words, since the suit instituted differed from the one, for which sanction was given the plaint should be rejected. AIR (V 12) 1925 Mad 636 : 85 Ind Cas 1405 : 20 MLW 71.

——S. 92 — Reliefs — Suit to establish trusteeship — Mosque — Mutwalli.

Where none of the reliefs specified in S. 92, C. P. C., are claimed and the plaintiff does not ask the court to appoint him a 'Mutawalli', the suit is incompetent under S. 92, C. P. C. AIR (V 3) 1916 Cal 712 : 20 CWN 605 : 29 Ind Cas 423 (DB).

——S. 92 — Reliefs — Suit for possession and declaration by residents of locality, whether maintainable.

A suit for declaration but not a suit for possession of certain property alleged to be 'waqf' is maintainable by the residents of a locality interested in a 'waqf' property. (1911) 33 All 660 : 8 ALJ 710 : 11 Ind Cas 36 (DB).

19. Removal of trustee.

(a) Grounds.
(b) Powers of Court.
(c) Suit, maintainability of.

——S. 92 — Standard of morality expected of 'shebait' — Removal from trust — Grounds.

A distinction has to be drawn between the conduct of a private individual and of a 'shebait' who has to perform the worship and to manage the property on behalf of the deity. A higher standard of morality and rectitude is expected of a person who has to perform spiritual functions and has to look after the interests of the idol.

Where secular and religious functions are intermingled and interdependent, a Court, in a proper case, will have the power to remove the head of the public religious charitable trust from the performance of both the functions. If it is found by the Court that the functionary in the exercise of his duties, has put himself in a position in which the Court thinks that the obligations of his office in connection with an endowment can no longer be faithfully discharged without danger to the endowment, that is a sufficient ground for the removal, if need be from both his offices. Where he sets up a private ownership and denies that there are any obligations attaching to the office, there is a good ground for his removal. AIR (V 32) 1945 Nag 64 : 1944 NLJ 502 : ILR (1944) Nag 788.

——S. 92 — Plaintiff alleging that he was appointed mahant and shebait — Possession asked for — No prayer for removal of defendant.

The plaintiff came into Court alleging that he was the 'mahant' of the Asthal rightly appointed to that office and that he, as 'shebait' of the three deities named in the cause title to the plaint, was entitled to the properties and asking to be put into possession of them as such 'mahant' and 'shebait'. No prayer for the removal of the defendants or any of them was made, and on the frame of the suit no such prayer was necessary:

Held, that to such a suit S. 92 had no application. (1936) 62 CLJ 153 : 63 Cal 326 : 164 Ind Cas 33.

——Ss. 92, 151 — Scheme for management of temple framed — Application for removal of trustee — Separate suit or application under S. 92 — Proper procedure.

Where in a suit under S. 92, a person is appointed trustee of a temple and directed to keep accounts of the income and expenditure of the temple and to give inspection of those accounts to any person who would obtain an order of the Court in that behalf, the suit is for all practical purposes at an end.

If there is any grievance against him, the proper procedure for his removal is to file a separate suit as contemplated by S. 92, and not to move the Court by an application under Ss. 92 and 151 of the Code. AIR (V 22) 1935 Sind 210 : 29 SLR 308 : 159 Ind Cas 296.

——S. 92 — Public temple — Suit for declaration that plaintiff is the owner of a share in the tem-

ple income — Prayer for injunction to restrain defendants from obstructing plaintiff.

A suit by a co-sharer for a declaration that he was the owner of a one-third share in the income derived from two public temples and for injunction against the other co-sharers permanently restraining them from obstructing him in the enjoyment of the suit property according to his turn, and for awarding him a certain amount for the loss sustained by him through his having been deprived of his turn falls within the purview of S. 92, as the relief claimed would imply the removal of the existing trustee or 'pujari', and the vesting of the temple property in the plaintiff and also a direction by the Court as to the taking of account. AIR (V 21) 1934 Bom 26 : 35 Bom LR 1119 : 148 Ind Cas 1153

——S. 92 — Provision for removal of sajjadanashin.

There is nothing in S. 92 to prevent the inclusion in a scheme framed under that section of a provision empowering the Court in specified contingencies to reduce the powers of the managing trustee or 'sajjadanashin' 'mutawalli', temporarily or otherwise, or even to remove him altogether. AIR (V 21) 1934 Pat 443 : 1 BR 205 : 153 Ind Cas 557.

——S. 92 — Cause of action — Suit for removal of 'sajjadanashin' — 'Sajjadanashin' dying pending suit — Cause of action for settlement of scheme.

In a suit to remove the 'sajjadanashin', and for settlement of a scheme, the 'sajjadanashin's' death renders his removal unnecessary, but the cause of action which necessitated the settlement of a scheme survives. AIR (V 21) 1934 Pat 443 : 1 BR 205 : 153 Ind Cas 557.

——S. 92 — Provision for removal of trustee on application — Validity.

If a clause provides for the removal of a trustee on an application, that clause is invalid, for it goes right across the provisions of S. 92. In order to remove a trustee, a suit has to be filed with the sanction of the Advocate-General. AIR (V 18) 1931 Nag 82 (1) : 131 Ind Cas 423.

——S. 92 — Personal unfitness.

A trustee can be held unfit to continue as trustee if his own personal acts or omissions, and not those of his predecessor, are such as would render him personally unfit. AIR (V 15) 1928 Mad 879 : 113 Ind Cas 635 (DB).

——S. 92 — Suit for recovery — Applicability.

Where the trustee of charitable endowment transfers the trust property, plaintiffs cannot recover the property before first having the trustee formally removed by the Court for which purpose a suit under C. P. Code, S. 92, is necessary. AIR (V 12) 1925 Mad 689 : 88 Ind Cas 375 : 21 MLW 525.

——S. 92 — Removal of trustee, grounds for — De facto trustee — Long management — No misconduct — Scheme — Additional trustee when appointed.

Where the defendant and his ancestors though not the lawful trustees, had been in office for many years, Courts would not easily disturb the defendant's possession and depose him at the instance of strangers unconnected with the family of former trustees, except on proof of misconduct or for the clear benefit of the trust.

Where the association of strangers along with the existing trustee in the management is likely to lead to friction, the existing trustee will be allowed to manage the trust as the sole trustee, subject to exhibiting the accounts for examination of the worshippers. AIR (V 6) 1919 Mad 575 : (1918) MWN 786 : 48 Ind Cas 833 (DB).

——S. 92 — De facto trustee — Suit for removal — Vesting trust property in new trustee — Court fee — Death of one of plaintiffs obtaining sanction — Effect.

A suit brought for the removal of a person who is a 'de facto' but not a 'de jure' trustee, for the appointment of a trustee and for vesting trust property in him is a suit falling under S. 92 of the Code.

It is not necessary to stamp the plaint in such a suit with a court-fee stamp calculated 'ad valorem' on the value of the trust property. The death of one of the plaintiffs in a suit under S. 92 of the Code would not cause the abatement of the suit. AIR (V 5) 1918 Lah 146 : 97 PR 1918 : 173 PWR 1918 : 47 Ind Cas 983.

——Ss. 92 and 47 — Scheme — Construction of.

A clause in a scheme provided for an appeal from an order removing or appointing a trustee.

Held, the clause will not apply to an order declining to remove a trustee. AIR (V 5) 1918 Mad 927 : 5 LW 596 : (1917) MWN 420 : 38 Ind Cas 415 (DB).

——S. 92 — Removal of trustee — Proper remedy.

An application to remove a manager becoming an insolvent, after his appointment under a compromise in a suit under S. 92 cannot be entertained, as one in continuation of the suit, the decree being already passed. The remedy in such a case is to file a new suit under S. 92. AIR (V 2) 1915 Oudh 76 : 30 Ind Cas 382 (DB).

——S. 92 — Removal of trustee — Hindu widow.

A Hindu widow holding a hereditary office of trustee of a public charity alienated the office. The next reversioner sued for immediate possession on the ground that the alienation did not determine the estate of the trustee but the illegality was a good ground for removal of the trustee.

Held, S. 92 was no bar to a suit and the next reversioner could have the widow removed from office. (1913) 13 MLT 515 : 25 MLJ 373 : 19 Ind Cas 740.

——S. 92 — Removal of trustee — Hereditary trusteeship — Selection from family members, propriety of — Co-trustee when can be appointed.

In a suit under S. 539, C. P. C. 1882, the Court cannot remove any of the existing trustees. When the office of trustee descends hereditarily, a trustee cannot be appointed from the members of the family by selection.

When some members of the family who held the office of trustee were guilty of breach of trust or carelessness.

Held, that it is desirable to associate a respectable resident of the place in the management of the trust. (1911) 21 MLJ 784 : 11 Ind Cas 728 (DB).

(a) Grounds.

——S. 92 — Removal of trustees — Grounds of — What plaintiff has to make out.

Where removal of the trustees for misconduct or breach of trust is prayed for, the test to be applied is to find out whether the acts or omissions complained of disclose conditions which render intervention necessary in order to save the trust property.

Errors of judgment or miscarriage of discretion are not enough. There must be want of fidelity or dishonest and corrupt motives or deliberate or wilful neglect or deliberate misfeasance. AIR (V 34) 1947 Oudh 22 : (1946) OWN 160 : 1946 OA (CC) 127 : 21 Luck 222 : 225 Ind Cas 45 (DB).

——S. 92 — Change in the name of the charity held was not such a serious breach of trust as to justify the removal of trustees. AIR (V 31) 1944 PC 39 : 71 Ind App 47 : ILR (1944) Kar 193 : 1944 ALJ 172 : 48 CWN 448 : 10 BR 566 : (1944) 1 MLJ 466 : 57 MLW 401 : 1944 MWN 450 : 46 Bom LR 518 : 212 Ind Cas 433.

——S. 92 — Breach of trust, if must be proved.

For removal of trustee of a charitable institution proof of breach of trust or mismanagement is not essential. The Court has a wide discretion under S. 92, to take such action as it thinks necessary or desirable for the good of the charity. AIR (V 28) 1941 Bom 317 : 43 Bom LR 706 : ILR (1941) Bom 556 : 196 Ind Cas 826.

——S. 92 — Mere assertion by trustee that trust properties are private properties, whether sufficient ground.

Mere assertion in a suit under S. 92, by a trustee that trust properties are private properties is not by itself a sufficient ground for his removal. If he committed any breach of trust before the suit, his conduct in the course of the suit is an important element to be taken into consideration in deciding whether the breach should be condoned and he should be allowed to retain the office. AIR (V 28) 1941 Cal 68 : 72 CLJ 362 : 194 Ind Cas 874.

——S. 92 — Indebtedness.

In the absence of evidence to show that a person actually spent money on prostitutes or drink or drugs, his mere indebtedness is insufficient to justify an inference that he wasted money on such immoral purposes so as to render him unfit to be trustee of a temple. AIR (V 16) 1929 All 433 : 1929 ALJ 438 : 117 Ind Cas 828 (DB).

——S. 92 — Neglect to keep accounts.

Where a hereditary trustee is not positively dishonest and does not lack the capacity for discharging his duties, the mere fact that he is guilty of petty neglect of duty and of not keeping proper accounts and mixing up trust account with his private accounts, is no adquate cause for removing him from his office. 1929 ALJ 438 : 117 Ind Cas 828 : AIR (Vol 16) 1929 All 433 (DB).

——S. 92 — Alienation of trust property.

Removal of trustee who sets up his own right to the temple property and has alienated the trust property is proper. 26 MLW 581 : 1927 MWN 759 : 106 Ind Cas 134 : AIR (Vol 14) 1927 Mad 1033 (DB).

——S. 92 — No misappropriation.

When it is not proved that the defendants have misappropriated any of the temple income, and when it is found that they are as much interested as anyone else in maintaining the temple worship, it will not be for the benefit of the trust to remove them from office and put strangers who have no such interest in their place. AIR (V 12) 1925 Mad 1011 : 86 Ind Cas 371 (DB).

——S. 92 — Setting up adverse title in suit.

Where the managers vigorously contested the suit and put forward and tried to establish their own adverse and absolute title to the 'waqf' property they were held liable to be removed from the management of the 'waqf'. AIR (V 11) 1924 Lah 107 : 77 Ind Cas 398 : 4 Lah 364 (DB).

——S. 92 — Misconduct — Keeping mistresses — Gambling.

A Mahant is a trustee for the purposes of S. 92, C. P. Code. The interpretation put in 44 M 831 on the words "trust and trustee" is not intended to apply to those words as used in S. 92, C. P. Code. A Civil Court cannot of course interfere with the spiritual functions of the Mahant.

He can continue to instruct disciples; but the Court can certainly remove him from the control of and connection with a religious or charitable endowment and prevent him from acting as Mahant of the temple in future. The worshippers of the temple are the true beneficiaries in the endowment and are entitled to sue under S. 92.

Where it was proved that the Mahant kept three mistresses before and that he still kept a hill woman by whom he has had several children and one of these was treated as his chela and was commonly spoken of as the chota Mahant, that he had in several cases allowed the property belonging to the trust to be sold in execution of small personal decrees against himself, and had admittedly been declared an insolvent and convicted for gambling.

Held, this was sufficient evidence to prove misconduct. AIR (V 11) 1924 Oudh 261 : 10 OLJ 619 : 80 Ind Cas 674 : 27 OC 149 (DB).

——S. 92 — Removal of trustee — Misapplication.

Misappropriation of the trust fund by a trustee is sufficient to justify his removal from the office. (1910) 20 MLJ 726 : 8 MLT 404 : 8 Ind Cas 545 (DB).

(b) Powers of Court.

——S. 92 — Scheme — Framing of — Power of Court to remove person nominated as head of Math by will by his predecessor in office — Trust for a public purpose — Test.

In settling a scheme for the administration of a charitable trust involving the appointment of trustees or managers, the Court is bound to secure persons whom it regards as suitable. Hence it cannot be contended that the Court has no jurisdiction to remove a person nominated as the head of a Math by will by his predecessor when it is found as a fact that that person has by his conduct shown himself unfit for such position.

Where the evidence establishes beyond doubt that certain properties were either originally given or were dedicated by a Swami to the purposes of a Math, which is a charitable or religious institution to which anybody was at liberty to go at any time to worship the Swami and take food there, the trust is plainly one for public purposes. AIR (V 35) 1948 PC 214: 1948 ALJ 435 : 61 LW 722 : 51 Bom LR 1 : (1948) 2 MLJ 450.

——S. 92 — District Judge given power to remove trustee for unfitness — Whether can remove all trustees for dishonesty or breach of trust — Power, whether includes power to suspend.

If the District Judge has power to remove any trustee for unfitness, etc., he can remove all of them if circumstances should make it necessary. If he can remove for unfitness, he can do so for dishonesty or breach of trust. Section 92 does not say that a trustee guilty of breach of trust can only be removed by a suit.

A suit may be brought to remove him and any suit seeking that relief must be brought in the manner prescribed in the section. But if a suit has once been brought under the section, and a scheme has been framed which provides for the removal of trustees for unfitness, the exercise of that power is not contrary to S. 92, even though the trustee may be unfit by reason of a breach of trust. AIR (V 24) 1937 Bom 124 : 38 Bom LR 1137 : 168 Ind Cas 577.

——S. 92 — Scheme empowering trustees to remove trustee — High Court, if can entertain application for removal.

Where the scheme passed under S. 92, provides that if the office of a trustee falls vacant, the other trustees shall fill up the vacancy by appointing a suitable person and also for the re-

moval of a trustee by the trustees themselves, it is impossible for the High Court to entertain an application made by some persons interested in the endowment for the removal of the trustee conformably with the provisions of the scheme. AIR (V 28) 1936 All 97 : 1936 ALJ 398 : 1935 AWR (HC) 1338 : 58 All 538 : 160 Ind Cas 1091.

——S. 92 — Removal of trustee — Questions not determined by trial Court — If appellate Court can give directions on.

In a suit under S. 92 for the removal of the defendants from the trusteeship of a temple, for the appointment of a certain person named in the plaint as a new trustee and for delivery to the latter of the landed property attached to the temple, the trial Court granted a decree for the removal of the defendants from the office in the temple and as regards other prayers it was noted that further steps would be taken for the appointment of a competent independent person as trustee and the plaintiffs were asked to propose the name of a fit person.

On appeal by the defendants, the District Judge held that instead of appointing a third person as Mahant, it would be best to bring into existence a trust committee of not more than five members and that the said committee should appoint a pujari on Rs. 10/- per month to look after the temple and arrange for worship, while a suitable portion of the income from the land including muafi should be allotted to the defendants for the maintenance of themselves and their families.

Held, that as all that had been decided by the trial Court was that the defendants should be removed and that the name of a fit person should be suggested who might be suitable to act as Mahant, and as the District Judge accepted the appeal of the defendants to the extent of directing that a committee of five persons should be brought into existence to manage the temple as trustees, he had no right to add directions about other matters which had not yet been decided by the trial Court. AIR (V 17) 1930 Lah 1056 : 12 LLJ 199.

——S. 92 — General Principles.

In the case of removal of a trustee the Court should be guided by considerations of the welfare of the trust estate, and before a removal of the trustee is directed, a clear necessity for the intervention of the Court to save the trust property must be established. It is not every mismanagement or neglect of duty which will induce the Court to remove a trustee.

There must be such gross negligence or misconduct as to evidence a want either of capacity or of fidelity which is calculated to put the trust in jeopardy. Failure in the discharge of duty on account of mistake or misunderstanding is not a ground for removal unless such failure shows want of capacity to manage the trust.

A trustee may be removed if he fraudulently misapplies the revenues of the trust property and grossly misbehaves himself in the execution of the trust: for example, if he renews a lease for his personal benefit, purchases the trust property, concurs in a breach of trust, asserts a hostile title with knowledge that it was unfounded, fails to keep accounts, wrongfully alienates trust property, obstructs the management and wants only to waste the estate. AIR (Vol 15) 1928 Cal 225 (DB).

——S. 92 — Personal claim to trust property.

A Court is not called upon to remove a trustee merely because he has asserted that the trust is his private property as that attitude in itself cannot be characterized as a wilful breach of trust. AIR (Vol 15) 1928 Mad 879: 113 Ind Cas 635 (DB).

——S. 92 — Interests of trust — Justification.

Once a person accepts an office of trusteeship the one governing consideration in his mind, the ruling motive for all actions, the one principle by reference to which all his acts should be determined, is the interest of the institution and that alone.

Persons who, though holding a fiduciary position allow their actions to be prompted by any other considerations, motives or principles are as much guilty of breach of trust as persons who may be found actually guilty of misappropriating property belonging to the trust.

Even though the evidence in a case against the trustees may not be sufficient to warrant, generally speaking, their removal from office on the ground of misconduct or negligence, still their removal may be ordered, if, in the opinion of the Court, such removal is necessary in the interests of the trust to be administered. 1925 MWN 505: AIR (Vol 12) 1925 Mad 1070 (FB).

——S. 92 — Interests of trust — Principles.

It cannot be disputed that a mutwalli should not be allowed to continue in office if his or her management of the institution is detrimental to the interest of the endowment. In removing a trustee the Court will be guided solely by considerations of the welfare of the trust and will not hesitate to remove a trustee who has purchased the trust property or concurred in a breach of trust or has wrongfully alienated trust property or shows a total lack of capacity to manage, and neglect of duty. 81 Ind Cas 850: 28 CWN 781: AIR (Vol 11) 1924 Cal 1024 (DB).

——S. 92 — Reliefs — Appointment of Receiver — No prayer for removal of trustee — Power of court.

In a suit under S. 92 the Court has power to appoint a Receiver and take the management of the temple out of the hands of the trustees appointed by the Temple Committee pending the disposal of the suit even though there is no prayer for his removal and though he cannot be removed except on a proper enquiry. 68 Ind Cas 565: 16 MLW 927: 1923 MWN 75: AIR (Vol 10) 1923 Mad 224: 41 MLJ 545 (DB).

——S. 92 — Setting up private ownership in suit.

Where the whole of the litigation has substantially been occupied by an unfounded assertion supported by the concoction of accounts — an assertion by the trustee of private ownership in himself and a powerful resistance to the recovery of the properties for the trust which he administers.

Held it is not open to the Court on any sound principles, either of administration or of law to permit the continuance of the trustee in the office of Dharmakartha. 68 Ind Cas 1: 45 Mad 565: 16 MLW 247: 31 MLT 1: 49 IA 237: 24 Bom LR 1214: 21 ALJ 250: 27 CWN 317: 36 CLJ 524: AIR (Vol 9) 1922 PC 325: 43 MLJ 536.

——S. 92 — Removal of trustee — Mohamedan wakf — Power of Court to remove mutawalli and appoint a stranger as such.

In a suit under S. 92, C. P. C., the Dt. Judge removed the sister of the founder from the office of mutawalli and no one of the founder's family being available appointed a stranger.

Held, that the appointment of the plff. as mutawalli was entirely within the discretion of the Dt. Judge as Kazi and in the circumstances of the case, it was not without jurisdiction although the plff. was a stranger. 24 CWN 690: 58 Ind Cas 705: AIR (Vol 7) 1920 Cal 379 (DB).

——S. 92 — Removal of trustee — Hereditary trustee — Trustee spending money not required

by terms of endowment — Right to reimbursement.

A hereditary trustee is liable to be removed, if his continuation in office is likely to endanger the interests of the institution. 2 Mad 197 ref. In cases of positive misconduct, Courts of Equity have no difficulty in interposing to remove trustees who have abused their trust. It is not indeed that every mistake or neglect of duty or inaccuracy of conduct of trustees which will induce Courts of Equity to adopt such a course.

But the acts or omissions must be such as to endanger the trust property or to show a want of honesty or a want of a proper capacity to execute the duties or a want of reasonable fidelity. The court's duty is to look entirely to the interests of the trust, and where the circumstances show that it will not be for the benefit of the institution to allow it to remain under the management of a hereditary trustee, he ought to be removed.

Want of capacity to manage the trust properties is a sufficient ground for removal of a trustee. One of the most important duties of a trustee is to keep separate accounts for the trust property and to keep the trust property separate from his own property; and if that is not done and difficulties in taking accounts thereby arise, every presumption is to be made against the deft. and in favour of the trust.

A trustee of a public charity who chooses year after year to spend monies not required by the terms of the endowment out of his own pocket should not be allowed credit for such expenditure. The duty of the trustee is to carry out the directions of the founder and not to encumber the trust property by systematically incurring expenditure beyond the limits of the income of the trust property. (1918) MWN 555: 48 Ind Cas 897: AIR (Vol 5) 1918 Mad 56 (DB).

——Ss. 92 and 93 — Removal of trustee Sajjadanashin.

Court has no power under Ss. 92 and 93 (S. 539) to remove the Sajjadanashin from his office when there is a breach of trust in respect of wakf. The possession and custody of the property is inseparable from the office of Sajjadanashin. It is impossible to appoint new trustees and vest the wakf property in them. (1909) 6 ALJ 632: 3 Ind Cas 508 (DB).

——S. 92 (S. 539, old Code) — Suit to remove Mahant — Amount of misfeasance — Addition of parties by Court — Court's inherent power.

See (1904) 8 CWN 404 (DB).

——S. 92, (S. 539 old code) — Sajjadahnashin, removal of.

The provisions of S. 539 of the old Code of Civil Procedure do not authorise a Court to remove a Sajjadahnashin from his office even in case of breach of trust. The possession and custody of property is inseparable from the office of Sajjadahnashin. It is impossible to appoint a new trustee and vest the wakf property in him.

In a suit filed under S. 539 of Act XIV of 1882 for the removal of a Sajjadahnashin, when the Court finds that he cannot be removed from his office, the Court has also no power to order the Sajjadahanashin to furnish accounts and to issue an injunction restraining him from alienating the property. (1902) 6 ALJ 632 (DB).

(c) Suit, maintainability of.

——S. 92 — Suit for removal of defendants as not validly appointed trustees and for appointment of new trustees — Plaint alleging that one of plaintiff is sole trustee.

A suit for the removal of defendants on the ground that they are not properly appointed trustees and for appointment of new trustees, comes within the scope of S. 92, C. P. Code, although the plaint alleges that one of the plaintiffs is a sole surviving trustee and it is open to him to bring a regular suit for the vindication of his personal rights.

It is as much a breach of trust for a person not entitled to act as trustee to meddle with trust property as it is for a properly appointed trustee not to manage the property. 23 Luck 193: 1948 OWN 179: AIR (Vol 35) 1948 Oudh 203 (DB).

——S. 92 (2) — Suit to substitute other trustees in place of those appointed under scheme is barred — Proper procedure.

Even when a scheme has been settled by the Court under S. 92, a stranger may come in for the purpose of asserting a title which is paramount to the trust altogether and in that sense, he may claim to have the whole scheme displaced upon the ground that there never ought to have been a scheme at all because the property was never the subject of a trust for charitable or religious purposes.

Where, however, the trust is a trust for public religious purposes and the scheme settled by the Court was a valid and legally proper scheme under S. 92, sub-s. (2) of S. 92, bars a suit to have a fresh set of trustees substituted for the trustees appointed under the scheme or to have the scheme overridden altogether. The plaintiff cannot have it done except by the machinery of S. 92. He must take out proper steps in the Court which has seizin of the scheme. AIR (Vol 33) 1946 All 148: 1945 ALJ 486: 1945 OWN (HC) 272: 1945 AWR (HC) 270.

——S. 92 — Applicability — Suit for removal of de facto trustee.

A suit under S. 92, C. P. Code, lies for removal of a de facto or constructive trustee. ILR (1946) Nag 518: 1946 NLJ 511: AIR (Vol 33) 1946 Nag 401 (DB).

——S. 92 — Suit for removal of trustee.

In a suit under S. 92, Civil P. C., for removal of a trustee with respect to a public endowment, it is to the interest of the public to have it determined whether the defendant was guilty of having committed a breach of trust, malfeasance and misfeasance and misappropriation and therefore, whether he was at all competent to manage the affairs of the math, especially when he is further alleged to have committed illegal alienations and so should be removed from the mahantship. AIR (Vol 31) 1944 Pat 115: 9 CLT 85: 10 BR 435: 212 Ind Cas 35.

——S. 92—Where in a will creating a trust, trustees are wrongly termed as executors, a suit to remove such persons from their office does not lie under S. 301, Succession Act; that should be under S. 92, Civil P. C. AIR (Vol 25) 1938 All 197: 1938 ALJ 124: 1938 AWR (HC) 97: 174 Ind Cas 890.

——S. 92 — Suit for office of Mutawalli — Applicability of.

A suit for an establishment of the right to act as mutawalli is cognisable by the ordinary Civil Court without any preliminary formalities. But it is otherwise where the appointment of a trustee has been recognised and it is sought to remove him for a breach of trust. 88 Ind Cas 1035: 4 Pat 741: 7 PLT 4: 1925 PHCC 194: AIR (Vol 12) 1925 Pat 544 (DB).

——S. 92 — Removal of trustee — Temple Committee — Appointment of fresh trustee — Suit by other trustee against appointee for injunction —

Suit without sanction under S. 92 or S. 14 of the Rel. End. Act.

A temple committee appointed a trustee to fill up a vacancy. Two out of three existing trustees sued the members of the Devastanam Committee and the person appointed by them as a third trustee for a declaration that the appointment by the committee was invalid, as having been made under corrupt motives and for an injunction restraining the appointee from interfering with the affairs and property of the temple.

Held that the suit is not maintainable without sanction under S. 92 C. P. C. Such a suit falls under S. 92 (1) (h) C. P. C., and not within S. 14 of the Rel. End. Act. 42 Mad 668: 26 MLT 143: (1919) MWN 522: 53 Ind Cas 605: AIR (Vol 6) 1919 Mad 159 (DB).

——**S. 92 — Public trust — Mutt — Head of.**

The Head of a Mutt is not a trustee of Mutt property and no suit lies for his removal under S. 92 C. P. C. 32 MLJ 271: 40 Ind Cas 627: AIR (Vol 5) 1918 Mad 1016 (DB).

But See 37 MLJ 231: 52 Ind Cas 914: AIR (Vol 6) 1919 Mad 571; 40 Mad 745: 40 Ind Cas 531: AIR (Vol 5) 1918 Mad 984; 43 Cal 707: 33 Ind Cas 583: AIR (Vol 3) 1916 PC 256; 43 Mad 253: 53 Ind Cas 288: AIR (Vol 6) 1919 Mad 374.

——**S. 92 — Public trust — Wakf — Suit for removal of mutwalli — Trust.**

A suit to remove a duly appointed mutwalli of a trust created for a public purpose of a religious or charitable nature cannot be instituted save in conformity with S. 92, C. P. C. (1913) 35 All 98: 11 ALJ 25: 18 Ind Cas 573 (DB).

——**S. 92 — Mandatory provision — Scheme suit without sanction under the old Code — The new Code, if retrospective.**

S. 92 (2) was enacted to settle the point if the provisions of S. 539 were directory or mandatory and so it operates retrospectively, especially when there is no saving of pending suits under the section. Hence a suit for removal of certain trustees and for administration of a Trust instituted in 1904 without the sanction of the Advocate-General would be barred by S. 92 (2). (1912) 5 Sind LR 184: 13 Ind Cas 264.

——**S. 92 — Public trust — Mutt.**

A suit for removal of a Mahant from the Gadi and for a declaration that the property under his control is a trust property must be brought in conformity with S. 92 (1). (1910) 13 OC 177: 7 Ind Cas 566 (DB).

20. Revision.

——S. 92 — District Judge deciding that he has jurisdiction to entertain application for removal of trustees — Powers of revision cannot be extended to such case— Proper course is to allow the District Judge to try the case and if the decision is adverse to the trustees, then to invoke the revisional powers of the High Court. AIR (Vol 29) 1942 Oudh 208: 1941 OWN (CC) 1350: 1942 AWR (CC) 6: 197 Ind Cas 677.

——S. 92 — A decision on question whether an application for removal of a trustee is maintainable or not is one on a question of jurisdiction and hence open to revision. AIR (Vol 29) 1942 Oudh 135: 1941 OWN (CC) 1269: 1941 All WR (CC) 375: 17 Luck 391: 197 Ind Cas 743.

——**S. 92 — Scheme.**

Order of Court making amendment in scheme prepared in suit under S. 92 — No appeal but revision lies — An appeal preferred challenging jurisdiction of Court can be treated as revision. AIR (Vol 27) 1940 Oudh 421: 1940 OWN (CC) 639: 1940 AWR (CC) 298: 15 Luck 730: 189 Ind Cas 696.

——**S. 92 — Refusal to remove — Revision.**

No appeal lies from an order of District Judge refusing to remove a trustee of a temple on an application of the worshippers under a scheme framed under S. 92 on the ground of various acts of misconduct and breach of trust but the High Court can in revision direct fresh disposal of the application. AIR (Vol 14) 1927 Mad 427: 99 Ind Cas 425 (DB).

——**S. 92 — Execution of scheme — Appeal — Revision.**

Where a scheme has been framed, no appeal lies from the order of Court in the matter of its execution. But where the order of the Court is without jurisdiction, revision will lie. AIR (Vol 13) 1926 Mad 659: 91 Ind Cas 794 (DB).

——**S. 92 — Removal of trustee — Dt. Judge ordering suspension of mahant on report — No suit — Jurisdiction — Revision.**

The C. P. C. gives no powers to the Dt. Judge to take any action to protect property forming the subject matter of a public endowment unless and until a regular suit is filed in his Court under S. 92.

When the Dt. Judge exercises any of the powers vested in him under that section without a suit, he acts without jurisdiction and the High Court in its revisional jurisdiction can set aside the order of the Dt. Judge suspending a Mohunt on a mere report when there was no suit before him under S. 92. AIR (Vol 5) 1918 All 218: 16 ALJ 742: 47 Ind Cas 850. (DB).

21. Right to sue.

(a) Advocate General, right of.
(b) Forma pauperis, suit in.
(c) Interest, meaning of.
(d) Persons having interest.
(e) Private right.
(f) Private and Public trust.
(g) Worshippers, right of.

——**S. 92 — Private dispute.**

A suit under S. 92 is properly a representative suit filed in the interests of the public or a section of the public who are interested in the proper administration of the trust. A private dispute between one of the beneficiaries and the trust through its 'mutawalli' not in any way affecting the interests of the public in any way is not within the ambit of the section. AIR (Vol 32) 1945 All 69: ILR (1944) All 561: 1944 OWN 164: 1944 AWR 199: 219 Ind Cas 349.

——S. 92 — The plaintiffs in a suit under S. 92 Civil P. C., were 'zamindars' in the village in which the property endowed in favour of a temple or dharamsala' lay and they were the son and grandson of the man who gave up the property on the understanding that it should be treated as endowed property:

Held, that even if the plaintiffs did not believe in the Hindu gods, there was no reason why they should not be interested in the upkeep of the 'dharamsala' and they would have a direct interest in seeing that the property which would have ultimately descended to them should be used for the purpose for which it was surrendered.

As 'zamindars' they might be interested in the upkeep of a temple in their village for the benefit of their tenants even if they were not in the habit of making use of it themselves. The plaintiffs therefore, had interest in the 'waqf' property sufficient to entitle them to sue under S. 92. AIR (Vol 31) 1944 All 1: 1943 ALJ 535: ILR (1944) All 20: 1943 AWR (HC) 269: 211 Ind Cas 157.

——S. 92 — Suit by trustees on their own behalf and in discharge of their own functions as trustees.

Section 92 applies only where the suit brought is representative in its nature, that is to say, where the suit is brought by two or more persons as representing the general public in order to secure the proper administration of a public trust. A suit brought by trustees on their own behalf and in the discharge of their own functions as trustees, not being a representative suit is outside the scope of S. 92. AIR (Vol 27) 1940 Cal 376: 44 CWN 327: 190 Ind Cas 589.

——S. 92 — Right to get scheme framed and accounts examined — Right, how accrues.

The right to have a scheme framed or accounts examined under S. 92, accrues before the preliminary decree and originates from facts which constitute the very foundation of the suit itself. The preliminary decree simply records the findings of the Court but the rights of the parties cannot be said to originate with the preliminary decree. AIR (Vol 24) 1937 Cal 150: ILR (1937) 1 Cal 673: 41 CWN 382: 65 CLJ 340: 171 Ind Cas 59.

——S. 92 — Section 92 is in a sense an enabling section in that it confers on two or more members of the public a right to seek relief without any proof of special damage. But once the Court is moved, the scope of its enquiry must be determined in the light of what is germane to the various matters indicated in S. 92 and not by reference to the right of the plaintiffs to particular reliefs. AIR (Vol 23) 1936 Mad 449: 43 MLW 409: 1936 MWN 245 (2): (1937) 2 MLJ 437: 164 Ind Cas 615.

——S. 92 — Cause of action, nature of.

Persons suing under S. 92, have to establish as their cause of action that there is a trust express or constructive created for public purposes of a charitable or religious nature and that it has been broken. AIR (Vol 23) 1936 Mad 449: 43 MLW 409: (1936) MWN 245 (2): (1937) 2 MLJ 437: 164 Ind Cas 615.

——S. 92 — Descendants of founder — Right to sue for enforcing proper management of trust.

Descendants of the founder of a trust have an interest in the trust which is over and above that which the public generally have or might have in a public trust and have a 'locus standi' to sue if the provisions of that trust have not been carried out or have been rendered impossible of being carried out. AIR (Vol 20) 1933 Lah 670: 149 Ind Cas 570.

——S. 92 — Plaintiff claiming as duly appointed mahant.

When the plaintiff is not suing in representative capacity but to enforce his personal right as the duly appointed 'mahant' of an institution, the suit does not fall within the provisions of S. 92. AIR (Vol 18) 1931 Lah 727: 33 PLR 544: 135 Ind Cas 509.

——S. 92— Suit by trustee to enforce his right of trusteeship.

So far as a suit is brought by a plaintiff in his individual capacity as a trustee to enforce his individual claim to be such trustee, it does not lie within the scope of S. 92. AIR (Vol 18) 1931 Mad 801: 34 MLW 254: 61 MLJ 815: 54 Mad 1011: 133 Ind Cas 14.

——S. 92 — Right to control.

Where the founder has laid down the persons in whom the right of control is vested, it is erroneous to hold that they alone can bring an action under S. 92. AIR (Vol 16) 1929 Lah 428: 116 Ind Cas 451 (DB).

——S. 92 — Right to sue — Heirs of founder — Right to sue for removal of trustee and proper management — Removal of trustee.

In certain events, for instance, where the line originally indicated by the founder of trust fails, the founder or his heir has the right to nominate the shebait and this principle is applicable equally to private and public trusts.

The founder or his heirs may sue for the enforcement of the trust, for removal of the old trustee, for the appointment of a new one and may thereby secure the proper administration of the trust and its properties.

Whatever restrictions may have been prescribed by the legislature as to the mode of institution of such suits in respect of public trusts, the right of the founder of a private trust or of his heirs remains unimpaired.

The question whether there are sufficient grounds for the removal of a shebait is within the judicial discretion of the court and the court will be guided by considerations of the welfare of the trust. AIR (Vol 7) 1920 Cal 210: 30 CLJ 177: 54 Ind Cas 6 (DB).

— S. 92 — Right to sue — Church.

A member of a church need not sue by virtue of an office. AIR (Vol 4) 1917 Mad 431: 39 Mad 1056: 19 MLT 249: 30 MLT 423: 3 LW 348: (1916) 1 MWN 307: 34 Ind Cas 557 (DB).

——S. 92 — Right to sue — Trustee next in succession — Applicability of.

For a suit by a person having a special right such as one next entitled to be trustee, no sanction under the section is necessary. (1913) 24 MLJ 48: (1913) MWN 368: 18 Ind Cas 622 (DB).

——Ss. 92 and 93 — Right to sue — Founder's heir.

A trust was created in 1787 and handed over to a Pandara Sannadi as trustee. It was to continue to successor in office of this trustee. One of such successors sued the founder's heir in 1869 for management and got a consent decree. The plff. now as the heir and descendant of the founder sued the successor of the Pandara Sannadi for management. The consent decree of 1869 did not bar the present suit nor did it give to the plff. any right to management. (1911) 8 MLT 205: (1910) MWN 682: 7 Ind Cas 751 (DB).

——Ss. 92 and 93 — Right to sue — Infant.

The "person" in Ss. 92 and 93 need not necessarily be 'sui juris'. An infant may, through a properly represented next friend, bring a suit, if he is interested in the public charitable or religious trust. (1910) 6 Ind Cas 119 (Cal) (DB).

——S. 92 — Right to sue — Lay disciples — Suit for removal of head of mutt — Trusteeship of temple.

Lay disciples of the mutt or worshippers at the 'Devasthanam' may maintain a suit for a declaration that a head of mutt has not been lawfully appointed and that he must be removed from office.

It is necessary that a successor must first be appointed to bring a suit for possession against the trespasser. Even though the head of the mutt may not be removed from his office as such the 'Devasthanam' properties which he holds as trustee may be taken from him and other arrangements may be made for their management. (1909) 6 MLT 193: 19 MLJ 772: 3 Ind Cas 255 (DB).

[Affirmed by the Privy Council. See 39 MLJ 98 : (1920) MWN 371 : 18 ALJ 1041 : 25 CWN 145 : 57 Ind Cas 564 : AIR (V 8) 1921 PC 84.]

——**S. 92 — Mutt — Juridical person — Capacity to hold property — Suits relating to.**

A mutt like an idol is a juridical person capable of holding property. A person in whose name a suit is brought on its behalf, has in relation to that suit a distinct capacity. He is therein a stranger to himself in his personal and private capacity in a court of law. In connection with the property of a mutt there are two distinct classes of suits.

Those in which the Manager seeks to enforce his private and personal right and those in which he seeks to vindicate the rights of the mutt. The rights of the mutt cannot ordinarily be prejudiced by the result of a suit of the former class. (1903) 5 Bom LR 932: 28 B 215 (FB).

(a) Advocate-General, right of.

——Section 92, Civil P. C., gives the Advocate-General a cause of action which he would not otherwise have and prevents others from instituting suits without his sanction in order to obtain certain definite reliefs in a representative capacity.

It contains no provisions for the joinder of parties or causes of action and can create no exception to the general rules on that subject which are to be found in Os. I and II of Sch. I. Grounds of misjoinder are not to be set up to delay decisions or multiply litigation.

Hence even if the impleading of third party transferees in a suit under S. 92 is irregular, a decree passed by a competent Court after a fair contest will not be set aside merely because there has been an irregularity of procedure in impleading third parties. AIR (Vol 31) 1944 All 1: 1943 ALJ 535: 1943 AWR (HC) 269: ILR (1944) All 20: 211 Ind Cas 157.

——**S. 92 — Procedure under S. 92, whether summary.**

The procedure under S. 92 is in no sense summary; and so far at any rate as the Advocate-General is concerned, it is doubtful if the section can be regarded as prescribing only a cumultive remedy in the sense that he has a right of suit independently of the section; cl. 2, S. 92, would indicate the contrary. **AIR (V 23) 1936 Mad 449: 43 MLW 409: 1936 MWN 245 (2): (1937) 2 MLJ 437: 164 Ind Cas 615.**

——**S. 92 (S. 539 old Code) — 'Advocate-General may institute a suit' — Suit by persons authorized under a will — No consent obtained — Effect of.**

Section 539 does not take away or affect existing substantive rights unless it says so. The section cannot be read as if the words "but no other person or persons" were inserted between the words "Advocate-General" and "may institute." Persons authorized, under the terms of a will, to remove the manager of an endowment in case of mismanagement, can maintain a suit to remove the manager, without the consent of the Advocate-General. 1906 AWN 260: 3 ALJ 773: 29 A 27 (28) (DB).

(b) Forma pauperis, suit in.

——S. 92 and O. 33, R. 1 — Right to sue — Forma pauperis — 'Persons interested' — 'Meaning of' — Pocjari 'of temple.'

A suit under S. 92, C. P. C. cannot be instituted in 'Forma Pauperis'. The sanction granted by the Legal Remembrancer to institute such a suit cannot be a good permission until, at the time of granting it, the fact that the plffs. were paupers had been brought to his notice.

A person having an interest in the trust within the meaning of S. 92 must be a person having an interest in its due and proper administration and not a person who is benefited or claims a benefit by some act on the part of the trustee which is not shown to be in accordance with the purposes of the trust.

A 'pocjari' of a temple can fairly be presumed to have an interest in the trust within the meaning of S. 92 of the Code. (1912) 15 OC 202: 14 Ind Cas 731 (DB).

(c) Interest, meaning of.

——**S. 92 — Plaintiffs not asserting interests of any kind.**

For purposes of S. 92, something more than a mere abstract sentimental interest is required. Even an 'abstract interest (assuming that it could in some circumstances support a suit) would have to be an 'actual' interest, i. e. an abstract interest which the plaintiffs really have.

Where in the case of a Hindu public trust for religious or charitable purposes, the plaintiffs notwithstanding their being local Hindus and Brahmins, do not even care to come to the Court and assert that they have an 'interest' of any kind — Concrete or abstract — in the suit they sponsor, they cannot maintain a suit under S. 92, Civil P. C. AIR (Vol 29) 1942 All 315: 1942 ALJ 334: 1942 AWR (HC) 274: 204 Ind Cas 153.

——**S. 92 — Tests.**

In considering the question whether the plaintiff has interest in the particular trust within the meaning of S. 92, it would be certainly not less dangerous than in many other class of cases to try to apply the conclusion of decided cases to the particular facts of others and to overlook that each case must be considered with reference primarily to its own fact. But it is useful nevertheless to observe, from decided cases what principles have from time to time been applied to the question. AIR (Vol 29) 1942 All 315: 1942 ALJ 334: 1942 AWR (HC) 274: 204 Ind Cas 153.

——**S. 92 — Sentimental or abstract interest.**

Quaere.— Whether the necessary 'interest' for purposes of S. 92, must be something more than a merely 'sentimental' or 'abstract' one. Or whether the abstract interest of a Hindu in his own religious institutions is itself sufficient to support a suit without showing anything more. AIR (Vol 29) 1942 All 315: 1942 ALJ 334: 1942 AWR 2 (HC) 74: 204 Ind Cas 153.

——**S. 92 — Interest — Meaning of — If includes remote interest.**

The word "interest" in S. 92, Civil P. C., means a present and substantial, and not a remote and fictitious or purely illusory interest.

Where the only interest which the plaintiffs have in the trust property which is the subject-matter of 'wakf' is that they are the members of the Sunni Borah community of the town in which only a small part of the property of the testator who was a Sunni Muhammadan, is situate and the property is specifically excluded from the trust by the testator, the interest of the plaintiff, if any at all, is merely sentimental and, therefore, too remote and not a substantial one within the meaning of S. 92, Civil P. C. AIR (Vol 25) 1938 Rang 339: 1938 Rang LR 276: 177 Ind Cas 851.

——**S. 92 — Interest — Possibility of future worship.**

Mere general statements that persons following a certain faith go to an institution for worship, in absense of evidence to that effect cannot be considered sufficient to establish that the plaintiffs in particular possess the requisite interest in the institution for the purposes of S. 92. Nor can the bare possibility that the plaintiffs may have in future to resort to the institution for worship can give them a 'locus standi' to maintain a suit under

S. 92. AIR (Vol 17) 1930 Lah 1: 31 PLR 424: 11 Lah 142: 124 Ind Cas 305 (DB).

——S. 92 — **Public mosque — Nature of interest.**

The question whether a person interested in a public mosque simply as a person who has a right to worship therein, can institute a suit in respect of it in his individual capacity depends on the determination of the question in each particular case as to whether the plaintiff has or has not a cause of action which would entitle him to the relief which he claims.

The question as to whether the suit will be maintainable at the instance of a particular plaintiff depends not upon any inherent right which one may have to worship in a mosque or a temple, upon the fact of his living in the vicinity or his being a mere resident of the district.

Every Mahomedan has a right apart from his right as member of the community to worship in a public mosque, but on that does not depend his right to maintain any and every suit in connexion with it. If there is an individual right in the plaintiff which has been violated, or if some injury to that right is threatened, the suit will lie. AIR (Vol 14) 1927 Cal 130: 44 CLJ 339: 31 CWN 184: 99 Ind Cas 205 (DB).

——S. 92 — **Interest in trust.**

Section 92 enables any two or more persons that have an interest in the trust to sue for certain reliefs and it is not necessary that they should have been personally affected by any act done by the person or persons sued. It is sufficient that they have enough of an interest in the trust to see that the trust is properly conducted and that the terms whereby it is regulated are complied with. AIR (V 14) 1927 Mad 462: 53 MLJ 545: 50 Mad 726: 25 MLW 594: 1927 MWN 197: 38 MLT 253: 102 Ind Cas 270 (DB).

——S. 92 — **Interest in trust — Meaning of.**

In order to entitle a plaintiff to sue under the section he must have a clear interest in the particular trust over and above that which millions of his countrymen may be said to have by virtue of their religion. The words "interest in trust" must mean a 'clear interest', that is to say, a present and substantial and not a remote and fictitious or purely illusory interest and further that interest, if the provision is not to be altogether illusory must arise from some special relation in which the plaintiff stands to the endowment in question as compared with the whole body of religious community throughout India.

Proof of residence in the neighbourhood of the institution, will, no doubt be one way of establishing possession of an interest on the simple ground that those who live near to the institution will be most likely to take advantage of its benefits. The test of locality is only to be applied in relation to actual user of the temple or mosque by the inhabitants residing close to it.

The question is a pure question of fact, and must be left to the Court to decide on a consideration of the particular circumstances of each case. AIR (Vol 13) 1926 Mad 466: 23 MLW 240: 92 Ind Cas 950 (DB).

——S. 92 — **Interest in temple trust — What constitutes.**

Persons belonging to neighbouring villages who attend the suit temple on important occasions and also celebrate at that temple their marriages are persons having an interest in the temple trust within the meaning of S. 92. The interest which the plaintiffs possess must be real and not remote, must be substantial and not illusory, must be an existing interest and not a mere contingency, and the mere circumstance that the plaintiffs do not habitually resort to a temple is not sufficient to debar them from exercising the right under the section. AIR (Vol 13) 1926 Mad 267: 49 MLJ 746: 1926 MWN 40: 91 Ind Cas 924 (DB).

——S. 92 — **Absence of interest.**

The Advocate-General's written consent will not entitle a party to sue unless he has an interest in the trust. AIR (Vol 11) 1924 PC 221: 47 MLJ 361: 35 MLT 189: 47 Mad 884: 22 ALJ 983: 26 Bom LR 1121: 40 CLJ 454: 29 CWN 154: 20 MLW 803: 1924 MWN 749: 26 PLR 1: 82 Ind Cas 804: 51 IA 282.

——S. 92 — It is wholly impossible to define with any degree of accuracy what exactly constitutes an interest as contemplated in S. 92. There is no doubt that it need not be a direct interest in the sense that only a beneficiary can institute a suit and that it must be a real, substantial and existing interest.

Where a trust provided for the maintenance of widows and orphans of a certain caste and dedicated a building for the use of pilgrims as a 'Dharmasala'.

Held, a suit by some members of the caste living in the 'Mohalla' in which the institution was situate could maintain a suit. AIR (Vol 10) 1923 Lah 518: 73 Ind Cas 302 (DB).

——S. 92 — **Right to sue — Bad for want of requisite interest on the part of one of the plffs — Subsequent addition of other persons having requisite interest.**

In a suit under S. 92 C. P. C. one of the plffs. was found to have no interest as is required by the section and thereupon two other men who had the requisite interest applied to the Collector and obtained sanction to institute the same suit and were then added as third and fourth plffs. Held the suit was held not liable to be dismissed on the ground that it was bad as laid. AIR (Vol 7) 1920 Mad 134: 43 Mad 720: (1920) MWN 337: 38MLJ 504: 11 LW 536: 56 Ind Cas 450 (DB).

(d) Persons having interest.

——S. 92 — **Suit under — Who can file — Nature of their interest.**

After the deletion of the word "direct" in S. 92 of the C. P. Code of 1908, it is no longer necessary that a person should have a direct interest to enable him to institute a suit and the amendment has widened the class of persons entitled to file a suit under the section.

By omitting the word "direct" and at the same time giving the right of suit only to persons interested, the Legislature must have intended not to give the right of suit only to those who had some direct interest, e.g., those who were connected with the management or who had special interest greater than that of others who had interest in the trust, but at the same time to restrict the right of suit so that only those who had a real interest in the present and not merely a sentimental interest in future like that of mere co-religionist could file a suit.

This was with the obvious object not to allow those who were in charge of public trusts to be harassed by litigation at the instance of busy bodies who had no real or personal interest in the trust. Case law discussed. AIR (Vol 37) 1950 All 62: 1949 ALJ 453 (DB).

——S. 92 — **Who can apply for modification of scheme originally framed.**

Where the scheme of management of a public religious trust provides for modification of the scheme by the High Court on the application of

parties interest in the 'Sansthan', any person who may have an interest in the institution from time to time, whether or not he was a party or is a representative of a party to the original litigation, can apply for modification of the scheme. The scheme cannot be regarded as a continuation of the suit, at any rate in the sense that applications under the scheme can only be made by parties to the suit. AIR (Vol 24) 1937 Bom 124: 38 Bom LR 1137: 168 Ind Cas 577.

——S. 92 — **Persons of locality using mosque, if persons interested.**

The residents of the locality in which a religious institution is situated and for which it was originally founded, and the persons authorised by law to use it and the worshippers of the mosque are the persons interested as required by S. 92. AIR (Vol 21) 1934 Pesh 57: 152 Ind Cas 323.

——S. 92 — Persons belonging to the same caste as the founder and doing worship in a temple are 'persons interested' within S. 92. AIR (Vol 20) 1933 Oudh 22: 9 OWN (CC) 966: 8 Luck 266: 140 Ind Cas 896.

——S. 92 — **Interest — Relation to founder — Visiting temple.**

Persons who are constant visitors of the trust temple and are also closely related to the founder of the trust are sufficiently interested in the trust property to maintain a suit against the trustee praying for his removal. AIR (Vol 16) 1929 All 433: 1929 ALJ 438: 117 Ind Cas 828 (DB).

——S. 92 — **Collaterals of founder.**

Collaterals of the founder are such persons as have an interest in the institution and so can sue under S. 92. AIR (Vol 16) 1929 Lah 428: 116 Ind Cas 451 (DB).

——S. 92 — **Persons entitled to food in chattram.**

When all the plaintiffs are persons who would be entitled to receive food, if they so wished, in chattram to which property was dedicated under the terms of the original trust deed.

Held, that they had sufficient interest in the trust within the meaning of S. 92. AIR (Vol 15) 1928 Mad 268: 108 Ind Cas 199 (DB).

——S. 92 — **Udasi Shrine.**

Udasis constitute a separate sect of schismatics from the religion founded by Nanak. They are Hindus as well as Sikhs. Their mode of life, ritual & religious observances are materially different from those of the followers of Guru Gobind Singh; and therefore, such followers of Guru Gobind Singh, as do not profess to be Hindus, have no such interest in an Udasi shrine as is contemplated by S. 92, and are therefore not competent to maintain a suit under that section in respect of an Udasi shrine. AIR (Vol 13) 1926 Lah 100: 27 PLR 115: 7 Lah 275: 94 Ind Cas 695 (DB).

——S. 92 — **Worshippers in a Dharmasala — Worshippers in a Sikh Dharmasala can sue under S. 92.**

In the case of a temple or a mosque as well as in the case of Dharmsala, persons entitled to attend there for purposes of worship are beneficiaries and must as such be held to possess a sufficient interest to support a suit under S. 92, of C. P. Code. AIR (Vol 12) 1925 Lah 189 (2) : 5 Lah 455: 85 Ind Cas 111 (DB).

——S. 92 — **Female descendants of founder.**

Descendants in the female line from the founder of the charity have an "interest" therein within the meaning of S. 92 although they may not directly obtain any benefit from it. AIR (Vol 11) 1924 PC 221: 47 MLJ 361: 51 IA 282: 35 MLT 189: 47 Mad 884: 22 ALJ 983: 6 LR PC 17: 26 Bom LR 1121: 40 CLJ 454: 29 CWN 154: 20 MLW 803: 1924 MWN 749: 26 PLR 1: 82 Ind Cas 804.

——S. 92 — **Interested parties — Who are.**

Whether the plaintiffs have an interest within the meaning of S. 92 or not has to be determined upon the facts of each case bearing on the relation of the plaintiffs to the charity with reference to which the suit is brought. The mere fact that the plaintiff suing under S. 92, C. P. Code, is a Hindu and is entitled to worship in a temple would not give him interest enough to maintain a suit under S. 92, C. P. Code.

But the fact that the plaintiffs belong to the family of the founder or are his descendants such as sons or grandsons through sons or daughters would naturally give them an interest in the family charity. AIR (Vol 8) 1921 Mad 563: 41 MLJ 20: 68 Ind Cas 631 (DB).

——S. 92 — **Right to sue — Person interested.**

The interest required under S. 92 to enable plffs. to sue is something substantial. In respect of a chatram charity, a person living in the neighbourhood of the institution and being a member of the Brahmin community and as such entitled to make use of the charity was held to possess a substantial interest. AIR (Vol 7) 1920 Mad 238: (1920) MWN 478: 58 Ind Cas 124 (DB).

——S. 92 — **Right to sue — Persons having interest — Trustee — Liability to account — Limit to.**

Residents of the locality in which a choultry is situated and members of the community for whose benefit the choultry was founded have a sufficient "interest" therein within S. 92 of the C. P. C. and can sue under that section in respect of it. Courts have a discretion in fixing the period for which accounts should be rendered by a trustee of a charity.

The Court held the defts. liable only for the collections made during 12 years prior to suit though the period of mismanagement related to a much longer period. AIR (Vol 6) 1919 Mad 943: 35 MLJ 661: 9 LW 1: 25 MLT 86: 48 Ind Cas 740 (DB).

——S. 92 — **Right to sue — Interest — Hindu temple — Rel. End. Act, S. 14. Per Oldfield and Coutts Trotter, JJ. (Abdur Rahim, J. Contra).**

The mere right to worship in a temple is not such an interest as is sufficient to enable the plffs. to sue for a scheme under S. 92, C. P. C. The interest of the relator must be a clear or a present and substantial interest and not a remote, fictitious or purely illusory interest; it must be an existing interest and not a mere contingency. The question is one of fact. AIR (Vol 6) 1919 Mad 384: 42 Mad 360: 36 MLJ 396. 25 MLT 304: 9 LW 492: (1919) MWN 370: 50 Ind Cas 693 (DB).

——S. 92 — **Right to sue — Worshipper in Hindu temple.**

A Hindu entitled to worship in a temple has an "interest" in it; the section does not require a "direct" interest. (1913) 7 SLR 129: 24 Ind Cas 712.

(e) Private right.

——S. 92 — **Private capacity — Applicability to.**

A suit brought by the plaintiff in his private capacity to recover possession of the trust property from the persons who, he alleges, are trespassers, is not barred by S. 92. AIR (Vol 16) 1929 Bom 193: 31 Bom LR 349: 117 Ind Cas 523.

——S. 92 — Where the plaintiff is not suing for the vindication of any public right, but his suit is confined to a vindication of his own private right

to be a co-trustee and co-manager of a kattalai, with the first defendant and others, his suit is not governed by S. 92, nor is such a suit prohibited by Act I of 1925. AIR (Vol 14) 1927 Mad 338: 97 Ind Cas 480.

——S. 92 — Where a plaintiff sues, not for the purpose of protecting the interest of the public but in order to enforce his own right as a Mahant or trustee, the suit does not fall within the purview of S. 92. AIR (Vol 11) 1924 Lah 131: 5 LLJ 480: 4 Lah 295: 73 Ind Cas 645 (DB).

——**S. 92 — Right to sue — Private right.**

The section protects the right of the public and does not take away private rights; it should not be used to deprive individuals, whose rights have been infringed, of their remedy. (1913) 13 MLT 515: 25 MLJ 373: 19 Ind Cas 740.

(f) Private and Public trust.

——**S. 92 — Private trust — Suit for framing of scheme by founder's heirs — Suit by some heirs alone.**

The Civil Court has jurisdiction even in the case of a private trust to frame a scheme for the management and administration of the trust on the application of the founder of his heirs.

A suit for the framing of such a scheme brought by some of the heirs of the founder can be entertained where the other heirs are parties and have no objection to the prayer of the plaintiffs being granted. AIR (Vol 19) 1932 Cal 117: 53 CLJ 621: 134 Ind Cas 576.

——**S. 92 — Right to sue — Public trust.**

A suit relating to a public trust is not maintainable without the Advocate-General's permission unless the plaintiff has special claim or interest. AIR (Vol 4) 1917 Cal 678: 35 Ind Cas 846 (DB).

——**Ss. 92 and 93 — Private Trusts — Acts of trustee — Right to impeach — Locus standi.**

The acts of a trustee of a private trust cannot be impeached by a person having no interest in the trust property. AIR (Vol 7) 1920 Oudh 120: 70 LJ 246: 56 Ind Cas 707.

——**S. 92 — Private trusts — Suit for.**

Section 539, C. P. C., 1882 applies to public trusts; persons interested in a private trust may take necessary steps to see that the trust is rightly carried out. (1910) 33 Mad 265: 7 MLT 1: 19 MLJ 778: 5 Ind Cas 4 (FB).

——**S. 92, O. 1, R. 8(1); (Ss. 539, 30 old Code) — Suit by an individual to establish a common right to a public religious trust — Other persons associated as co-plaintiffs — If such suit falls within S. 30 or S. 539 — Ss. 539 and 30 old Code, if mutually exclusive — S. 539 construction of.**

The words of S. 539, C. P. C., contemplate the existence of persons other than those permitted to sue who may be affected. The existence of such other persons, or the joinder of some of them as co-plaintiffs, does not take away the right of an individual to sue under that section, provided his rights, as contemplated in that section, have been infringed.

The Chinese community of Calcutta are divided into two classes—the Puntis and the Hakralus. The Puntis being excluded from the Chinese temple and cemetery, five of them, after obtaining the sanction of the Advocate-General under S. 539, C. P. C., instituted this suit for a declaration that the temple and cemetery were public, religious and charitable trusts for the benefit of the said community and as such the Puntis, including the plaintiffs, were entitled to the benefits thereof. Objection was taken that the suit, as framed, was not maintainable as it fell within S. 30 and not under S. 539 old Code. Held, that the suit was maintainable. (1905) 9 CWN 594 (596, 597).

(g) Worshippers, right of.

——**S. 92 — Suit by worshippers for declaration that temple is public wakf — Defendant pujari pleading that it was his private jagir — Subsequent suit for his removal on the basis of this plea — If competent.**

The worshippers of a temple sued for a declaration that the temple with the land attached thereto was a public wakf, and the defendant pujari pleaded that they were his private jagir and that the income derived therefrom was his private income. The suit was decreed by the Court holding that the temple and the land attached thereto were public wakf properties.

In a subsequent suit by the worshippers for the defendant's removal from the post of pujari, it was alleged that the assertion of a private claim and the denial of the existence of a public trust by the defendant in the previous suit was sufficient in themselves to justify his removal.

Held, that it was open to the defendant to defeat the plaintiff's claim by all means in his power and the fact that he chose a particular means would not entitle the plaintiffs to bring a fresh suit against him. AIR (Vol 35) 1948 East Punj 18 (DB).

——**S. 92 — Person with right to worship — Competency to sue under S. 92.**

Where the evidence shows that the temple is a public temple, the right to worship in the temple gives a person a right to sue under S. 92. AIR (Vol 20) 1933 Sind 213: 150 Ind Cas 266.

——**S. 92 — Scheme — Right to sue — Subscriber — Worshipper.**

In a scheme suit in respect of a temple a person who has contributed to the funds of the temple and is a worshipper at the shrine has sufficient interest to be plaintiff. Joining a person not entitled to sue does not affect the right of others who are entitled to sue. AIR (Vol 12) 1925 Mad 1011: 86 Ind Cas 371 (DB).

——**S. 92 — Mere worshipper — Claim for possession.**

In respect of properties which form part of a public trust, a mere worshipper cannot have the right of suit to obtain possession of the properties. He has no right to sue for any of the reliefs mentioned in S. 92 of the C. P. Code except in the manner prescribed by that Section. AIR (Vol 12) 1925 Rang 294: 3 Rang 213: 89 Ind Cas 623 (DB).

——**S. 92 — Mere worshipper.**

In respect of properties which form part of a public trust a mere worshipper can have no right by way of a suit to obtain possession of the properties. AIR (Vol 13) 1926 Lah 425: 8 LLJ 231: 27 PLR 833: 96 Ind Cas 934 (DB).

——**S. 92 — Public trust — Dedication — Proof — Persons interested — Worshippers — Scheme when framed.**

When a deed of endowment is silent as to the nature of the trust, viz., public or private, extrinsic and circumstantial evidence can be let in as to the nature of the trust. Where a temple is open to public worship and when the usual religious festivals are conducted:

The proper inference to be drawn from the circumstances is that it is a public trust and any person having a right to worship at such a temple is entitled to sue under S. 92, C. P. C. Even apart

from the question of mismanagement and misappropriation, a Court can settle a scheme if it can conduce to the better management of the trust property. AIR (Vol 5) 1918 Oudh 207: 5 OLJ 97: 45 Ind Cas 213 (DB).

——S. 92 (S. 539, old Code) — Public Religious trust — Suit to declare right to take part in worship and for joint possession — Right of suit.

See (1906) 10 CWN 867: 33 C 905 (908, 913).

22. Sanction.

See also Note 3.

(a) Advocate-General.
(b) Collector, sanction of.
(c) Legal Remembrancer, Sanction of.
(d) Principles governing.
(e) Power of the Court.
(f) Parties, addition of.
(g) Representative suit.
(h) Relief.
(i) Right to worship, enforcement of.
(j) Sanction for amendment.
(k) Suit by trustee.
(l) Trustee, appointment of.
(m) Trustee, removal of.
(n) Trust property.

——S. 92 — Form and scope of sanction — Sanction for suit claiming specified relief — Suit claiming other reliefs — Competency.

Where permission is granted by the Advocate-General for the institution of a suit under S. 92, C. P. Code, the suit need not be confined to the particular relief mentioned in the application for sanction. No special form of sanction is contemplated by S. 92, nor does it contemplate that the Advocate-General should specify the relief or reliefs in respect of which the leave is granted.

The various clauses of S. 92 only indicate the nature of the suit for which sanction has to be obtained. If a prima facie case has been once made out, any relief or reliefs which the nature of the case may require may be claimed in the suit, provided they are for the protection of the trust and in furtherance of its objects. AIR (Vol 34) 1947 Oudh 22: 21 Luck 222: 225 Ind Cas 45: 1946 AWR (CC) 127: 1946 OA (CC) 127: (1946) OWN 160 (DB).

——S. 92 — Provisions of S. 92, if imperative.

The provisions of S. 92 are imperative, and the consent in writing of the Advocate-General or the Legal Remembrancer as the case may be, has to be secured as a pre-requisite and a sine qua non before the plaintiffs can file a suit under this section of the Code. AIR (Vol 22) 1935 Oudh 96: 11 OWN 1435: 152 Ind Cas 861.

——S. 92 — Breach of order under Charitable and Religious Trusts Act for production of accounts — Suit based on such breach — No sanction necessary.

Once a breach referred to in S. 6, Charitable and Religious Trusts Act, is committed by the disobedience of an order passed by the District Judge for production of accounts, a suit, so far as it is based on such disobedience may be instituted under S. 92, Civil P. C., without the sanction of the Advocate-General and it is not necessary that the suit under S. 92 should be filed by the person who secures the order from the District Judge.

If the plaintiff who has obtained permission under S. 6 of the Charitable and Religious Trusts Act to institute a suit under S. 92, Civil P. C., drops out, it is open to the other plaintiffs who had joined with him in instituting suit to proceed with the suit. AIR (Vol 20) 1933 Mad 854: 38 MLW 730: 65 MLJ 690: (1933) MWN 1286: 57 Mad 153: 146 Ind Cas 628 (2).

——S. 92 — Sanction whether should be in a particular form — "Person interested", meaning of.

Section 92 does not require that details as regards the names of the proposed defendants and the reliefs should be stated in the order granting the sanction and the mere fact that the order of sanction given by the Legal Remembrancer does not specify the persons against whom the suit is to be instituted, does not make the sanction defective. AIR (Vol 20) 1933 Oudh 22: 9 OWN (CC) 966: 8 Luck 266: 140 Ind Cas 896.

——S. 92 — Scope of — Waqf — Mutwalli — Powers of management.

A sanction given by the District Judge on an application by the mutwalli may be sufficient authority for the mutwalli for letting out the waqf property for more than three years. It is not necessary to bring a suit under S. 92, C. P. C., for obtaining such sanction. AIR (Vol 7) 1920 Cal 129: 47 Cal 592: 24 CWN 339: 56 Ind Cas 475 (DB).

——S. 92 — Sanction — Necessity for.

Where the object of suit is to secure certain advantages to a trust, any two persons can sue in that behalf with the sanction of the Advocate-General or the Collector of the District concerned. AIR (Vol 4) 1917 Mad 868: 3 LW 512: 35 Ind Cas 88.

——S. 92 — Right to sue — Suit by disciples of mutt for setting aside compromise — No sanction.

A suit by the disciples of a mutt under O. 1, R. 10, C. P. C., to set aside a compromise decree entered into by the Head of the mutt or an alienation by him for purposes not binding on the mutt, can be maintained. Sanction under S. 92, C. P. C., is not necessary for the purpose. AIR (Vol 2) 1915 Mad 915: 28 MLJ 410: 18 MLT 135: 28 Ind Cas 337 (DB).

——S. 92 — "Sanction" — Form of.

A Collector's sanction given to one applicant by name and other applicants is good. (1911) 13 Bom LR 49: 9 Ind Cas 358 (DB).

(a) Advocate-General.

——S. 92 — Advocate-General, duty of.

In cases of alleged mismanagement of public trust, the Advocate-General should go into the question not only of the condition of the trust but also into the question of the bona fides of the would-be-plaintiffs and of their capacity properly to represent the public on whose behalf they are purporting to sue. AIR (V 31) 1944 All 231: (1944) ALJ 303: 1944 OWN (HC) 129: 1944 AWR (HC) 164: 217 Ind Cas 329.

——S. 92 — Fact that consent of Advocate-General was applied for and refused.

If the trust is in fact one which falls within S. 92, then the fact that the consent of the Advocate-General has been applied for and refused would afford no ground for relaxing the provisions of sub-s. (2). AIR (Vol 26) 1939 Rang 254: 1939 Rang LR 140: 184 Ind Cas 413.

——S. 92 — Applicability to.

The Advocate-General is only concerned with public charitable trusts. He is not concerned with private trusts. AIR (Vol 8) 1921 Bom 338: 24 Bom LR 1060: 84 Ind Cas 759.

——S. 92 (S. 539 old Code) — Sanction of the Advocate-General when necessary under S. 539, C. P. C.

Section 539 of the Civil Procedure Code contemplates the existence of a dispute of such a public nature that the intervention of the Advocate-General is necessary to decide it and by whom a suit

should be brought to establish public rights. (1905) 9 CWN 151: 32 C 273 (276).

(b) Collector, sanction of.

——Ss. 92, 93 — Collector's right to impose restrictions.

The restrictions which a Collector can impose in granting sanction under S. 92, Civil P. C., are only in respect of the persons who can institute a suit and the reliefs which they can obtain. He cannot impose any other condition regarding institution and conduct of the case, e.g., fix time for institution of suit. (1937) 1937 MWN 1319.

——Ss. 92, 93 and 11 — Suit under S. 92 decided on November 24, 1930 — Permission of Collector obtained — No sanction of Local Government — Subsequent decision of Privy Council in another case deciding sanction from Local Government necessary — Effect of Privy Council decision, if retrospective — Judgment of such previous suit, if res judicata.

A suit was brought under S. 92 and the permission of the Collector to bring the suit had been granted under S. 93 of the Code, but no sanction, however, of the Local Government was obtained. The procedure was that ordinarily followed at the time in Berar and as laid down in Civil Circular No. I-18. The judgment in suit was passed on 24th November 1930.

About a year later a case from the United Provinces before their Lordships of the Privy Council in Prem Narain v. Ram Charan, AIR (Vol 19) 1932 PC 51, was decided. It was argued now that in view of that decision all suits previously decided in which only the permission of the Collector had been obtained under S. 93 of the Code were without jurisdiction, and therefore, the decrees in such suits are nullities:

Held, that the Privy Council decision had no retrospective effect and since the permission of the Collector was obtained the suit was not without jurisdiction and hence the judgment was res judicata. AIR (Vol 22) 1935 Nag 28: 157 Ind Cas 90.

——S. 92 — Collector previously declining sanction — If it can be given after further consideration.

The law requires that the Collector should sanction the filing of the suit under S. 92. The fact that at one time he was not satisfied as to the propriety of giving sanction is immaterial. It is quite open to him to change his mind on further consideration. AIR (Vol 21) 1934 Bom 257: 36 Bom LR 526: 152 Ind Cas 50.

——S. 92 — Under S. 92, Local Government may appoint the Collector to prosecute a particular suit though it may have invested Legal Remembrancer generally with the duties elsewhere discharged by the Advocate-General under that section. AIR (Vol 18) 1931 PC 121: 1931 ALJ 369: 35 CWN 699: 53 CLJ 537: 33 Bom LR 968: (1931) MWN 662: 34 MLW 63: 61 MLJ 402: 53 All 910: 58 IA 460: 132 Ind Cas 745.

——S. 92 — Sanction not obtained against some of the defendants — C. P. Code.

Where a suit under S. 92 was filed against three persons but it appeared that the sanction of the Collector had been obtained against only one, held, that the Court of appeal could direct the matter to stand over with a view to enable the plaintiff to obtain such sanction.

Held also, that such a lax practice on the part of litigants should generally be dicouraged. 1930 MWN 456 (DB).

——S. 92 — Notice.

Held, that the Collector's order granting sanction under S. 92, C. P. Code, is not invalidated by want of notice to defendants. 1930 MWN 456 (DB).

——S. 92 — Sanction for suit against alleged trustee — Addition of real trustee — Fresh sanction.

P obtained sanction of the Collector under S. 92, C. P. Code, and sued A and B, the alleged trustees. A plea was raised that M was the real trustee and he was added as a defendant to the suit at the Court's instance, but without the sanction of the Collector.

Held, that the sanction of the Collector was necessary to maintain the suit against M. AIR (Vol 15) 1928 Lah 717: 116 Ind Cas 334.

——Ss. 92 and 93 — Sanction — Conditional consent.

A conditional consent given by the Collector on an application under S. 92 (read with S. 93) C. P. C. is no consent at all, the consent having been given subject to the condition that the Court thought that S. 92 applied to the case. The provisions of S. 92, C. P. C. are imperative. 39 Bom 580: 17 Bom LR 625: 30 Ind Cas 17: AIR (Vol 2) 1915 Bom 38 (DB).

——S. 92 — Sanction — Consent of Collector in Sind — Whether sufficient.

The consent of the Collector in Sind is enough, and that of the Advocate-General of Bombay is unnecessary, in order to institute a suit under the section. (1913) 7 SLR 129: 24 Ind Cas 712.

——Ss. 92 and 93 — Sanction — Collector — Delegation of functions.

The duties imposed upon a Collector by Government Resolution under S. 93 of the C. P. C. are of a very special nature, and cannot be discharged by his subordinates. (1911) 35 Bom 243: 13 Bom LR 207: 10 Ind Cas 803 (DB).

(c) Legal Remembrancer, sanction of.

——S. 92 — Legal Remembrancer sanctioning institution of suit — Presumption.

The presumption is that the Legal Remembrancer, when he sanctioned the institution of the suit, acted properly and in accordance with law. AIR (Vol 30) 1943 All 74: (1942) ALJ 722: ILR (1943) All 112: 1943 AWR(HC) 197: 205 Ind Cas 48.

——Ss. 92, 93 — Suit under S. 92 with sanction of Legal Remembrancer — Sanction of Local Government not obtained — Scope of S. 93.

Section 93, Civil P. C., provides for two distinct matters, the appointment of an officer to exercise the powers conferred by Ss. 91 and 92 on the Advocate-General, and the previous sanction of the Local Government to the exercise of such powers. In each case both the appointment and the previous sanction of the Local Government to the exercise of the powers are necessary before the provisions of S. 93 can be utilised.

A suit under S. 92 brought with the consent of the Legal Remembrancer but without the previous sanction of the Local Government as required by S. 93, is not maintainable. AIR (Vol 19) 1932 PC 51: 36 CWN 257: 35 MLW 224: 9 OWN 53: 55 CLJ 54: 1932 ALJ 182: 62 MLJ 249: 34 Bom LR 494: 59 IA 121: (1932) MWN 685: 53 All 990: 136 Ind Cas 461.

(d) Principles governing.

——S. 92 — Sanction must be to named persons.

The permission required by S. 92 must be given to two or more named persons. It is not sufficient for the Advocate-General or the Collector to nominate one person and give him a blank cheque to join any other person or persons he chooses as co-plaintiffs.

That no doubt is the law, but if certain persons apply to the proper officer for permission to sue and he grants the application, the omission to set out the names of all the applicants in the per-

mission order does not render it invalid. AIR (Vol 29) 1942 Bom 291 (292): 44 Bom LR 643: 204 Ind Cas 275.

——S. 92 — **Object of.**

The object of requiring sanction or permission before suits are instituted under S. 92 is to safeguard not only the rights of the public but also the rights of the institution and the trustees. The suit being a representative suit, it is necessary to see that the persons who come forward are persons who have an interest in the temple and persons who can be safely entrusted with the conduct of the suit. It is also for the benefit of the institution and of the trustees because it affords a safeguard against impecunious improper persons coming as plaintiffs and involving the trust in litigation and expenses and it is also a safeguard that the persons are substantial persons from whom, if the suit fails, the costs can be recovered and not merely men of straw. 53 Mad 223: 30 MLW 954: 1929 MWN 911: 124 Ind Cas 220: AIR (Vol 17) 1930 Mad 129: 58 MLJ 39 (DB).

——S. 92 — The authority giving the sanction must consider the various aspects before giving the sanction and one important consideration should be as regards the status and position of those who come forward to represent the community. It would be more desirable, before giving the sanction that notice should be given to the institution or the trustees although it is not obligatory. 30 MLW 954: 1929 MWN 911: 53 Mad 223: 124 Ind Cas 220: AIR (Vol 17) 1930 Mad 129: 58 MLJ 39 (DB).

——S. 92 — Objection to want of — Waiver — Object of sanction.

Objection as to absence of sanction under S. 92 is not an objection that can be properly waived. The very object of insisting upon the sanction of a Collector or of the Advocate-General being obtained as a preliminary to a suit under S. 92 is to secure that suits are not brought against trustees unless there is a 'prima facie' case against them of breach of trust or unless circumstances exist which necessitate the Court's interference in the administration of the trust. 24 MLW 419: 1926 MWN 626: 97 Ind Cas 462: AIR (Vol 13) 1926 Mad 970 (DB).

——S. 92 — Sanction against non-trustee — Suit against real trustee — Maintainability.

The object of this section will be defeated if it is left open to a plaintiff to get sanction against a person who is not the trustee and then use it afterwards against the real trustee. The personality of the trustee and the way in which he is dealing with the trust are matters of material consideration in granting sanction for a suit. 24 MLW 419: 97 Ind Cas 462: 1926 MWN 626: AIR (Vol 13) 1926 Mad 970 (DB).

——S. 92 — Suit after — Procedure under C. P. Code, O. 1, R. 8, if necessary.

It cannot be seriously contended that the provisions of O. 1, R. 8, are not merely of an enabling character. The condition precedent to the proper institution of a suit under S. 92, C. P. Code, is the obtaining of the sanction of the Advocate-General and no other condition for the maintainability of a suit is to be found in the Code.

Previous to the amendment of S. 92 (formerly S. 539 in the previous Code) by the C. P. Code of 1908 no doubt the procedure under O. 1, R. 8 (formerly S. 30) was, in suits instituted otherwise than with the sanction of the Advocate-General or the Collector, deemed necessary in order to render the decree in the suit binding on all parties interested in or concerned in any manner with the trust. But the amendment of the law embodied in the present S. 92, C. P. Code, has obviated the necessity for a representative suit. 1925 MWN 505: AIR (Vol 12) 1925 Mad 1070 (FB).

——S. 92 — Grant of by Collector — Consideration of matters specified in section.

It is desirable that a Collector before granting sanction for a suit under Section 92 C. P. Code, should consider whether the trust is public trust, whether there are prima facie grounds for holding that there has been a breach of such trust and whether the persons suing are persons who have an interest in the trust. But his failure to consider these matters does not in any way invalidate a sanction granted by him. (1921) 60 Ind Cas 570 (Lah) (DB).

——Ss. 92, 93, (S. 539, Old Code) — Sanction — Condition precedent.

The "consent in writing" of the Advocate-General or other officer appointed by the local Government must be a specific permission given to two or more persons by name. A permission given to one applicant by name "an another" is not a sufficient compliance with the terms of the section. Held, also, that the consent is a condition precedent to the institution of the suit. 10 M 165 dissented from. 1903 AWN 227: 26 A 162 (165) (DB).

(e) Power of the Court.

——S. 92 — Applicability — Public charitable trust — Trustees recognised — Suit for proper accounting and for receiver — Suit if falls within S. 92 — Advocate-General's previous sanction — Necessity.

Where a plaintiff on behalf of all persons interested in a fund prayed 'inter alia' for a declaration that the defendants being the trustees of a trust, they should render true and proper accounts and to forward the funds collected to proper destination and for the appointment of a receiver, on the question whether the suit fell within S. 92, C. P. Code.

Held: as the suit is not for recovery of property from strangers or persons who according to the plaintiffs have no right to be in possession of the trust properties and moreover as the prayers are for correct accounting, etc., from trustees recognised by the plaintiff, the case would fall under Cls. (d) and (h) of S. 92 and the previous sanction of the Advocate-General would be necessary for its institution and in the absence of it would not be maintainable. 63 LW 759: 1950 MWN 616: (1950) 2 MLJ 282: AIR (Vol 38) 1951 Mad 406: ILR (1951) Mad 228 (DB).

——Ss. 92 and 93 — Sanction by competent authority — Power of review — Enqiry by Court — Scope of.

The powers vested by Ss. 92 and 93, C. P. Code, are not judicial and the rules which apply to the finality of judgments in Courts of law do not obtain here. All the Court is concerned to see is whether there is a valid sanction by a competent authority. It cannot go behind the sanction and enquire whether the sanctioning authority had heard the parties or changed its mind. But of course it can enquire into the competency of the authority to act under those sections. (1950) ILR (1950) Nag 50: 1950 NLJ 545 (DB).

——Ss. 92 and 115 (O. C. S. 539) — Sanction — Order of Collector — Revision.

The Chief Court cannot before suit revise an order of a Collector of a District granting permission under S. 539 of the Code, 1882, to sue for removal of a mahant. Such order is executive or administrative only, and in granting sanction, the Collector does not act as a Court. 104 PR 1910: 40 PLR 1911: 8 Ind Cas 1160.

(f) Parties, addition of.

——S. 92 — Applicability and scope — Suit instituted with sanction — Subsequent addition of party without sanction — Effect — Suit, if bad.

Where a suit brought with the leave of the Advocate-General is subsequently amended by the addition of a new defendant without such leave, the suit is vitiated by such addition without sanction.

If a suit is amended by the introduction of a new party or in some other substantial manner the suit is not identical with the suit as it was at its commencement. 49 Bom LR 428: AIR (Vol 34) 1947 Bom 487.

——S. 92 — Appeal relating to trust on behalf of Muhammadan community — Petition by member of community to be made party, in case appellants were unwilling to continue appeal — Fresh sanction, if necessary.

In an appeal relating to a trust under S. 92, on behalf of the Muhammadan community, a petition was made to the effect, that if the original appellants did not wish to prosecute the appeal and allow the appeal to be dismissed, the petitioner may be added as a party and appellant on record so that he may proceed with the appeal:

Held, that the petitioner being a member of the Muhammadan community was interested in the trusts and as such, the suit having been properly laid and the necessary sanction of the Collector of the district having been obtained, it was not necessary for any member of the public to obtain a fresh sanction to carry on the appeal. (1936) 163 Ind Cas 67: 39 CWN 951: 61 CLJ 469: 62 Cal 1132.

——S. 92 — Addition of parties — Fresh sanction, if necessary.

Fresh sanction under S. 92 is not needed if the scope of the scheme suit is not enlarged by the addition of a new party. AIR (Vol 16) 1929 Mad 635.

——S. 92 — New defendant — Sanction.

While plaintiffs in order to be parties to a suit under S. 92 require the permission of the Government Advocate, defendants do not require any such permission. 5 Rang 263: 103 Ind Cas 261: AIR (Vol 14) 1927 Rang 180 (DB).

——S. 92 — New defendant added — Sanction, if necessary.

The test as to whether a new sanction is necessary when a new defendant is added, depends on whether the scope of the suit has been really enlarged or altered by the addition of the new party. 24 MLW 419: 97 Ind Cas 462: 1926 MWN 626: AIR (Vol 13) 1926 Mad 970 (DB).

——S. 92 — New defendant — Validity of suit — Sanction of Advocate-General obtained — A stranger may be joined as defendant.

If a suit is brought under the sanction of the Advocate-General the addition of a stranger as defendant does not render the suit bad. 80 Ind Cas 44: AIR (Vol 12) 1925 Cal 187 (DB).

——S. 92 — Suit filed with sanction — New defendants — Fresh sanction, if necessary.

Where a suit is filed with sanction, its subsequent amendment by adding parties without fresh sanction, does not invalidate it. 79 Ind Cas 539: 16 SLR 221: AIR (Vol 10) 1923 Sind 35.

——S. 92 — Sanction — Granted to more than two — All must join.

Where a sanction under S. 92 is granted to more than 2 persons interested in the trust, all must join in the suit. 29 MLJ 231: 31 Ind Cas 236: AIR (Vol 3) 1916 Mad 762 (DB).

(g) Representative suit.

——S. 92 — Bequest in favour of boys and girls of Hindu community not restricted to particular locality — Representative suit on behalf of boys and girls of said community for declaration of trust in their favour does not fall under S. 92 and no sanction of the Advocate-General is necessary. AIR (V 27) 1940 Cal 236: ILR (1940) 1 Cal 14: 188 Ind Cas 674.

——S. 92 Trust deed in favour of charitable institutions — Suit by widow challenging validity of deeds and alternatively claiming suitable maintenance for her according to Hindu Law.

A Hindu died disposing of his property by will and a trust deed in favour of charitable institutions. The will provided for a certain amount to be paid to the testator's widow for her maintenance.

The widow brought a suit challenging the validity of the deeds and alternatively, if this could not be done, claiming maintenance suitable for her requirements and status to which she was entitled under the Hindu Law:

Held, that the widow was not seeking to enforce the trust. She was claiming what she considered reasonable maintenance not on the basis of the trust but in spite of the trust, relying on principles of Hindu Law to which the trust, though valid in other respects, must conform.

She was not asking the Court to administer the trust but administer her husband's estate in accordance with these principles simply for the purpose of giving her proper maintenance.

Hence the suit was not governed by S. 92, and not liable to be dismissed because it had not been filed as a representative suit with the sanction of the Collector. AIR (Vol 26) 1939 Bom 354: 41 Bom LR 787: 185 Ind Cas 44.

——S. 92 — Representative suit by villagers for declaration — Defendant appealing but dying in meantime — One of plaintiffs also dying:

Held, that surviving plaintiffs were competent to prosecute appeal:

Held, further that the District Judge without the sanction of the Collector could settle a scheme in a declaratory suit claiming that a mutawalli of mosque was not properly appointed and for his removal. AIR (Vol 23) 1936 Lah 361: 37 PLR 85: 162 Ind Cas 89.

——S. 92 and O. 1, R. 8 — Alienation of trust property — Suit by disciples for setting aside alienation.

A suit by the disciples of a mutt in a representative capacity to set aside an alienation of mutt properties by the Head of the mutt and for delivery of possession of the properties to the persons lawfully entitled to manage the mutt, is maintainable without sanction under S. 92 C. P. C. 41 Mad 124: 33 MLJ 357: 22 MLT 218: 6 LW 666: 42 Ind Cas 366: AIR (Vol 5) 1918 Mad 464 (DB).

——S. 92, O. 1, R. 8 (1) (Ss. 539, 30 of old Code) — Religious and charitable society — Suit for removal of officers when maintainable — Subscribers' right of suit.

The plaintiffs who were some of the subscribers of a religious and charitable society but who, under the rules of the society, had no control over the officers of the society, or the conduct of its affairs, and who were neither the beneficiaries of the trust nor in any other way possessed any right to make any claims upon the funds of the society, brought a suit for the removal of the defendants, certain office bearers of the society, for accounts, and for payment into Court of money which may be found due from them.

Held, Per Chief Justice — That the suit was not maintainable. Per Abdur Rahim, J. — The plaintiffs cannot in any event maintain a representative suit without the sanction or leave obtained either under S. 539 or S. 30, old C. P. C.

'Obiter':— If the defendants are merely servants they are liable to be sued only by the employers. (1909) 32 M 131: 1 Ind Cas 995 (997).

(h) Relief.

——S. 92 — Suit for declaration that property belonged to religious institution, with prayer for injunction and accounts — Subsequent omission of claim for accounts — Suit held fell under S. 92 and was incompetent for want of Collector's sanction.

A suit as originally filed was for a declaration that the suit house belonged to a religious institution of the members of a Ramdwara section. There was also a prayer for an injunction and for accounts. The prayer for accounts was subsequently omitted by amendment:

Held, that the suit as originally filed fell under S. 92 and was not competent for want of Collector's sanction. By amending the plaint by omitting the relief for accounts the suit could not be taken out of the purview of S. 92. AIR (Vol 27) 1940 Bom 242: 42 Bom LR 443: 189 Ind Cas 836.

——S. 92 — Relief claimed by plaintiff in effect nothing more than prayer for framing scheme for re-constitution of obsolete temple office.

Where one of the reliefs claimed by the plaintiffs in a suit is, in effect, nothing more than a prayer for framing a scheme for the re-constitution of an obsolete temple office, such a prayer is bad for want of the Advocate-General's fiat under S. 92, Civil P. C. AIR (Vol 26) 1939 Mad 102: 48 MLW 722: 1938 MWN 1206: (1939) 1 MLJ 124: 183 Ind Cas 258.

——S. 92 — Suit relating to trust — Consent of Advocate-General, when required.

If a relief is specified in S. 92, the result will be that a suit for that relief cannot be brought except with the consent of the Advocate-General or the Collector. It was certainly not the intention of the Legislature that every suit which may in any sense relate to a trust should be brought only after obtaining such consent. AIR (Vol 23) 1936 Mad 449: 4 MLW 409: (1936) MWN 245: (1937) 2 MLJ 437: 164 Ind Cas 615.

——S. 92 — Constructive trustee intermeddling with charitable property — Suit to restrain him from alienating it — Relief, if falls within S. 92, cl. (h).

It is true that S. 92 does not apply to the case of actions or suits relating to charities which are brought against third persons, namely to the case of a trustee for a charity bringing a suit to recover property belonging to the charity. But if the relief is claimed against persons who are constructive trustees, who have intermeddled with the charitable property and made themselves trustees, then the action is within the section.

The plaintiff, a 'shewak' of a temple, alleged that the defendants were trustees and in a suit on behalf of himself and other 'shewaks' prayed for a declaration that the property in suit was a public charitable property and there was also a prayer to restrain the trustees from alienating the land or any portion of it.

Held, that the relief fell within S. 92, cl. (h) and hence sanction under the section was necessary. AIR (Vol 23) 1936 Sind 179: 30 SLR 104: 165 Ind Cas 158.

——S. 92 — Suit founded on alleged breach of trust by a trustee of a public religious trust — Consequential relief of taking account sought.

Where the plaintiff has founded his suit upon an alleged breach of trust by the trustee of a public religious trust and seeks as a consequent relief, the taking of an account, the suit comes within the scope of S. 92 and it cannot be instituted without sanction of the Advocate-General. AIR (Vol 22) 1935 Mad 825: 58 Mad 988: 42 MLW 304: 69 MLJ 291: (1935) MWN 895: 158 Ind Cas 63 (FB).

——S. 92 — Tests to see if a suit falls within S. 92.

The question whether suit falls within S. 92 depends, not upon the character in which the plaintiff sues, but upon the nature of the reliefs sought. If the suit is in respect of an alleged breach of a public, charitable or religious trust and for any of the reliefs specified in sub-s. (1) of S. 92, the Advocate-General's sanction is necessary to its institution. AIR (Vol 22) 1935 Mad 825: 58 Mad 988: 42 MLW 304: 69 MLJ 291: (1935) MWN 895: 158 Ind Cas 63 (FB).

——S. 92 — Trust denied by defendant — Suit for mere declaration — No further relief of possession — Maintainability of suit — Specific Relief Act (I of 1877), S. 42, proviso.

Where the defendant denies the trust, he cannot be held to be a trustee and must, therefore, be a trespasser or a third party. Against such a trespasser or third party a suit can be brought without sanction.

Under S. 92, it is pre-supposed that an express or constructive trust created for public purposes of a charitable or religious nature exists, but where the nature or existence of such a trust is in dispute, S. 92 will not apply, and suit for a declaration with regard to the trust may be brought without any sanction. AIR (Vol 21) 1934 Nag 277: 153 Ind Cas 496.

——S. 92 — Suit for declaration that a property is public property — Whether comes under S. 92 — Absence of consent of Advocate-General — Facts that some reliefs cannot be granted without consent of Advocate-General — Grant of other reliefs.

A relief asked for in a suit that it may be determined that the property in dispute belongs to the general public and that the right may be declared, is not one contemplated by S. 92, Civil P.C. and there is no bar to the grant of such a relief on account of the absence of the consent of the Advocate-General.

Although in a suit properly instituted under S. 92, the defendant may raise the objection that the property was not the property of the nature of an express or constructive trust created for public purposes of charitable or religious nature, and on such objection being taken the Court has to decide whether or not the subject-matter of dispute was a public, charitable and religious trust, yet that does not take away the jurisdiction of the ordinary Civil Court to make a declaration that a particular property is a property belonging to the general public.

The fact that some of the reliefs cannot be granted on account of the absence of the consent in writing of the Advocate-General will not disentitle the plaintiff to the other reliefs. AIR (Vol 20) 1933 Pat 246: 14 PLT 768: 13 Pat 65: 145 Ind Cas 294.

——S. 92 — Charitable trust — Suit by trustee for declaration of a right to manage.

A suit for declaration that the plaintiffs are entitled to manage a charitable institution as its lawfully appointed managers and for an injunction to restrain the defendants from interfering with

the management of the institution by the plaintiffs does not fall within the purview of S. 92 and is maintainable without the sanction of the Collector.

A suit contemplated by S. 92 is one of a representative character brought for the benefit of the public; that section does not contemplate suit by plaintiffs in their individual capacity as trustees or managers to enforce their own personal right of management. AIR (Vol 18) 1931 Nag 198: 27 NLR 299: 134 Ind Cas 857.

——S. 92 — Declaration and injunction — Necessity for sanction.

Though the sanction of the Collector is not necessary to a suit filed by a few members of the community, which merely seeks a declaration that certain properties are subject to a charitable and religious trust, such sanction becomes necessary when an additional relief is sought claiming an injunction restraining the defendants from preventing the plaintiffs from enjoying the uses and objects to which the properties have been dedicated. AIR (Vol 17) 1930 Sind 204.

——S. 92 — Declaration of Trust Property — Applicability of.

A suit for a declaration that the defendant is not the owner of the disputed house and that the house is property attached to the temple which is a religious trust, and as such is liable to user by the inhabitants of Gujrat town who profess Sanatan Dharam, together with an injunction restraining the defendant from devoting the property in suit to purposes other than religious and charitable is a suit which does not fall within the purview of S. 92, C.P. Code, and the sanction prescribed therein is not required for its institution. 120 Ind Cas 161: AIR (Vol 16) 1929 Lah 740 (DB).

——S. 92 — Suit for mere declaration.

No sanction under S. 92 is necessary for a suit for a mere declaration that the property in dispute is wakf and that the alienations thereof are void. 113 Ind Cas 120: AIR (Vol 15) 1928 Lah 888 (DB).

——S. 92 — Suit for declaration of right to appoint mutawalli as founder.

A suit by plaintiff for a declaration that he as founder of the wakf, is entitled to appoint mutawallis, the original mutawallis having died without making such appointment, and that he has made valid appointment in pursuance of such right does not require sanction under S. 92. 49 All 435: 25 ALJ 329: 99 Ind Cas 1045: AIR (Vol 14) 1927 All 257 (DB).

——S. 92 — Declaration as to wakf property.

Where all that the plaintiff prays for in his suit is a declaration that the property be declared to be a wakf, no sanction under S. 92 is necessary. 99 Ind Cas 756: 28 PLR 486: 8 Lah 111: AIR (Vol 14) 1927 Lah 350 (DB).

——S. 92 — Relief under section — Prayer not specific but implied.

Where, though the plaintiffs do not expressly ask for the removal of the existing trustee from his trusteeship and for their appointment as new trustees and for a declaration that the properties have become vested in them but it is clear that the object of the suit is to get the dismissal of the old trustee and the appointment of the new trustees by the committee recognised by the Court and to recover the properties through Court from the trustees, the suit comes within the scope of S. 92 and sanction is necessary. 26 MLW 274: AIR (Vol 14) 1927 Mad 886 (DB).

——S. 92 — Reliefs under section claimed — Suit for personal right.

Where a suit is filed not for the purpose of vindicating any rights of the public as a public, religious or charitable trust but only for the purpose of satisfying the personal or individual rights of the plaintiff as trustee, no sanction under S. 92 is necessary, though the reliefs claimed are those specified in S. 92. 103 Ind Cas 134: AIR (Vol 14) 1927 Mad 820 (DB).

——S. 92 — Sanction for some reliefs — Suit comprising other reliefs — Effect of.

Where plaintiff's suit asks for some reliefs sanctioned by Collector and others not so sanctioned, the whole suit should not be dismissed. It may be tried so far as the relief sanctioned by the Collector is concerned. 79 Ind Cas 200: AIR (Vol 10) 1923 Bom 428 (DB).

——S. 92 — Suit for declaration as to public pathway — Applicability of section.

Where plaintiff sues on behalf of the public for a declaration that a certain way is a public way and for mandatory injunction to remove certain obstruction the suit is one governed by O. 1, R. 8, and if Court's permission is obtained, recourse to Advocate-General is unnecessary. 69 Ind Cas 910: 26 CWN 587: AIR (Vol 8) 1921 Cal 405.

——S. 92 — Suit for possession of trust property by worshippers — Maintainability — Suit for declaration as to trust property — Necessity for sanction.

Where the worshippers of a temple sue for possession of temple property, the suit is not maintainable as prima facie, it is only the trustees who could claim that relief. They can however sue for a declaration that it is trust property and to such a suit S. 92 will not apply. 67 Ind Cas 320 (2): 1 Lah LJ 150: 84 PLR 1922: AIR (Vol 6) 1919 Lah 56 (DB).

——S. 92 (S. 539, old Code) — Suit for declaration by Mahomedan residents that a certain idgah and lands adjoining were wakf property — No permission of Advocate-General or Legal Remembrancer necessary.

See (1910) 7 ALJ 797: 32 All 631 (634) (DB).

(i) Right to worship, enforcement of.

——S. 92 — Scope of — Right to exclusive worship — Suit to restrain interference.

S. 92 debars persons from unrestricted access to courts and hence must be strictly construed. A suit to restrain interference with plaintiff's right to exclusive worship is not within S. 92 and consent of the Advocate-General is not necessary. Such a suit can be brought by any person claiming such right without joining the trustee as parties. The result of the suit would bind all interested in the right. 11 Bur LT 249: 50 Ind Cas 509: AIR (Vol 6) 1919 Low Bur 56.

——S. 92 — Scope of — Suit to enforce rights of worshippers.

Where individual persons claim as citizens, rights of worship or performing certain festivals in a temple, no sanction of the Advocate-General or Dist. Judge is necessary as the case is one for direction that the officer in charge of the trust should perform the duties according to usual practice. 3 LW 512: 35 Ind Cas 88: AIR (Vol 4) 1917 Mad 868.

(j) Sanction for amendment.

——S. 92 — Powers of Advocate-General — Sanction of amendment of plaint — Validity.

Under S. 92, C.P. Code, the Advocate-General has no power to sanction an amendment of a plaint by addition of defendants. Only a Court can do that. (1950) ILR (1950) Nag 50: 1950 NLJ 545 (DB).

——S. 92 — Amendment not substantially changing character of suit can be allowed without sanction of Collector — Amendment changing cha-

racter of suit is not permissible even with permission.

It is for the Court to decide in suits under S. 92 as in any other suit whether an amendment is permissible, and the consent of the Advocate-General or the Collector, as the case may be, is really evidence which has to be taken into consideration before deciding whether the amendment should be allowed.

Amendments which do not substantially change the character of the suit or enlarge the scope of it can be made by the Court itself without sanction. Amendments which enlarge the scope of the suit for instance by allowing further relief, without substantially changing its character, may be made with the sanction of the Advocate-General or the Collector, that sanction being evidence that the suit after amendment is to all intents and purposes the same suit and not a different one.

Amendments substantially changing the character of the suit would not be permissiole even with sanction. In such a case it could hardly be said that the suit in its amended form was ever validly instituted. AIR (Vol 28) 1941 Bom 317: 43 Bom LR 706: ILR (1941) Bom 556: 196 Ind Cas 826.

——S. 92 — Amendment of plaint — Suit relating to public charity — Consent of Advocate-General obtained for institution — Amendment of plaint by addition of new parties — Fresh sanction if necessary.

The sanction of the Advocate-General which is a condition precedent to the institution of a suit under S. 92 of the Code is equally a condition precedent to the amendment of the same plaint, especially where such amendment relates to a cause of action arising after the institution of the suit and fresh parties are added in consequence, with a claim for fresh reliefs against them. (1912) 36 Bom 168: 13 Bom LR 583: 11 Ind Cas 726.

——S. 92 — Amendment of plaint — Without sanction, when proper.

Where the Advocate-General has sanctioned a suit under S. 92, C.P.C. and something outside the scope of that section has been inserted in the plaint and that has been covered by the general sanction it cannot be said that the striking out of that relief which did not fall strictly within the scope of S. 92 cannot be made without the sanction of the Advocate-General. (1910) 14 CWN 932: 12 CLJ 211: 7 Ind Cas 92 (DB).

——Ss. 92, 93 — (S. 539, Old Code) — Breach of trust — Suit brought with the consent of the Advocate-General — Amendment of plaint by mentioning particulars of the breach of trust — Consent not necessary.

A suit instituted under the provisions of S. 539, C. P. C., complained generally about a breach of trust. The suit was brought with the consent of the Advocate-General. The plaint was subsequently amended by mentioning the particulars constituting the breach trust. No consent of the Advocate-General was obtained to the amendment.

Held, that consent was not necessary because if the Advocate-General was satisfied generally that there was a breach of trust, and gave his consent, it was competent to the plaintiffs to specify such instances of breach of trust as they thought they could prove. (1907) 9 Bom LR 901 (902, 903).

——S. 92 (S. 539, Old Code) — Suit relating to charity — Suit instituted by one person with the consent of the Advocate-General — Amendment of plaint — Substitution of another plaintiff with the consent of the Advocate-General.

A suit under S. 539 of the Civil Procedure Code was in the first instance brought by one person with the consent of the Advocate-General.

This was objected to and it led to an amendment of the plaint by the addition of the 2nd plaintiff with the certificate of the Advocate General which ran: "I give my consent to the amendment of the plaint of suit as proposed."

Held, that the suit as brought was defective in a material particular, for S. 539 of the Civil Procedure Code nowhere speaks of the consent of the Advocate-General to amendment of the plaint.

And it would be unduly forcing the words of the Code to hold that by virtue of the second consent given by the Advocate-General it can be said of this suit that it was instituted by two persons having an interest in the trust and having obtained the consent in writing of the Advocate-General. (1906) 8 Bom LR 751: 30 B 603 (606) (DB).

(k) Suit by trustee.

——S. 92 — Plaintiff claiming to be trustee of property dedicated for religious purposes, against rival trustee and entitled to manage institution as such.

Where a suit has been instituted by a person claiming to be a trustee of property dedicated for religious purposes, for a declaration that he is a trustee and is entitled to manage the institution as such, but the relief he claims is in his individual capacity and not in a representative capacity, and the suit is against a rival trustee or one who claims to be a trustee, the suit does not fall under S. 92, and no sanction, therefore, is required.

The institution of the suit in such a form does not amount to a circumvention of law. In neither case is an injury to a public right or interest involved. Whoever happens to succeed will hold the trust property as 'mutawalli' and not in his own right.

The dispute between the two rival trustees 'inter se', therefore, is neither a suit for the removal of any trustee nor for appointing a new trustee, nor for vesting any property in a trustee; nor does it fall under any other head from (d) to (g) and will consequently, not fall under head (h) of S. 92. AIR (Vol 25) 1938 Lah 869: 180 Ind Cas 799.

——S. 92 — Suit by trustee against banker, to recover trust money misapplied.

A suit against a banker to recover trust moneys which he has misapplied does not fall under S. 92, and can be instituted without the sanction of the Advocate-General. AIR (Vol 25) 1938 Mad 999: 1938 MWN 1017: 48 MLW 577: ILR (1939) Mad 121: (1939) 1 MLJ 625: 182 Ind Cas 673.

——S. 92 — Persons intended to benefit under a trust — Competency to sue for declaration without sanction required by S. 92.

Persons intended to benefit under a trust are interested in its maintenance and are competent to sue for a declaration to the effect that a property is 'wakf' and may do so without the sanction required by S. 92. AIR (Vol 23) 1936 Lah 283: 160 Ind Cas 289.

——S. 92 — Suit by admitted trustee against non-trustee — Necessity for.

A suit by an admitted trustee against one who is not a trustee for the recovery of trust property and submission of accounts is cognisable by the ordinary Civil Court without any preliminary formalities mentioned in S. 92. 88 Ind Cas 1035: 4 Pat 741: 7 PLT 4: 1925 PHCC 194: AIR (Vol 12) 1925 Pat 544 (DB).

——S. 92 — Suit against co-trustee for accounts.

A suit by a trustee or trustees of a public charitable or religious trust against a co-trustee for accounts and for delivery of account books and other papers does not fall within section 92 of the Code of Civil Procedure and may be brought without

the sanction of the Advocate-General. 74 Ind Cas 45: 6 NLJ 209: AIR (Vol 10) 1923 Nag 298 (DB).

(l) Trustee, appointment of.

——Ss. 92, 96, 47 — Appointment of trustees for 'wakf' property — Trustees dying — Application by certain persons for their appointment — Some persons found managing property — Application, if can be entertained — Suit under S. 92, necessity of — Appeal from order entertaining application — Competency — Revision — Muhammadan Law — 'Wakf'.

Where after the death of all the 'mutawallis appointed by the Court', some persons applied to be appointed trustees of 'wakf' property and the Court after holding that it had jurisdiction to entertain the application without a suit under S. 92, ordered their appointment and the aggrieved party who was in possession and managing the property went in appeal:

Held, that an appeal being the creature of statute and there being no law under which the present appeal could be said to have been brought, the appeal must be deemed to be incompetent:

Held, also, that though the appeal purported to be one under Ss. 96 and 47, both the sections were not applicable:

Held, further that the main ground of attack on these orders being that the Judge was in error in holding that the applications in question were maintainable, the appeal could be treated as revision:

Held, further, that S. 92 barred applications of this kind by necessary implication. It is hardly conceivable that when the Legislature deemed it necessary that a suit brought for the purposes mentioned in the section should be incompetent unless brought with the consent in writing of the Advocate-General.

They meant to permit a mere application to be brought by a private individual without any official sanction whatever for the same purpose. The applications would have been maintainable had there been no question of removal of existing 'mutawalli'. But such was not the case here. AIR (Vol 24) 1937 Oudh 381: 1937 OWN (CC) 730: 13 Luck 523: 168 Ind Cas 803.

——S. 92 — Sanction — Appointment of new trustee.

A suit for appointment of new trustee requires sanction under S. 92, C. P. C. (S. 539 of Old Code). (1911) 1 MWN 142: 9 MLT 301: 21 MLJ 450: 9 Ind Cas 168 (DB).

(m) Trustee, removal of.

——S. 92 — Scheme drawn up in proceedings under S. 92 — Application to District Judge for removal of trustee and appointment of another — District Judge, whether has jurisdiction in the matter — Proper procedure.

A suit for removal of a trustee and appointment of another can be filed only with the sanction of the Legal Remembrancer for that purpose. And although the scheme is originally drawn up in a proper proceeding under S. 92, that fact does not remove the necessity imposed by the section for the obtaining of sanction before the Court can act under the section and remove a trustee or appoint another.

Consequently, where such an application is filed before a District Judge he has no jurisdiction in the matter, and the proper procedure is to get the necessary sanction under S. 92, and proceed by way of suit. AIR (Vol 22) 1935 All 273: 1935 ALJ 311: 1935 AWR (HC) 118: 157 Ind Cas 202.

——S. 92 — Alienation by widow of founder — Suit by reversioner — Proper remedy.

The founder of a trust appointed himself as manager during his lifetime and his heirs after his death. Founder's widow after his death alienated the trust property. The plaintiff, who was the reversioner to the estate of the founder sued to recover property alienated by the founder's wife.

Held, that the widow could not be transposed as plaintiff and the plaintiff could not claim to be trustee. The proper remedy for the plaintiff was to sue for the removal of the widow from the trusteeship by a suit properly framed under Sec. 92, C. P. Code, after obtaining Advocate-General's permission.

Held, further that plaintiff could not be allowed to do that in this suit as that would alter the nature of the suit. 22 MLW 701: 1926 MWN 117: 92 Ind Cas 823: AIR (Vol 13) 1926 Mad 280: 50 MLJ 42 (DB).

——S. 92 — Removal of trustee — Sanction — Suit by gaddinashin to eject trespasser.

A suit brought by persons claiming to be the worshippers of a shrine and beneficiaries in the property attached thereto, for the removal of the trustee thereof falls under S. 92 of the Code and, if instituted without the consent in writing required by the section, the relief for the removal of the trustee cannot be adjudicated upon. 11 PWR (1918): 44 Ind Cas 879: AIR (Vol 5) 1918 Lah 76 (DB).

——S. 92 — Removal of Trustee — Appointment of fresh trustee — Sanction necessary.

A person without instituting a suit under S. 92 C. P. C. (1908) cannot seek to oust from possession persons who claim to hold as trustees. A Court can appoint a 'Mutawalli' to fill up a vacancy in the office. 18 MLT 45: 29 Ind Cas 849: AIR (Vol 2) 1915 Mad 1044 (DB).

——S. 92 (O. C. S. 539) Charitable trust — Dharmasala — Suit by Lambardar for the removal of the mahant and cancellation of alienations.

One out of about four Lambardars and two other residents of a village sued for the removal of the 'Bhai' or 'Mahant' of a 'Dharmasala' and for the cancellation of alienations of the endowed property effected by him. Held, that the sanction of the Collector was necessary. 33 B 500; 33 C 789; not foll. 198 PLR 1910: 8 Ind Cas 528 (DB).

——S. 92 — Removal of trustee — Sanction.

A suit asking for the removal of trustee is not one falling under S. 539 C. P. C. 1882 and, therefore, no sanction was necessary. (1910) 8 MLT 357: (1910) MWN 500: 7 Ind Cas 868 (DB)

[S. 92 (1) (a) of the new C. P. C. requires Sanction.]

——Ss. 92 and 93; O. 1, R. 8 — Removal of trustee — Benefit Society.

A suit is not maintainable by the subscribers to a society against the office-bearers and other members for their removal and for an account of their management during their tenure of office without the permission of the Court under S. 30 (C. P. C. 1882) and without the sanction of the Advocate-General under S. 539 (C. P. C. 1882) because the plaintiffs are not beneficiaries of the trust and so cannot bring a representative suit and secondly the consent of the Advocate-General is necessary if the defendants are presumed to be trustees. (1909) 32 Mad 131: 1 Ind Cas 995 (DB).

(n) Trust-property.

——S. 92 — Allotment of property for benefit of poor members of particular community — Suit relating to such property — Such property forming small part of trust property in respect of which suit is brought — Sanction — Court must see prayers in plaint at date of suit to satisfy itself that S. 92, is complied with — No regard to be paid to subsequent amendment or abandonment.

Allotting property for the benefit of poor members of a particular community is a purpose of a public and charitable nature within the meaning of S. 92, and sanction of the Advocate-General is necessary before instituting a suit relating to such property even if such property forms a small part and is divisible from the rest of the trust property in respect of which a suit is brought.

The sanction of the Advocate-General is all the more necessary when the suit is not divisible and it is not possible for the plaintiff to omit the relief which he claims relating to charitable part of the trust and in such a case, the whole suit is governed by S. 92.

It is incumbent upon the Court to see what were the prayers in the plaint at the date the suit was instituted in order to satisfy itself whether S. 92, Civil P. C., has been complied with and for this purpose the Court must pay no regard to what may happen by way of amendment or abandonment at some later stage in the suit. AIR (Vol 26) 1939 Sind 13: ILR (1939) Kar 325: 178 Ind Cas 897.

——**S. 92 — Major portion of property assigned to private trust — Suit for management of whole — Sanction, if necessary.**

In a trust where a major portion of the property is assigned to private trust and a small portion is left to charity, when the suit is for the management of the trust property as a whole and the removal of the trustees, no sanction under S. 92, Civil P. C. is necessary and any beneficiary can file the suit in his name. AIR (V 22) 1935 Sind 235: 160 Ind Cas 694.

22. Scheme.

See Civil P. C. S. 47.

(a) Alteration of, procedure.
(b) Considerations.
(c) Certain provisions, if ultra vires.
(d) Directions from the court.
(e) Execution.
(f) Liberty clause.
(g) Power of Court.

——**Ss. 92, 151 — Temple scheme entrusting Subordinate Judge with appointment of trustees — Judge fixing certain date and appointing certain persons as trustees — Other candidates applying for cancellation of order on ground that they were informed that petition was adjourned.**

A Judge or a Court carrying out the provisions of a scheme decree acts as a Court and not as a 'persona designata'.

Under a temple scheme a Subordinate Judge was entrusted with the duty of appointing trustees to fill vacancies as they arose. Three vacancies arose in the office of the trustee and the Subordinate Judge was moved to fill up the vacancies. The matter was posted for hearing on certain date and on that date the Subordinate Judge passed an order appointing three persons as trustees.

Thereupon other candidates applied for cancellation of the order on the ground that they were informed that the petition had been adjourned and posted to some other day. But they could not tell as to who had informed them that the petition was adjourned:

Held, that the Subordinate Judge was acting as a Court and that he had power to pass the order of appointment but that under the circumstances he had no jurisdiction to review or cancel the order which he passed appointing three persons as trustees.

The other candidates who went away on the date of hearing were not misled or put into any disadvantageous position by reason of any act done by the Subordinate Judge or by anything which would be considered to be the act of the Court.

When the Subordinate Judge appointed these three persons as trustees, he conferred upon them the status of trustees and once they had got that status, they could only be removed by proceedings properly taken in the Court. The inherent powers of the Court could not be extended to cover such a case. AIR (Vol 26) 1939 Mad 969: 1939 MWN 915: (1939) 2 MLJ 475: 50 MLW 460.

——S. 92 — Court putting certain construction on terms of scheme — Construction incorrect — It cannot be regarded as anything more than mere mistake of law which by itself is no ground for interference under S. 115. AIR (Vol 24) 1937 Oudh 193: 1937 OWN (C C) 39: 13 Luck 81: 166 Ind Cas 215.

——**S. 92 — Mutt — Suit for scheme in respect of endowments.**

Where some of the endowments of a 'mutt' are endowments for a specific purpose, a scheme can be framed under S. 92, at least in respect of those endowments. AIR (Vol 22) 1935 Mad 282: 68 MLJ 21: 41 MLW 257: 1935 MWN 172: 58 Mad 771: 157 Ind Cas 589.

——**S. 92 — Intention of founder — Charity in deplorable condition — 'Mutawallis' insolvent — Interest of public for whose benefit trust is created — Order for removal of 'mutawallis' — Order of reference to Commissioner to take accounts and frame scheme.**

Where the trust is for public purposes of a charitable and religious nature, the primary duty of the Civil Court is to consider the interests of the public, or that of the public for whose benefit the trust was created, and when it is found that the charity was in a deplorable condition, that there was no income to carry on the trust that the 'mutawallis' had been ex-communicated by the 'Mulaji', that they were insolvent, that owing to these reasons the number of pupils in the 'madrasa', an institution maintained by the trust, had diminished, and that the number of pilgrims had fallen off, there is ample material before the Court which will justify it in deciding, in the exercise of its discretion that the 'mutawallis' should be removed.

Under such circumstances it is also in the discretion of Court to make an order of reference to a Commissioner for taking accounts, framing a scheme for the administration of the trust, and suggesting the names of fit and proper persons to be trustees. AIR (Vol 21) 1934 PC 53: 11 OWN 204: 66 MLJ 333: 38 CWN 452: 1934 ALJ 258: 36 Bom LR 386: 59 CLJ 133: (1934) MWN 309: 39 MLW 478: 3 AWR 277: 147 Ind Cas 882.

——**S. 92 — Necessity of new scheme on failure of previous scheme.**

Where the directions given by a Court in the previous suit for settling a scheme have entirely failed to secure the due administration of the trusts for want of effective machinery, a new scheme must be framed to make the administration effective. AIR (Vol 21) 1934 Pat 443: 1 BR 205: 153 Ind Cas 557.

——**S. 92 — Trivial deviations, effect of.**

No trivial deviation from formal compliance with the rules under the scheme will do any real injury to any party, and no injury is done if the rules have been substantially complied with. To hold otherwise would be to constitute the Civil Court, the actual manager of the temple, a practice which has often been condemned. AIR (Vol 19) 1932 Mad 658: 36 MLW 669: (1932) MWN 1311: 140 Ind Cas 443.

——S. 92 — Scheme — Operation of — Madras Hindu Religious Endowments Act, S. 75 — Retrospective effect of.

S. 75, Religious Endowments Act, cannot be construed as having a retrospective effect with regard to a scheme settled by a Court under S. 92, C. P. Code, before the enactment of the said Act. 115 Ind Cas 54: AIR (Vol 16) 1929 Mad 322.

——S. 92 — Scheme — Separate schemes — Temple properties and kattalai properties.

Where there are temple properties and kattalai properties, there should be a separate scheme for the kattalai properties. Where the Kattalai properties are devoted to certain special objects, although all the properties may vest in the idol, still the difference is well recognized between the properties belonging to the idol dedicated absolutely to it which form the properties of the temple and the kattalais or subordinate trusts whereby properties were endowed by worshippers for special objects, very often with special trustees to administer the trust. 1927 MWN 405: 108 Ind Cas 649: AIR (Vol 15) 1928 Mad 955 (DB).

——S. 92 — Scheme — Management — Temple built on subscripions — Right of the person building to hereditary management.

If persons invite subscription on a representation that they would devote the subscriptions so collected to a particular purpose and they divert the subscriptions to some other purpose, the subscribers have a right to object to the funds being diverted to other purposes than those for which they were collected.

But so long as the subscribers do not object to the person or persons collecting subscriptions for building or endowing any particular institution, the person or persons so building or endowing it have the right to provide for its management for all time to come.

Where there is nothing in the evidence to show that the persons who gave subscriptions gave them on the understanding that the founders should not have the hereditary right of management, the founders can direct that the management should be hereditary in their families. 98 Ind Cas 208: AIR (Vol 13) 1926 Mad 1150: 51 MLJ 457.

——S. 92 — Right of archaka to sue for salaries.

Where a scheme is framed and under it permission is given to apply to the Court for direction for the proper management of the institution that does not empower the archakas of the temple to apply to the Court for payment of the salaries to which they are entitled under the provisions of the scheme, for there would be no means to execute the order. 95 Ind Cas 5: 1926 MWN 283: AIR (Vol 13) 1926 Mad 655 (DB).

——S. 92 — Private Trust — Scheme suit — Maintainability.

The will of a Hindu testatrix addressed to her grandson directed that out of the income of specific poperty he should perform the worship of the family idols but there was no provision for the worship of the idols after the death of the grandson. The balance of the income was to be divided between the representatives of the three branches of her own family.

In administration proceedings taken on the death of the grandson it was decided that out of the produce of the houses belonging to the estate of the testatrix, the worship of the idols should be performed and that the surplus be paid equally to the three branches of the family. This was adopted in a decree of 1888 to which the branch of the respondents of the family was a party.

Held, (1) there was no gift of the whole property to the idols; (2) the burdens of performing different duties which involved ownership were cast on the grandson appointed by the will; (3) no heritable 'shebaitship' was established;

(4) the representatives of the three beneficiaries under the will were entitled to the residue absolutely and in equal shares; (5) as the gift was a private trust the settlement of a scheme under S. 92, C. P. Code (1882) could not be ordered; and (6) the order in the administration suit was binding on all the parties and operated as 'res judicata'. 67 Ind Cas 561: 20 ALJ 625: 36 CLJ 57: 49 Cal 459: 27 CWN 174: 24 Bom LR 937: 49 IA 100: 16 MLW 963: AIR (Vol 9) 1922 PC 253: 43 MLJ 116.

——S. 92 — Public trust — Grant to specific persons as servants of a mosque for expenses of lamp oil etc., — Scheme.

A grant to certain specified persons, described as servants of the mosque, recited that the revenue of lands granted was to be enjoyed by the grantees according to their own needs, to defray the lamp oil expenses for the mosque and the maintenance.

In the registers maintained by Government the property had been treated with the assent of the heirs of the grantees as an endowment of the mosque. Held, that the grant constituted a public religious trust and a suit for scheme was maintainable. AIR (V 6) 1919 Mad 225 : 10 LW 135 : 51 Ind Cas 42 (DB).

——S. 92 — Scheme — Right of management — Suit for partition whether maintainable.

A suit for the partition of the right of management and superintendence in respect of property of a temple is not maintainable. AIR (Vol 4) 1917 All 123: 39 All 651: 15 ALJ 666: 41 Ind Cas 835 (DB).

——S. 92 — Public trust — Caste institution — Scheme.

Though a caste or a section thereof can own a temple, a temple which is merely managed by certain caste is the subject of a charitable trust and a scheme can be framed for it under S. 92. In framing a scheme the court need not remove trustees already holding office when no misconduct is proved against them. AIR (Vol 4) 1917 Mad 426: 4 LW 228: 34 Ind Cas 551 (DB).

——S. 92 — Scheme — Private right — Infringement of — Preferential claim of descendants of founder overlooked — Claimant not made a party to scheme suit — Right of claimant — Fresh scheme suit.

A suit under S. 92 was instituted by persons claiming to be interested in the due administration of the trust and the defendants in that suit admitted that the trust was a public one.

The plaintiff the sole surviving descendant of the founder of the trust on the death of 'mutwalli' of 'waqf' without appointing a successor applied to be made a party to the scheme suit alleging that 'waqf' was a private trust, but her application was disallowed and the District Court appointed the defendant as 'mutwalli of the 'waqf'.

Held, that in the suit as framed plaintiff could not be appointed 'mutwalli' and the proper remedy of the plaintiff was to bring a scheme suit under S. 92 and to get her preferential claims to mutawalliship recognized. AIR (Vol 3) 1916 Cal 894: 43 Cal 467: 20 CWN 113: 22 CLJ 577: 32 Ind Cas 21 (DB).

——Ss. 92 and 93 — Scheme — Administration of trust.

Where the trustees named by a testator for making and completing the trust have died and the object of the trust as named by him is specific and definite, the Court will administer the trust.

S. 539 does not apply to a suit to eject a trespasser from property under a public religious trust. (1912) 36 Bom 29: 13 Bom LR 989: 12 Ind Cas 577 (DB).

——S. 92 (S. 539, old Code) — Religious endowment — Scheme for management.

In settling a scheme of management under S. 539 of the old C. P. C., due consideration should be given to the established practice of the institution and to the position of the person connected with it. (1906) 8 Bom LR 756 (DB).

(a) Alteration of, procedure.

——S. 92 — Scheme validly framed under S. 92 — Scheme can be varied or set aside only by application to Court which framed it — Separate suit in another Court for that purpose is not maintainable — To determine whether claim is to vary or set aside scheme, substance of claim must be looked at.

No doubt in a proper case it would be possible to vary a scheme validly framed under S. 92 or even to rule it out of existence altogether and to make a new one. But that can be done only under the section under which it originally came into existence and by an application of some kind or other made to the Court that originally sanctioned the scheme and not by a suit filed in another Court.

A scheme framed under S. 92 is binding on everyone (whether a worshipper or not) including even one who might have claimed an hereditary trusteeship and have brought a suit to enforce such a right before the settlement of the scheme.

A decree framing a scheme is a bar to a suit by such a person, even though the denial of such a right of suit might act prejudicially to his interest and even though his application to be made a party to the suit in which the scheme was framed had previously been rejected.

His remedy is to assert his right by taking proper steps in the Court which has seizin of the scheme. He cannot raise in another Court a claim which is inconsistent with and hostile to the scheme. In determining whether the plaintiff is seeking to vary or set aside scheme, substance of the claim must be looked at. AIR (Vol 33) 1946 All 148: 1945 OWN (HC) 272: 1945 ALJ 486.

——S. 92 — Provision to apply for alteration.

Per Devadoss, J.:— A provision made for alteration by an application to the Court by the parties or by persons interested in their working does not give the Court jurisdiction to alter the scheme on an application made to it. When a scheme is settled the suit comes to an end. To say that any person could apply to alter the scheme once framed would necessarily mean that the suit is pending. It cannot be said that the suit is pending for all time from the mere fact that the scheme framed contains a provision that an application can be made for altering the scheme.

It would be ultra vires of any Court to obtain jurisdiction by inserting a clause in the scheme whereby persons interested in the scheme or others are enabled to apply to the Court for the alteration of the scheme. To empower the Court to exercise disciplinary jurisdiction over the trustees and panchayatdars of a religious institution is practically investing the Court with power of management of the institution.

Such a provision cannot empower the Court to interfere in matters of internal arrangement, and parties cannot invest the Court with jurisdiction which it does not possess: for under the Civil Procedure Code it is only suits of civil nature that can be entertained. A clause of this kind if held valid, would empower the Court to interfere in matters purely religious. AIR (Vol 13) 1926 Mad 559: 49 Mad 580: 1926 MWN 226: 95 Ind Cas 720 (DB).

——S. 92 — Majority of worshippers Bengalee Muhammedans — Proper scheme — Amendment in appeal.

Where the worshippers attending a mosque consisted for the most part of Bengalee Mahomedans and a scheme was passed providing that three out of six trustees should be Bengalee Mahomedans.

Held, it was desirable under the circumstances that the Bengalees should have a majority and that the best settlement of the dispute would be attained by an increase in the number of trustees to seven with four reserved for Bengalees.

Also as no objection had been taken to the number of six trustees in the grounds of appeal it was not desirable that such amendment of the scheme should be initiated on the decision of the appeal but it would be open to the appellants to apply to the lower Court for alteration. AIR (Vol 11) 1924 Rang 134: 2 Bur LJ 208: 76 Ind Cas 788 (DB).

——S. 92 — Scheme — Alteration of — Procedure.

Alterations in a scheme of management provided by the consent of all the persons interested in the endowment can be made only by a suit filed under S. 92 of the C. P. C. Where the scheme is the result of an award it cannot be altered by the consent of the parties. AIR (Vol 6) 1919 Mad 731: 8 LW 357 : (1918) MWN 595 : 47 Ind Cas 548 (FB).

——S. 92 — Scheme — Alteration in — Application — Fresh suit — Procedure.

A Court which has sanctioned a scheme for the administration of a charitable trust is competent from time to time to vary the scheme if the exigencies of the case require on an application, without the necessity of a fresh suit. AIR (Vol 5) 1918 Cal 530: 43 Ind Cas 772 (DB).

(b) Considerations.

——S. 92 — Scheme — Framing of — Propriety of clauses.

The true test as to the legal propriety of a clause in a scheme is whether the relief granted by the Court is such a relief that if it was being sought before the scheme was sanctioned, it would have to be sought by suit under S. 92. AIR (Vol 17) 1930 Mad 226: 122 Ind Cas 455: 1929 MWN 744 (DB).

——S. 92 — Scheme — Interest of beneficiaries.

In settling a scheme regulative of the conduct of an institution as the owners of moneys and property which it possesses, no doubt the institutional trust must be respected, but the sect and body of worshippers for whose benefit it was set up have the protection of the Court against their property being the subject of abuse, speculation and waste. AIR (V 16) 1929 PC 27: 114 Ind Cas 10: 1929 MWN 417 : 31 Bom LR 243 : 1929 ALJ 401 : 33 CWN 352 : 29 MLW 130.

——S. 92 — Justifying circumstances.

Where there is nothing to show that the puja has not been performed by the archakas, nor malversation is proved and the record does not show that the archakas set up any title in themselves to deal with the property as their private property.

Held, that there is no ground for a scheme being framed. AIR (Vol 15) 1928 Mad 401: 106 Ind Cas 375 (DB).

——S. 92 — The Court should primarily look to the interests of the institution rather than the right of individuals in framing a scheme. Where the interests of the institution do require that certain trustees should be removed the Court can do so without actually finding that they are guilty of mismanagement provided their remaining as trustees is incompatible with the proper management of the institution, or that the number of

trustees is so large that it will not be possible for any scheme to work with all of them as trustees. In framing a scheme the Court should not lightly exclude the interests of hereditary trustees and others. But where the Court finds that their continuance could not be for the welfare of the institution and is not conducive to the proper working of the scheme it should not hesitate to remove them. But where they can be retained without any detriment to the institution the Court may do so. AIR (Vol 13) 1926 Mad 1150: 98 Ind Cas 208: 51 MLJ 457.

——S. 92 — Scheme — Points to be ascertained.

A scheme which does not ascertain the income of the properties of the trust the expenses and the remuneration of the person in charge thereof is an unsatisfactory scheme. AIR (Vol 5) 1918 Mad 1006: 6 LW 134: 42 Ind Cas 474 (DB).

——S. 92 — Scheme — Grounds for — When can be claimed.

The relief by way of settlement of a scheme need not depend upon charges against the trustees in office; it is sufficient if mis-management is averred and that a large surplus is left after meeting the expenditure to seek the aid of the Court to frame a proper scheme to render the recurrence of the state of affairs impracticable. AIR (Vol 3) 1916 Mad 318: 28 MLJ 174: 2 LW 148: (1915) MWN 185: 27 Ind Cas 874 (DB).

(c) Certain provisions, if ultra vires.

——S. 92 — Provision that on death of one of the trustees Court shall appoint another is not 'ultra vires'.

Provision in the scheme giving the Court authority to appoint a successor in place of a deceased trustee, is not a provision which can be regarded as constituting a modification of the original scheme and is not, therefore, 'ultra vires', AIR (Vol 24) 1937 Oudh 193: 1937 OWN (C C) 39: 13 Luck 81: 166 Ind Cas 215.

——S. 92 — Power to modify.

The provisions reserving a power to the Court preparing a scheme under S. 92, to modify it, is not 'ultra vires'. AIR (Vol 23) 1936 All 97: 1936 ALJ 398: 1935 AWR (HC) 1338: 58 All 538: 160 Ind Cas 1091.

——S. 92 — Clause investing Court with general powers and duties of superintendence over institution — Whether 'ultra vires' — Remedy by application where law requires suit — Whether can be provided by framers of scheme.

Where the effect of a clause in a scheme settled by the Court would be to invest the Court with wide general powers and duties of superintendence over the institution in question, the clause is clearly 'ultra vires'. It is not competent to the framers of a scheme to provide that where the ordinary law requires that a suit shall be brought an application may be substituted for it.

In many instances, especially where the allegations amount to charges of breach of trust, such an application would run counter to the terms of S. 92 and would evade the safeguards imposed by that section.

Even where the subject-matter of the petition would not fall within the terms of S. 92, no scheme can give to the Court a special jurisdiction any more than private persons, by contracting together, can give the Court power to deal in a particular way with any matter which arises between them. AIR (Vol 22) 1935 Mad 474: (1935) MWN 387 : 41 MLW 597 : 157 Ind Cas 586.

——S. 92 — Provision that election of new trustee shall be subject to confirmation by Court.

A provision in a scheme settled under S. 92, that after new trustees are elected their appointment shall be subject to the confirmation by the Court, does not provide for any alteration or modification of the scheme and is not, therefore, 'ultra vires'. AIR (Vol 19) 1932 Mad 41: 60 MLJ 173: 33 MLW 149: 54 Mad 345: (1931) MWN 586: 134 Ind Cas 60.

——S. 92 — Scheme — Ultra Vires — Scope of suit.

A scheme which goes beyond what was decided in the scheme suit, and decides matters which come within the purview of S. 92 is so far 'ultra vires'. AIR (Vol 17) 1930 Mad 226: 122 Ind Cas 455: 1929 MWN 745 (DB).

——S. 92 — Provision to apply for modification of.

Where a scheme is settled, direction for applying to Court for modification of terms thereof is 'ultra vires'. AIR (Vol 15) 1928 Mad 268: 108 Ind Cas 199 (DB).

——S. 92 — Scheme 'ultra vires', etc.

A scheme providing for continued supervision of the scheme property is objectionable both in principle and in practice. Court should not assume to themselves the continued supervision of institutions for the management of which they are called upon to frame schemes.

Thus a scheme providing for vacancies of trusteeship to be filled up by the Court or appointment of an Auditor by the Court annually and for the Court sanctioning mortgages or leases of temple properties and generally providing for applications to the Court regarding any matter arising out of the scheme or modifications thereof is contrary to principle and objectionable in practice. AIR (Vol 12) 1925 Mad 411: 85 Ind Cas 188: 20 MLW 687: 47 MLJ 714 (DB).

(d) Directions from the Court.

——S. 92 (1) (e) and (g) — The essence of cl. (e) as also of cl. (g) of S. 92 is directions from the Court concerning the management of the trust. A direction that in the administration of the trust the trustee should do a certain thing or abstain from doing a certain thing is not alien to a scheme of management. AIR (Vol 29) 1942 Cal 343: ILR (1942) 2 Cal 211: 46 CWN 59: 201 Ind Cas 248.

——S. 92 — Scheme framed by decree — Provision regarding election of trustee and his qualifications for election, made — Scheme empowering trustee, worshippers or voters of temple to apply to Court for such further directions as may be necessary for carrying out scheme — Worshippers and voters held entitled to apply to Court for determination whether person nominated for election as trustee was eligible — Court had power to determine that question and give direction accordingly — Relief need not be provided for in decree or asked for in separate suit.

A decree framed a scheme for the management of a temple and provided for the election of trustee whenever vacancy occurred. A clause in the scheme stated the qualifications of trustee for being eligible to election and provided that nominations should be delivered to the remaining trustee on certain date. Another clause in the scheme empowered any trustee, worshippers or registered voters of the temple to apply to the High Court for such further directions as might be necessary for carrying out the scheme.

On the vacancy of a temple trustee, nomination for the office of trusteeship of certain person was received by the remaining trustee. Thereupon worshippers and voters of the temple applied to the Court for determination whether the person nominated was eligible for election:

Held, that the applicants were entitled to apply to the Court for determination whether the person nominated for trusteeship was eligible for it.

The Court had power to determine the question and direct the trustee to reject the nomination paper. Such direction was necessary for the carrying out of the scheme.

Held further, that it was unnecessary to ask for the relief prayed for in the plaint and it need not be specifically provided in the decree. The relief asked for was with reference to a provision made for the management of the trust and it was inconceivable that every direction for carrying out particular provision of the trust should be asked for in the suit or provided in the decree. There was no necessity to wait until an election took place and file a suit to declare the election void. AIR (Vol 26) 1939 Mad 605: (1939) MWN 1009.

——S. 92 — Rules framed in accordance with scheme for filling vacancies on committee.

Where one of the directions of the Court in regard to the scheme for a temple was that till the trustees decided what number of themselves should form a quorum, any act performed by not less than ten of them should be act of all of them and rules were framed in accordance with the decision of the Court for filling vacancies on the committee:

Held, that the direction was intended to provide for the working of the scheme, even though certain members appointed refused to act or became, for any reason, incapable of acting and that the Court did not intend to say that 10 members should form a quorum until rules had been made, as they scrupulously avoided using the word quorum here though they used it elsewhere.

It was impossible for the committee to fill the vacancies until they had decided on what principle the vacancies should be filled. If a member of the committee died before these rules had been made, then either 10 or more members could act for the committee and make rules, or the committee could not act at all and an application to the Court to appoint a member to fill the vacancy was necessary and that the second alternative should not be accepted unless it was clear that the Court did not intend to provide for such a contingency. Consequently 10 members of the committee were capable of making rules and that these rules were valid. (1936) 161 Ind Cas 43: 18 NLJ 110.

——S. 92 — Scheme — Directions for the performance of a festival.

When a decree directs a trustee of a Hindu temple to perform a festival, a Court has no jurisdiction to give certain directions for the same. AIR (Vol 3) 1916 Mad 549: 2 LW 607: 30 Ind Cas 771 (DB).

(e) Execution.

——S. 92 — Scheme decree under S. 92 — Provision in, if executable — Test — Direction in scheme decree in regard to realisation of trust properties including certain amount as belonging to trust.

The provisions of a decree in a scheme suit would be inexecutable if they formed a part and parcel of the permanent scheme of administration and were not "intended to be given effect to independent of the constitution framed by and embodied in the decree" even if they happened to be directory in their nature.

They would be executable even if they happened "to stray into the wording of the scheme if they were intended to be immediately executable for the purpose of introducing the scheme or otherwise". The true distinction is, not whether a provision in a scheme decree is directory or declaratory but whether the provision sought to be executed, is or is not in what is really the scheme part of the decree.

A decree for money directs payment of money by the defendants to the plaintiff and, therefore, in considering the question whether the provision in a scheme decree amounts to a money decree, the distinction whether the direction in the decree, was being given against a trustee or against a stranger to the trust, who had to be impleaded because his presence was necessary for a final adjudication of the question, relating to the existence of the trust or to the nature of the property should not be lost sight of.

In a suit under S. 92, Civil P. C., for the removal of the trustee and for the settlement of a scheme, the trustee died pending the suit and his legal representatives were brought on the record. The Court appointed a new trustee and framed a scheme. The decree mentioned a certain amount as belonging to the trust and directed the trustee to realise the trust property. The relevant clause in the decree was "that the trustee do realise the trust properties and administer the same as per the scheme hereto appended".

The material clause in the scheme ran as follows: "All the trust properties either cash or movable shall vest in the trustee for the time being and he shall take possession of the same through Court if necessary in execution of this decree and manage the same on behalf of the public":

Held, that the decree was not a decree for payment of money as there was nothing in the decree which empowered the decree-holder to realize the money from the deceased trustee's legal representatives.

Nor could the decree be said to be executable as the direction in the decree in regard to the realisation of the trust properties formed part of the actual scheme of management and could not be said to have erroneously strayed into the scheme as the realisation of the trust properties on which the whole scheme depended was an essential part of the same. AIR (Vol 29) 1942 Mad 748: 55 MLW 627: (1943) 1 MLJ 504: 206 Ind Cas 466.

——S. 92 — Decree settling scheme — Court, if can be called upon in execution to make scheme work.

When once a decree settling a scheme has been passed in a suit for scheme under S. 92, the Court has done its duty and is not to be called upon in the execution department to make the scheme work. AIR (Vol 25) 1938 Mad 256: 46 MLW 701: (1937) 2 MLJ 887: (1937) MWN 1159: 174 Ind Cas 934.

——S. 92 — Execution of.

Where a decree in a scheme suit allowed arrears of pay to 'archakas' from the date of suit to the date of judgment and also provided that they were entitled to a certain salary:

Held, that the provision regarding past arrears was not a part of the scheme and so they could be recovered by way of execution, but the salary which accrued due after the date of the decree was part of the scheme for management and could not be recovered by way of execution. AIR (Vol 24) 1937 Mad 326: 45 MLW 230: (1937) MWN 611: 168 Ind Cas 715.

——S. 92 — Provision in scheme decree, if executable.

A provision in a scheme decree is not executable. AIR (Vol 23) 1936 Mad 581: (1936) MWN 673: 44 MLW 93: 71 MLJ 87: 59 Mad 751: 165 Ind Cas 820.

——S. 92 — Execution of.

The clauses in a decree in the portion not embodying the scheme, which are otherwise capable of being executed, do not cease to be executable

merely because the decree also embodies a scheme of management. But any provision embodied in the part of the decree containing the scheme is 'prima facie' inexecutable although in form it is directory. (1933) 1933 MWN 183.

——S. 92 — Enforcement of clauses — Execution — Suit.

There is no reason why there may not be some clause in the scheme which amounts to a direction to the defendant to perform some duty, such as the payment of money either at a point of time or periodically, and why such a direction should not be executable. Whether it is executable or not depends on the intention of the decree.

While generally a scheme decree may be declaratory, specific parts thereof may contemplate execution. It is necessary to expressly provide for the enforcement of such a clause by execution, though where there is an express provision to that effect it makes matters clear, and such a provision except as to the removal of a trustee is not 'ultra vires'.

In the case of the removal of a trustee it may be that the only remedy is by a suit under S. 92. The presentation of a proper budget and payment of the moneys to the treasurer by kattalaidars, as directed by a scheme settled are matters intended to be enforced in execution. AIR 1924 Mad 369, Diss. from; Spencer, J., in AIR 1926 Mad 130, Diss. from.

Even assuming that there is some doubt as to the intention of the scheme and that a suit is the proper remedy, it is clear that the suit is not a suit under S. 92 and does not require any sanction. Therefore, an application to enforce such duties from the kattalaidars can be treated as a suit under S. 47(2) and thus the decision of the lower Court thereon is appealable. AIR (Vol 15) 1928 Mad 61: 39 MLT 579: 27 MLW 32: 107 Ind Cas 136 (DB).

——S. 92 — Further remedy.

When the relief asked for and granted was the scheme alone, there is no reason for holding that the further remedy provided in the scheme need or can be asked for execution of the decree or that the order granting or refusing it is appealable as one passed under S. 47.

When a suit is instituted in the words of S. 92, C. P. Code, to obtain a decree settling a scheme the relief must so far as the suit is concerned, be regarded to have been finally given and there remains nothing to obtain by way of execution. AIR (Vol 11) 1924 Mad 369: 47 Mad 139: 75 Ind Cas 189: 18 MLW 237: 1923 MWN 664 (DB).

(f) Liberty clause.

——S. 92 — Alteration — Decree — Clause reserving liberty to modify scheme, validity — Directions for carrying out scheme — Validity.

If, in a decree for a scheme framed under S. 92, liberty is given to persons to apply to the Court for directions merely to carry out the scheme already settled, such reservations of liberty in the decree will be 'intra vires' if the assistance of the Court can be given without offending S. 92; but where liberty is given to apply to the Court for alteration or modification of the scheme, such reservation is 'ultra vires' as offending S. 92.

The true test as to the legal propriety of such a clause in a scheme is whether the relief granted by that Court was such a relief that if it was being sought before the scheme was sanctioned, it would have to be sought by suit under S. 92. AIR (Vol 32) 1945 Sind 177: ILR (1945) Kar 224.

——S. 92 — Alteration of.

An application in pursuance of a liberty clause in a scheme, which seeks to alter or modify the scheme itself, offends against S. 92, Civil P. C. AIR (Vol 31) 1944 Mad 421: 1944 MWN 269: 57 MLW 290: (1944) 1 MLJ 377.

——S. 92 — Scheme framed by Court — Clause giving liberty to apply for alterations.

It is desirable and necessary that a scheme for the administration of a charitable trust should contain a clause giving liberty to any person interested in the trust to apply for modification or alteration of the scheme. Such a clause is not 'ultra vires'. AIR (Vol 18) 1931 Bom 391: 33 Bom LR 520: 55 Bom 414: 133 Ind Cas 740.

——S. 92 — Clause giving liberty to apply.

Where a scheme is once settled, it precludes a suit to establish a private right to manage the property which if established would interfere with the scheme settled by the Court. The proper remedy in such cases would be by an application under the liberty so reserved.

For an application under such a clause the consent of the Advocate-General is not necessary. It is necessary only when the scheme has to be drawn for the first time. AIR (Vol 18) 1931 Bom 391: 33 Bom LR 520: 55 Bom 414: 133 Ind Cas 740.

——S. 92 — When liberty to apply is confined by a rule under the scheme decree to particular persons, no others have 'locus standi' to apply and to permit others to apply is in effect to modify the scheme which is not permissible in law except by suit under S. 92. AIR (Vol 17) 1930 Mad 226: 1929 MWN 745: 122 Ind Cas 455 (DB).

——S. 92 — Application for directions — Scope of.

Under the liberty clause in a scheme framed by a Court, an application for direction is maintainable only with regard to those questions which were left open by the Court for future determination and decision. Every other question can be raised by means of a suit under S. 92 only.

An application was put in by a trustee under the liberty clause in a scheme, framed by Court for directions as to whether after the passing of the Act II of 1927 the North Arcot District Committee formed under Act XX of 1863 had jurisdiction under the scheme to appoint a person as trustee of the temple.

Held, that the application would not lie because the question raised cannot be said to be one deliberately left open by the Court for future determination and decision. AIR (Vol 16) 1929 Mad 625: 119 Ind Cas 469 (DB).

(g) Power of the Court.

(i) To alter or modify.

(ii) To direct cypres.

——S. 92 — Trust of public nature — Court must consider interests of public — New scheme framed by trial Court — Scheme approved by Chief Court but inconsistency in Chief Court judgment — Held, in spite of inconsistency, Privy Council will not disturb safeguards in scheme.

In cases of trusts coming under S. 92, the Court has a duty, once if finds that it is a trust for public purposes, to consider what is best in the interests of the public.

The trial Court framed a new scheme which was designed to prevent recurrence of the extravagance and mismanagement which had taken place during the period that a compromise was ruling the matter. The scheme was approved by the Chief Court on appeal.

But a passage in the judgment of that Court suggested in one sentence that it would be just and fair to tie down the parties to the terms of the compromise for the benefit of the trust :

Held, that even if there were an inconsistency in that judgment, their Lordships would be very slow to disturb the safeguards which were provided in that scheme, if their Lordships found it necessary to reconsider the scheme. AIR (Vol 33) 1946 PC 34.

——**S. 92 — Prayers outside the scope of the Sanction.**

In a scheme suit if any prayers are outside the scope of the sanction given under S. 92, no relief can be granted with reference to them. 30 MLW 954: 1929 MWN 911: 53 Mad 223: AIR (Vol 17) 1930 Mad 129: 58 MLJ 39 (DB).

——S. 92 — Where an institution is governed by scheme, the power of Court to deal with matters arising under it being dependent upon the scheme itself, it has no jurisdiction to interfere except by some method provided by scheme itself even where trustee omits to comply with terms of scheme. 120 Ind Cas 874: 1929 MWN 300: AIR (Vol 16) 1929 Mad 526.

——S. 92 — To empower the Court to exercise disciplinary jurisdiction over the trustees and punchayatdars of a religious institution is practically investing the Court with power of management of the institution. Such a provision cannot empower the Court to interfere in matters of internal arrangement, and parties cannot invest the Court with jurisdiction which it does not possess; for under the Civil Procedure Code it is only suits of civil nature that can be entertained. A clause of this kind if held valid, would empower the Court to interfere in matters purely religious. 49 Mad 580: 1926 MWN 226: 95 Ind Cas 720: AIR (Vol 13) 1926 Mad 559 (DB).

——**S. 92 — Directions in wakfnamah — Departure.**

It must not be understood that the Court has no power to depart from the arrangement contemplated in the Wakfnamah. The institution of a suit under S. 92 attracts the jurisdiction of the Court, and the Court has complete power to make such appointment as it considers proper though the appointment may involve a departure from the arrangement contemplated in the constitution of the trust.

There is no legal restriction in the power of the Court; but although there is no legal restriction, the Court ought not to depart from the arrangement contemplated by the settlor except for a very strong reason. Where the deed of trust vested the power of appointment in the respectable Shiahs of Muzaffarpur and, they by a majority of votes elected one A as the mutawalli of the endowment :

Held the Court should have been more careful in enquiring whether it was necessary that the election of A be set aside, merely on the unwarranted suggestion of the other party, that A had procured his election by offering bribes to the electors. It cannot be said that because the trust-deed, does not contemplate a scheme, a scheme should not be framed by the Court. 4 PLT 326: 71 Ind Cas 280: AIR (Vol 10) 1923 Pat 420 (DB).

——**S. 92 — Power of Court — Enquiry as to trust property.**

Under S. 92 C.P. Code, when the Court is asked to frame a scheme, one of the essential enquiries to be made is what are the properties belonging to the charity. For this purpose the Court is entitled to go into questions not arising directly in the suit. 68 Ind Cas 631 : AIR (Vol 8) 1921 Mad 563 : 41 MLJ 20 (DB).

——S. 92 — **Scheme — When framed.**

Even apart from any question of mismanagement and misappropriation, a Court can settle a scheme if it can conduce to the better management of the trust property. 5 OLJ 97 : 45 Ind Cas 213 : AIR (Vol 5) 1918 Oudh 207 (DB).

——**S. 92 — Scheme — Management of the trust — Discretion of Court.**

In a suit under S. 92, C.P.C. the Court has complete discretion in arranging for the management of the trust although it must take into consideration such matters as the wishes of the founder, the past history of and the custom of the institution and the way in which the management was carried on before. 40 Ind Cas 177: AIR (Vol 4) 1917 All 331 (DB).

——**S. 92 — Scheme — Court's powers.**

Per Seshagiri Iyer J: Court's jurisdiction to frame a scheme under S. 92, C. P. C., is not excluded by the fact that the temple for which the scheme is to be framed is one subject to a Temple Committee but in framing the scheme the Court should not unduly interfere with the power entrusted by the statute to the Committee. e.g., by appointing a Board of Control between the trustees and the Temple Committee. 39 Mad 700: 30 MLJ 29: 19 MLT 25: 3 LW 43: 32 Ind Cas 211: AIR (Vol 4) 1917 Mad 551 (DB).

——**S. 92 — Scheme — Object of — Mahomedan mosque — Management — Scheme — Guiding principles — Intention of founder — Usage — Power of Court — C. P. C. (1882) S. 539.**

The object of the enquiry in a suit under S. 539 of the C. P. C. (1882) (S. 92, C. P. C.) is not to determine the conflicting rights of private individuals but to devise the best method for fully and effectually carrying out the purposes for which the trust was created.

In settling a scheme of management for a Mahomedan mosque, the court has a wide discretion; the wishes of the founder regarding the management if conformable to the changed conditions and circumstances of the present day as well as the past history of the institution, might be taken into consideration.

But the primary duty of the Court is to consider the general interests of the body of the public for whose benefit the trust is created and the Court might vary any rule of management which it finds to be impracticable or unsuited to the best interests of the institution.

In view of the mischief of leaving the power of appointing or electing new trustees in the hands of an indeterminate and necessarily fluctuating body of people, such as the inhabitants of a locality, the Judicial Committee directed the appointment of future trustees to be made by a Committee formed out of the worshippers on a representative basis. 43 Cal 1085 : 14 ALJ 741 : (1916) 1 MWN 460: 20 CWN 1118: 20 MLT 110: 18 Bom LR 611: 31 MLJ 290: 24 CLJ 198: 43 IA 127: 4 LW 269: 9 Bur LT 141: 8 LBR 517: 35 Ind Cas 30: AIR (Vol 3) 1916 PC 132.

(On appeal from 5 Bur LT 221: 18 Ind Cas 105.)

——**S. 92 — Scheme — Hereditary trustee — Appointment of treasurer — Necessity for.**

To deprive a hereditary trustee of the possession of the funds is a strong step for the Courts to take. If, however, a Court is satisfied that it is necessary in the interest of the institution to deprive him even of this power and to appoint a treasurer who should, in supersession of the Dharmakartha handle the monies allocated for the expenses, the scheme may be modified in that respect.

Where an application to modify a scheme settled for the administration of a public trust, is based

not on the ground that the scheme is really defective but is made for the purpose of giving the worshippers a larger share in the management of the trust, and where the scheme itself is proper, though badly worked, the Court will refuse to modify the scheme.

Allegations of malversation on the part of the trustees afford no ground for a modification of the scheme though they may sustain a suit for their removal from office. AIR (Vol 3) 1916 Mad 530: 28 Ind Cas 479 (DB).

——S. 92 — Scheme — Discretion — Exercise of — Costs.

The High Court has a large discretion in the matter of sanctioning a scheme for the management of a temple and of its funds. Unless it can be shown that that discretion has been improperly exercised or that the High Court had failed to give due consideration to matters which they should have taken into consideration its decision ought not to be interfered with. Costs of all the parties were ordered to come out of the temple funds, the trustee paying them in the first instance and then recouping himself from the funds. (1912) 12 MLT 448: (1912) MWN 1106: 16 CLJ 640: 15 Bom LR 13: 24 MLJ 199: 17 Ind Cas 441 (PC).

(i) To alter or modify.

——S. 92 — Scheme decree — Modification of scheme — Application for — Maintainability — Inherent power to alter or modify — C. P. Code, S. 152 — O. 20, R. 3 — If bars application for modification.

Although a scheme framed by the High Court under S. 92, C. P. Code, contains no provision or clause giving liberty to apply for a modification of the scheme, the High Court has inherent jurisdiction to modify the scheme under S. 151, C. P. Code, in proper cases on an application made to it in that behalf, if circumstances have arisen which make it desirable for it to be altered, if it does not work beneficially, and for the purpose of doing justice and preventing an abuse of the process of the Court. O. 20, R. 3, C. P. Code, cannot be held to be a bar to such an application for modification. AIR (Vol 35) 1948 Bom 146: ILR (1947) Bom 466: 49 Bom LR 757 (DB).

——Suit under S. 92 — Scheme framed — Court can provide for modification by application in every suit itself.

It is not beyond the power of the Court which frames the scheme to provide for the modification of the scheme by an application in the very suit itself in which the scheme is framed. AIR (Vol 28) 1941 Cal 618: 73 CLJ 532: 199 Ind Cas 841.

——S. 92 — Amendment.

The Court has jurisdiction to entertain an application under S. 151 for amendment of the scheme prepared in a suit under S. 92 and the scheme, particularly one relating to a Muslim wakf, can be modified.

Held, on facts that the relief sought in application for amendment did not fall within any of the clauses (a) to (h) of sub-s. (1) of S. 92. The amendments sought were both necessary and advisable. AIR (Vol 27) 1940 Oudh 421: 1940 OWN (CC) 639: 1940 AWR (CC) 298: 15 Luck 730: 189 Ind Cas 696.

——S. 92 — Amendment.

Where the scheme passed under S. 92, makes a quorum of three out of seven trustees necessary for the transaction of any business and no particular quorum for an adjourned meeting is provided for but there is, however, a provision that in case a trustee ceases to attend meetings of the board of trustees for a period of two years he renders himself liable to be removed by the other trustees, this provision being sufficiently deterrent against habitual absence of trustees from meetings, any amendment requiring the presence of particular number of members at all adjourned meetings is likely to work very unsatisfactorily on certain occasions and will in any case be conducive to delay. AIR (Vol 23) 1936 All 97: (1936) ALJ 398: 1935 AWR (HC) 1338: 58 All 538: 160 Ind Cas 1091.

——S. 92 — Amendment — Inherent powers.

The inherent power of the Court to modify a scheme prepared by itself should be exercised where it is necessary to prevent the abuse of the process of the Court or where the ends of justice plainly demand it. AIR (Vol 23) 1936 All 97: (1936) ALJ 398: 1935 AWR (HC) 1338: 58 All 538: 160 Ind Cas 1091.

——Ss. 92 and 47 — Scheme — Power to alter or modify — Court filling up vacancies in office of trustees is not modification of scheme — Separate suit not necessary.

A scheme made in a suit under S. 92 provided: "Each of the two trustees to be appointed by the Court should hold office for a term of five years but shall be eligible for reappointment; and any vacancy in the office of either of the said trustees shall be filled up by the Court." The Court filled up the vacancies on an application made to that effect.

Held, that the provision that the vacancies should be filled by the Court, did not amount to any alteration or modification of the scheme and the Court had therefore jurisdiction to entertain the application for filling up the vacancies. No separate suit under S. 92 was necessary for the purpose.

Held, further, that such matters could not be taken to be matters arising under S. 47 and so no appeal would lie. AIR 1928 Mad 61 not Appr. AIR (Vol 17) 1930 Mad 918: 128 Ind Cas 515 (DB).

——S. 92 — Scheme — Power to alter or modify — Alteration of Scheme.

Where a scheme has been framed, any modification or alteration of the scheme is in effect a new scheme and power to frame a new scheme is given only subject to the condition laid down in S. 92. For the management of the affairs of a "pagoda" trustees were appointed for life under a scheme which the trustees had no power to vary. On the application of the trustees the lower Court changed the tenure to three years and appointed by election new trustees.

Held that the appointment of new trustees was illegal under S. 92 which lays down that in order to vary the terms of an express trust, the proper course is for the Advocate-general or two or more persons with his permission to institute a suit to obtain such variation. AIR (Vol 16) 1929 Rang 20: 6 Rang 594: 114 Ind Cas 293 (DB).

——S. 92 — The High Court has the power to alter or modify a scheme of management of an institution itself and so rules framed under such scheme are as liable to alteration or modification by High Court as any other provisions of the

scheme itself. AIR (V 13) 1926 Bom 179 : 28 Bom LR 309 : 94 Ind Cas 47 (DB).

——S. 92 — There is ample authority for the proposition that a Court which has sanctioned a scheme for the administration of a charitable trust is competent from time to time to vary the scheme as exigencies of the case may require. But it is not competent to the High Court to vary the rules for succession of Sardar Panda or High priest which were determined in the original suit according to ancient usage. A variation in this respect cannot be taken to be a "modification of the scheme that may appear to be necessary or convenient." AIR (V 11) 1924 Cal 330 : 76 Ind Cas 220 : 37 CLJ 281 (DB).

——Ss. 92 and 93 — Scheme — Construction — Doubtful provisions — Modification in execution proceedings.

Doubtful provisions of a scheme framed by the Court must be construed reasonably but debatable points must not be worked out. Neither can the scheme be modified in execution proceedings. A separate suit will lie to modify the scheme or to clear doubtful points. Election proceedings in pursuance of a scheme of the Court should be short, summary and inexpensive. AIR (V 1) 1914 Low Bur 226 : 7 Bur LT 298 : 24 Ind Cas 915 (DB).

——S. 92 — Scheme — Modification of — Powers of Court.

In a scheme for the administration of a public charity framed by the Dt. Court and confirmed by the High Court, an application for modification of the scheme can be entertained only by the High Court but the Dt. Court can give necessary directions to carry out the modified scheme.

Where the income of a public endowment is of an uncertain and variable character, audits should be fairly frequent and searching. No one, having any pecuniary interest in the endowment or is a creditor of the endowment should be on the Committee of management of the endowment. (1913) 17 CWN 841 : 16 CLJ 431 : 17 Ind Cas 969 (DB).

——S. 92 — Scheme — Effect of — Private rights lost — Alteration of scheme.

Only on substantial grounds can a Court alter a scheme once settled by Court in respect of a public trust; therefore, a scheme framed by a court under S. 92 bars a subsequent suit by a trustee not a party to the scheme suit, to establish his private rights to trust, which if established, would interfere with a charitable scheme made by Court.

The erroneous order of court refusing to add him a party to the previous scheme suit cannot give the private individual a right to sue which he otherwise would not have had. He must institute a fresh scheme suit under S. 92, C. P. C. (1913) 36 Mad 364 : 21 MLJ 952 : 10 MLT 356 : (1911) 2 MWN 387 : 12 Ind Cas 449 (DB).

(ii) To direct Cypres.

——S. 92 — Scheme — Cypres application — Power of Court to direct.

It is competent to the Court in framing a scheme for a Hindu religious or charitable endowment to sanction a 'cypres' application of the funds of the endowment if the objects of the trust are not suited to modern conditions and if there is a general charitable intention in the terms of the endowment. The trustee himself cannot apply the income 'cypres' without the sanction of the Court. AIR (V 6) 1919 Mad 659 : 37 MLJ 489 : 47 Ind Cas 611 (DB).

——S. 92 — Application to charity provided by a Parsi doctor.

Where, under altered circumstances through lapse of time or through other causes, it appears to the court that the charity provided by the donor could not be carried out literally in terms of his directions with any benefit whatever to the objects of his benefactions, the court ought not to hesitate to give its sanction to a scheme which will carry out the charitable intentions of the donor to be gathered from the instrument establishing the charity, as nearly as possible to the original intentions of such donor. (1907) 9 Bom LR 1203 : 32 B 214 (231, 232).

——S. 92 (S. 539, old Code) — Scheme — Alteration of scheme — Trusteeship vested in head of a mutt — Controlling authority — Additional trustee, jurisdiction of Court to appoint — Cypres.

Where a prior arrangement made for the administration of a public religious institution has not effected the desired object (viz., the better administration of the trust) and where successive trustees have been proved to have been incompetent in the discharge of the duties of their office and to have misappropriated the surplus trust funds there is a proper case for the Court to sanction a scheme.

It is competent for the Court to appoint new or additional trustees in the case of a temple when the office of trustee vests in that of the head of a mutt for the time being. It is also competent for the Court to appoint a controlling authority over such trustee.

The expression "appointment of new trustees under the trust' in S. 539, C. P. C., does not mean in conformity only with the original constitution of the trust or with the rule in force in respect to it at the time of the suit. The High Court and the District Court in this country to which the jurisdiction is confined under S. 539, C. P. C., possess practically the same unlimited jurisdiction as the Courts of Chancery in matters relating to the administration of public charities.

Where the Government, in withdrawing their control and management of religious institutions, made provision for the due administration of the same, such provision was analogous to a scheme and could be altered on good cause being shown by any authority legally competent so to alter or modify it.

Where the original rulers of the country were directly in management of a religious institution, and the East India Company, and afterwards the Board of Revenue were managing the same, and the Government while ceasing their connection handed over the management to a Mahant, the latter is not a trustee deriving his power of management under the original constitution as framed by the founder. A scheme for the due administration of the Tirupati Temple framed and the surplus funds applied 'cypres'. (1905) 15 MLJ 133 : 28 M 319 (DB).

But see decision of the Privy Council, modifying the scheme in Tirupati Temple. (1907) 11 CWN 442 : 9 Bom LR 588 : 30 M 138 : 17 MLJ 236 : 34 IA 78 (85) (PC).

24. Stranger.

——S. 92 — Scheme settled under S. 92 — Suit by stranger asserting title paramount to trust — Maintainability of.

Even when a scheme has been settled by the Court under S. 92 a stranger may institute a suit for the purpose of asserting a title which is paramount to the trust altogether and in that sense he may claim to have the whole scheme displaced upon the ground that there never ought to have been a scheme at all because the property was never the subject of a trust for charitable or religious purposes. AIR (Vol 33) 1946 All 148: 1945 OWN (HC) 272: 1945 ALJ 486.

——S. 92 — Trespasser.

Where an ordinary suit for ejectment is filed by a plaintiff who calls himself a trustee, against a defendant who is alleged to be a trespasser, the plaintiff can ignore S. 92, and can sue for possession of 'wakf' property and of the office of 'Mutawalli' and 'amin' of the 'wakf' by dispossession of the defendant. AIR (Vol 28) 1941 All 1: 1940 ALJ 705: ILR (1940) All 315: 1940 AWR HC 607: 193 Ind Cas 697.

——S. 92 (2) (h), whether makes S. 92 applicable to strangers.

Section 92 (2) (h), does not so widen the provisions of S. 92 as to make the section not otherwise applicable to suits against strangers applicable to such suits. AIR (Vol 24) 1937 Sind 230: 31 SLR 510: 171 Ind Cas 344.

——S. 92 — Relief against third party.

In a suit under S. 92, no relief can be granted as against third parties. AIR (Vol 23) 1936 Mad 449: 43 MLW 409: (1936) MWN 245 (2): (1937) 2 MLJ 437: 164 Ind Cas 615.

——S. 92 — Declaration that property in hands of strangers belongs to trust, if can be had.

A declaration, that the property in the hands of strangers belongs to the trust, cannot be had in a suit under S. 92. AIR (Vol 23) 1936 Mad 449: 43 MLW 409: (1936) MWN 245 (2): (1937) 2 MLJ 437: 164 Ind Cas 615.

——S. 92 — Stranger receiving property from trustee knowing that property is trust — Relief against him.

A stranger to a trust is neither a necessary nor a proper party to a suit under S. 92, but where he receives money or property from the trustee which he knows to be part of the trust estate, and paid or handed to him in breach of the trust, he is a constructive trustee of it for the persons equitably entitled and consequently relief against him can be claimed in a suit under S. 92. AIR (Vol 22) 1935 Cal 805: 39 CWN 1103: 63 Cal 74: 159 Ind Cas 893.

——S. 92 — Claim for declaration of title or possession against stranger to trust — 'Vesting any property in a trustee', meaning of.

Section 92, was enacted to provide means for obtaining the directions of the Court in connection with matters relating to the administration of a trust, and for exposing malpractices of defaulting or fraudulent trustees and issues relating to the rights of third parties are outside the scope of a suit brought under this section of the Code.

The plaintiffs in a suit framed under S. 92 are not entitled to claim against strangers to the trust either a declaration of title or possession or any other relief, and a suit under S. 92 in which a claim for relief against strangers to the trust is added to a claim for relief which the Court is competent to decree in such a suit, entails a clear misjoinder both of parties and of causes of action, and unless the plaint is amended, the suit cannot be sustained.

Not only can no relief be granted against strangers to the trust in a suit under S. 92, but such persons are not necessary or proper parties to a suit framed under S. 92.

The words 'vesting any property in a trustee' in S. 92, cl (c), refer to cases where a new trustee is appointed, and are not intended to cover cases in which it is sought to recover possession of the trust property by ejecting trespassers who are wrongfully in possession of it. AIR (Vol 19) 1932 Rang 132: 10 Rang 342: 140 Ind Cas 317.

——S. 92 — A suit by the heir of the founder who becomes entitled to the management of the trust, for possession of the trust property from a trespasser does not fall within the purview of S. 92. AIR (Vol 18) 1931 Bom 170: 32 Bom LR 1687: 129 Ind Cas 741.

——S. 92 — Parties — Alienees.

A relief against strangers for recovery of possession of properties in their hands cannot be granted under S. 92 and hence they must be struck off the record. AIR (Vol 1) 1914 Oudh 237: 1 OLJ 548: 26 Ind Cas 103.

24A. Suit, maintainability of.

See N. 4, 18 and 19.

25. Trespasser.

See N. 24.

——S. 92 — Bona fide suit — Duty of Court to satisfy itself.

Though a trustee has to account for the income of the trust properties, care should be taken to see that outsiders and designing persons do not abuse the process of law. Where a suit brought under S. 92, C. P. Code, is found to be not for the purpose of advancing the objects of the trust but to put pressure upon the trustee to give up possession of the trust property to the plaintiffs, the Court should not lend support to such men. AIR (Vol 35) 1948 Oudh 255: 1948 AWR (CC) 85: 1948 OWN 114 (DB).

——S. 92 — Applicability — Denial of trust by defendant — Sanction — Necessity.

Where the defendant denies the alleged trust, he could not be held to be a trustee and must therefore be held to be a trespasser or third party and S. 92, C. P. Code, would not apply to such a suit and sanction would not be necessary for such a suit. AIR (Vol 34) 1947 Oudh 17: 21 Luck 539: 1946 OWN 261: 1946 AWR (CC) 187: 1946 OA (CC) 187: 226 Ind Cas 235 (DB).

——S. 92 — Applicability.

A suit brought by the plaintiff who is 'prima facie' entitled to the management of trust property, to recover possession of the property from a trespasser is not governed by S. 92. (1930) 32 Bom LR 1687 (DB).

——S. 92 — Section 92, C. P. Code, has no application to suits where a plaintiff claims possession of the endowed property on the allegation that he

is duly appointed trustee and that the defendant is a trespasser.

Section 92 has reference to those cases and to those cases alone, where there is an allegation of breach of any express or constructive trust created for public purposes of charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust. AIR (Vol 15) 1928 All 33: 50 All 165: 25 ALJ 902: 106 Ind Cas 389 (DB).

——S. 92 — Trespassers in possession — Procedure — Applicability of C. P. Code O. 1, R. 8 — Power of court to decree ejectment.

If the plaintiffs, after their evidence is closed, succeed in establishing that the defendants entered into possession as trustees, or have been acting 'de facto' trustees of these properties, and that the properties are trust properties, then there can be no doubt that the suit under S. 92 would be maintainable.

On the other hand, if they altogether fail to establish a character of the possession of the defendants, even then they have a right to ask the District Judge in case they prove that the properties are trust properties, to appoint new trustees, because no trustees exist. It is not incumbent on the plaintiffs to first bring a representative suit to recover possession of the properties under O. 1, R. 8, C. P. Code, and then, having obtained possession, ask the Judge to appoint trustees for the same.

Where either a breach of trust has been committed, or where the direction of the Court is necessary for the administration of such trust, persons interested in the trust can ask the Court to appoint new trustees. After such new trustees have been appointed, it would be open to them to take steps to recover possession of the property from the hands of the trespassers who may hold the properties.

In a suit under S. 92 it is within the jurisdiction of the Court to first decide the question whether the property in dispute is or is not trust property. If the Court has jurisdiction to decide this question it is obvious that such a question ought to be decided in the presence of persons who are interested in denying the trust. If trespassers in possession are made defendants they cannot be said to have been improperly impleaded, though they might not be absolutely necessary parties.

Even if it be held that the properties are trust properties and that the defendants are mere trespassers and have no right to retain possesion thereof, the Court cannot order their ejectment. But there can be nothing to prevent the Court from declaring that the properties are trust properties, and they vest in the newly appointed trustees. AIR (Vol 12) 1925 All 759: 47 All 867: 23 ALJ 795: 6 LRA (Civ) 405: 89 Ind Cas 639 (DB).

——S. 92 — Suit by idol against trespassers.

If the suit as filed is simply one by an idol in its juristic capacity against persons who are interfering unlawfully with its property or with its income, such a suit has nothing to do with S. 92, C. P. C. AIR (Vol 10) 1923 All 120: 20 ALJ 977: 45 All 215: 4 LRA Civ 50: 71 Ind Cas 420 (DB).

——S. 92 — Absence of allegation that defendants are trustees — Maintainability of suit.

Where there was no allegation whatever on the plaintiff's side that the defendants were either appointed as, or ever took upon themselves the duties of trustees.

Held, defendants could not be charged with committing a breach of trust and as they were trespassers pure and simple, having regard to the way in which they had dealt with the property, the proper course for the plaintiffs to proceed against them should have been by an ordinary suit in the Civil Court for ejectment. AIR (Vol 8) 1921 All 116: 19 ALJ 236: 62 Ind Cas 744 (DB).

——S. 92 and O. 1, Rr. 3 and 10 (2) — Parties — Alienee — Trespasser.

S. 92 does not cover a claim to recover possession of trust property from a trespasser or a transferee from a trustee neither of whom can be brought before the court in a suit under S. 92 by virtue of either R. 3 or R. 10 (2) of O. 1, C. P. C. AIR (Vol 5) 1918 Cal 5: 28 CLJ 4: 47 Ind Cas 111 (SB).

——S. 92 — Trespasser — Right to sue.

The relators of an author of a charitable trust have no claim against third parties, in possession of trust properties from the last trustee but who are not trustees themselves. They can sue only the trustees for accounts under S. 92 (1) (d). An order for accounts and inquiries can be passed against third parties in possession only in a suit properly framed. AIR (Vol 3) 1916 Sind 60: 10 SLR 12: 35 Ind Cas 593.

——S. 92 — Trespasser — Suit to eject.

A suit for the removal of a trespasser in possession of trust property does not come under Section 99. AIR (Vol 1) 1914 Cal 356: 41 Cal 749: 19 CWN 234: 22 Ind Cas 677 (DB).

——S. 92 — Trespasser — Suit to eject — Right to trust property.

A suit for a declaration that the plaintiff is entitled to the office of mutwalli of the mosque property in suit and for possession thereof, by the ejectment of the defendant who is in wrongful possession of it, does not fall within Section 92, C. P. C. (1913) 35 All 459: 11 ALJ 673: 20 Ind Cas 37 (DB).

——S. 92 — Trespasser — Ejectment of.

Any member of the Hindu Community can sue on behalf of his community with the permission of the Court and without the permission of the Legal Remembrancer to eject a trespasser from Thakurdevara property in a village. (1913) 19 Ind Cas 973 (All).

——S. 92 — Trespasser — Suit by trustee against.

The section does not refer to a suit by trustees of a public religious trust, against persons to whom the property has wrongfully passed and who are strangers to the trust and it makes no difference that the persons hold it as heirs of the late manager of the trust. (1913) 37 Bom 95: 14 Bom LR 941: 17 Ind Cas 665 (DB).

——S. 92 (O. C. S. 539) — Trespasser — Suit against.

Section 92 applies only in cases of an express or constructive trust created for a public charitable purpose: It applies only to a suit against a trustee and not to a suit against a trespasser. (1912) 23 MLJ 347: 17 Ind Cas 586 (DB).

——S. 92 — Trespasser — Suit against.

Under Section 92 a suit for possession cannot be maintained against a trespasser in possession of trust property. (1911) 14 OC 65: 10 Ind Cas 712.

26. Trustees de son tort.

——S. 92 — Applicability — Suit against trustee de son tort — If maintainable.

The scope of a suit under S. 92, C. P. Code, is no doubt strictly limited to matters set out therein and it cannot be converted into a suit for possession against a stranger or trespasser, but a suit will lie against trustees de son tort, provided they do not claim to hold adversely to the trust but purport to be administering the trust. AIR (Vol 38) 1951 Nag 394: ILR (1950) Nag 50: 1950 NLJ 545 (DB).

——S. 92 — Section, if applies.

Where the relief sought is the removal of a trustee, the prayer for removal must be based upon one of the conditions set out in the first part of the section, that is, the breach of trust or the necessity for the Court's direction.

In other words, one of those conditions must be not merely alleged but alleged as the basis for the suit, and if it had been sought to remove the defendants solely because they were not validly appointed trustees, then the mere fact that breach of trust had been alleged independently would not necessarily bring the suit within the terms of S. 92.

But where the removal is sought not only on the one ground but also on the other, & the ground for removal is based solely on the allegations of misconduct, which would amount to breach of trust, once it is held, that the plaint describes these defendants also as trustees de son tort, the suit would fall under S. 92.

Where the suit is for the removal of trustees de son tort and not for the removal of legal trustees; for the removal of persons who are trustees de facto but not de jure S. 92 applies. AIR (Vol 27) 1940 Pat 425: 6 BR 351: 21 PLT 155: 186 Ind Cas 359.

——S. 92 — Person in possession asserting property is his but admitting that he is executing trust.

Where a person who is in possession asserts that the property is his, but admits that the trust is being executed and states it will be executed in the future, as the property is in his possession and he is executing the trust, he is a trustee either constructive or de son tort. In either case he is not a stranger; a suit under S. 92, can therefore, be brought against him. AIR (Vol 24) 1937 Sind 230: 31 SLR 510: 171 Ind Cas 344.

——S. 92 — Persons appointed trustees by trust deed — Action for removal.

An action for removal of a trustee appointed under a trust deed falls under S. 92 which also applies to the removal of a trustee de son tort. AIR (Vol 21) 1934 Pat 321: 151 Ind Cas 138.

——S. 92 — In a suit under S. 92 the defendants must be alleged to be either de jure or de facto managers of the trust. The plaintiffs are bound to make it clear who are in fact managing the temple trust, and in particular who are intermeddling with the trust income and are therefore managers de facto or de son tort. (1931) 1931 MWN 898.

——S. 92 — Applicability.

A suit under S. 92 will lie against a trustee de son tort who is a trustee de facto though not de jure but no relief can be granted against alienees of trust property in a suit under S. 92. AIR (Vol 12) 1925 Mad 212: 78 Ind Cas 950 (DB).

——S. 92 — Applicability.

Per Dalal J.—Suit lies against trustees de son tort. AIR (Vol 11) 1924 All 884: 84 Ind Cas 631: 2 ALJ 866: 5 LRA (Civ) 697: 47 All 17 (DB).

——S. 92 — Applicability.

Where it is found that the defendant is neither a constructive trustee nor a trustee de son tort, the suit under S. 92 against him is not maintainable. AIR (Vol 10) 1923 All 247: 21 ALJ 310: 4 LRA (Civ) 190 (DB).

——S. 92 — A suit under S. 92 will lie against a person who, without title takes upon himself the character of a trustee, or in other words against a trustee de son tort. AIR (Vol 9) 1922 All 542: 69 Ind Cas 990: 44 All 652: 21 ALJ 105 (DB).

——S. 92 — Private right.

In order to bring a case within the purview of S. 92 the suit must be a representative one brought for the benefit of the public and to enforce a public right in respect of an express or constructive trust upon a cause of action alleging a breach of such trust or necessity for directions as to its administration against a trustee of such express or constructive trust and whether such trust be so de jure or de son tort and for the particular relief mentioned. Suits brought not to establish a public right but to remedy a particular infringement of an individual right are not within the section. AIR (Vol 8) 1921 Pat 511: 1921 PHCC 6 (DB).

——S. 92 — Trustee de son tort.

S. 92 of the C.P.C. applies to the case of persons who are trustees 'de son tort'. AIR (Vol 4) 1917 All 264: 40 Ind Cas 165 (DB).

——S. 92 — De facto trustee — Suit against — Removal of trustee — Minor.

A de facto trustee or a trustee de son tort is subject to the same liabilities as a de jure trustee and a suit under S. 92 is maintainable against the former. A person who is not a sui juris and requires a guardian to look after his property, cannot be entrusted with the management of a trust. AIR (Vol 1) 1914 Oudh 408: 1 OLJ 726: 18 OC 38: 27 Ind Cas 389 (DB).

——S. 93.

——S. 93 — Appointment of authority — General appointment to act in all cases — Validity.

Under S. 93, C. P. Code, the Provincial Government has to invest the Collector with authority afresh in each case to exercise the powers conferred upon the Advocate-General under S. 92, C. P. Code, and a general appointment to act in all cases as they arise will not do. AIR (Vol 38) 1951 Nag 394 : ILR (1950) Nag 50: 1950 NLJ 545 (DB).

——S. 93 — Appointment of authority — General appointment, if sufficient — Need for authority to be invested in each case with right to exercise powers of Advocate-General — Authority not invested with power in particular case refusing sanction — Sanction accorded by Advocate-General on fresh application — Validity — Legal Department Manual, R. 179.

The person appointed under S. 93, C. P. Code, has not only to be appointed for purpose of exercising the powers under S. 92, C. P. Code, but must also be invested with the right to exercise the powers of the Advocate-General in each particular case, and those powers include not only a right to accord sanction but also the right to withhold it. An order appointing him generally is not sufficient. If the authority appointed generally under S. 93 was not invested with authority to deal with a particular case, his order refusing sanction for the institution of a suit is ultra vires and it is competent for the Advocate-General to accord sanction on a fresh application made to him. R. 179 of the Legal Department Manual, 1941, is merely a departmental instruction to the two authorities not to entertain a fresh applica-

tion when either has already dealt with the matter. There is nothing more than the tender of advice to the two as to how they should proceed. It cannot control the statutory powers of the Advocate-General nor fetter his discretion. AIR (Vol 36) 1949 Nag 183 : ILR (1948) Nag 846: 1948 NLJ 434.

——S. 93 — **Collector exercising powers of Advocate-General — Previous sanction of Local Government in respect of particular suit — Necessity for.**

Under S. 93, C. P. Code, the Collector of a District can exercise the powers of an Advocate-General given under S. 92, C. P. Code, but in order that the Collector may be competent to exercise those powers it is necessary that he should act with the previous sanction of the Local Government authorising him to exercise those powers in respect of that particular suit. (1949) ILR (1949) 1 Cal 240: 52 CWN 831 (DB).

——S. 93 — **Previous sanction of Provincial Government — Whether necessary in each case — Proof of such sanction.**

Under S. 93, C.P. Code, the Collector or other officer appointed must in every case obtain the previous sanction of the Provincial Government. This means that a general sanction is not sufficient and previous sanction must be obtained for each case. A sanction of this type has to be strictly proved because in the absence of a proper sanction the suit is without jurisdiction. The Court will not draw a presumption under S. 114 of the Evidence Act that all due formalities of law must have been complied with. AIR (Vol 35) 1948 Nag 357: ILR (1948) Nag 281: 1948 NLJ 314 (DB).

——S. 94.

——S. 94 — **Temporary injunction under inherent powers.**

The words "if it so prescribed" in S. 94, Civil P.C., indicate that a temporary injunction can be granted if there is any provision for it in the Code. In other words, such injunction cannot be granted except under the specific provisions made for it in the Code. Hence it is not open to a Court to grant temporary injunction in exercise of its inherent power under S. 151, in the case which cannot be brought under O. 39 of the Code. AIR (Vol 32) 1945 Pat 483: 24 Pat 496.

——Ss. 94, 151, O. 39, R. 1, O. 41, R. 5 — **Connected suits — Same question in issue — Appeal in one suit only — Power of Court to stay execution of other decree by injunction, pending appeal.**

The same question was in issue in a mortgage suit and a partition suit and the parties agreed that the mortgage suit may be decided in accordance with the finding in the partition suit. Both the suits were accordingly decided. The aggrieved party appealed against the decree in the partition suit alone and applied for an injunction to restrain the opposite party from executing the mortgage decree pending the decision of the appeal:

Held, that the Court had no power to grant an injunction staying execution of the mortgage decree under O. XLI, R. 5 or under S. 94 or S. 151, or O. XXXIX of the Civil P.C. AIR (Vol 23) 1936 Mad 276: 59 Mad 744: (1936) MWN 51: 70 MLJ 257: 43 MLW 383: 161 Ind Cas 721.

——S. 94 — **Temporary injunction — Principles governing.**

The principles governing the issue of temporary injunctions are: (a) The applicant must show a fair prima facie case in support of the right claimed; (b) an actual or threatened violation of that right; (c) productive of irreparable or at least serious damage; (d) his conduct must be such as not to disentitle him to assistance; it should be fair and honest, and in particular there must be no acquiescence or delay; (e) there must be a greater convenience in granting than refusing the injunction, and lastly (f) equally efficacious relief must not be obtainable by any other usual mode of proceeding, except in case of breach of trust. AIR (Vol 23) 1936 Pesh 11: 160 Ind Cas 569.

——S. 94 — Section 94 (c) authorises the Court whose injunction has not been obeyed to punish the delinquent by sending him to the civil prison and attaching and selling his property. On general principles also the position is clear that an injunction could only be issued to a person against whom the Court could proceed to enforce it. In other words, an injunction would be valid if there is a sanction behind it. AIR (Vol 22) 1935 Pesh 182: 160 Ind Cas 82.

——Ss. 94, 151, O. 39, R. 2 — **Temporary injunction — Appeal from order made under inherent power.**

When the jurisdiction of the Court is invoked under S. 151, and it is called upon to act ex debito justitiae and to grant an injunction, it is necessary for the plaintiff to establish a strong prima facie case that there is no other remedy open to him to protect himself and that if the injunction asked for is not granted, irreparable injury or inconvenience would result. AIR (Vol 20) 1933 Lah 73: 34 PLR 51: 140 Ind Cas 843.

——S. 94 — **Prima facie case.**

On an application for an interlocutory injunction the Court has got to be satisfied that the applicant has made out a prima facie case that he is entitled to relief. AIR (Vol 15) 1928 Cal 464: 112 Ind Cas 712: 55 Cal 978: 32 CWN 576 (DB).

——S. 94 — **Documents — Power to compel production of.**

The Panchayat is a public body and the Code gives ample powers to the Court by arrest, imprisonment and attachment of property to compel the production of documents in their possession. AIR (Vol 15) 1928 Mad 299: 108 Ind Cas 760: 51 Mad 1: 27 MLW 611: 54 MLJ 174 (FB).

——S. 94 — **Temporary injunction — When not granted.**

Temporary injunction restraining defendant from interfering with plaintiff's possession, cannot be granted on the ground of apprehended interference with collection of rent and breach of the peace. AIR (Vol 13) 1926 Cal 604: 94 Ind Cas 871: 30 CWN 214 (DB).

——S. 94 — **Injunction, disobedience of — Applicability of O. 39, R. 2 (3).**

The drafting of R. 2 (3) of O. 39 is somewhat inartistic, but there is no doubt that it applies to disobedience generally of an injunction granted by the Court. It applies not only to disobedience of an order issued under Clauses (1) and (2) of that rule but has a more general application; it applies alike to disobedience of all the injunctions issued under S. 94. AIR (Vol 13) 1926 Mad 574: 95 Ind Cas 196: 50 MLJ 401 (DB).

——S. 94 — **Scope.**

S. 94 is governed by O. 39. AIR (Vol 13) 1926 Mad 258: 92 Ind Cas 615: 23 MLW 85: 1925 MWN 886.

——S. 94, C. P. C. (S. 346, old Code) — Security bond — Breach — Suit on assignment — Maintainability.

See (1904) 31 C. 162 (165).

——S. 94 (c) and (e) — **Proceedings under S. 40, B. T. Act — Power to restrain — Civil Courts.**

A Civil Court has no jurisdiction to issue an injunction to a party to a proceeding under S. 40 of the B.T. Act restraining him from proceeding further with an application made by him under that section to a Revenue Court. AIR (Vol 7) 1920 Pat 423: 5 Pat LJ 76: (1919) Pat HCC 461: 53 Ind Cas 37 (DB).

——Ss. 94 (e), 151 and O. 21, R. 58 (2) — Power of Court in claim suit to stay sale in execution of decree in a suit against third party.

A Court can under S. 94 (e), O. 21, R. 58 (2), and S. 151, C.P. Code, stay a sale in execution of a decree in a suit against a third party pending the disposal of a suit filed under O. 21, R. 63, C.P. Code, by a claimant to the properties brought to sale against the claim order.

[Order for stay made on condition of the petitioner giving adequate security for possible loss to the decree-holder.]

AIR (Vol 38) 1951 Mad 321: 63 LW 968: 1950 MWN 687: (1950) 2 MLJ 492.

——S. 94 (e) — Order for security and accounts.

An order directing the furnishing of security & submission of accounts passed on an application for the issue of temporary injunction is one under S. 94 (e). (1913) 17 CWN 318: 17 Ind Cas 361 (DB).

——S. 95.

1. **Appeal.**
2. **Arrest and attachment.**
3. **Compensation when and how granted.**
4. **Court which can grant.**
5. **Scope and applicability.**
6. **Suits.**

1. Appeal.

——Ss. 95, 104 — Order under S. 95 — Second appeal, if lies.

No second appeal lies from an order of the first Appellate Court in an appeal against an order of the trial Court under S. 95. AIR (Vol 29) 1942 All 261: (1942) ALJ 284: ILR (1942) All 360: 1942 AWR (HC) 114: 201 Ind Cas 184.

——Ss. 95 and 104 — Appeal — Compensation — Order — Second appeal.

An order for compensation under Section 95, C. P. C., is one independent of the decree, although it sets off the compensation as against the decreed amount. The right of appeal must be determined by Section 104, C. P. C. and it cannot form a subject of second appeal. (1913) 21 Ind Cas 756 (Mad) (DB).

——Ss. 95 and 104 (2) — Order of Divisional Court in appeal against order refusing compensation — Second appeal.

An order of a Divisicnal Court under Section 95, reversing an order of the Court of first instance is an appellate order under Section 104 (9) and under the authority of Section 104 clause (9) is not appealable. (1911) 4 Bur LT 204: 11 Ind Cas 917 (DB).

2. Arrest and attachment.

——S. 95 — Wrongful arrest before judgment — Award of compensation to defendant — Compensation, whether recoverable from minor's estate.

Section 95 is not inapplicable to suits instituted by a next friend on behalf of a minor plaintiff, and where the Court awards compensation for wrongful arrest before judgment to the defendants in such a suit, the compensation would, therefore, just like the award of costs, be recoverable from the minor's estate.

In such a suit it is for the Court to consider whether or not compensation ought to be awarded and if the Court is satisfied that in making the application the next friend was acting for his own ends and not in the belief that it was for the interests of the minor's estate, the Court may either refuse to exercise its discretion and refer the defendants to a suit for damages or, if the analogy of O. XXII, Rule 14, could be invoked, the Court may pass an order against the next friend himself. AIR (Vol 22) 1935 Mad 886: (1935) MWN 1055: 42 MLW 542: 69 MLJ 487: 59 Mad 415: 158 Ind Cas 831.

——S. 95, O. 38, R. 5 (3) — Conditional attachments — Power to award compensation.

There is nothing in the language of Section 95, which excludes conditional attachments of the class contemplated by O. 38, R. 5 (3) from its operation and the Courts may, therefore, award compensation even in the case of such attachments. AIR (Vol 19) 1932 Cal 92: 35 CWN 546: 135 Ind Cas 736.

——S. 95 — Mere procuring of an attachment before judgment does not of itself afford a cause of action for damages. It is an essential part of the cause of action in a suit for damages for the abuse of civil proceedings that the proceeding in which the process complained of is taken out, should have terminated in favour of the plaintiff or that the particular process complained of has been superseded or discharged.

Section 95 is applicable only where the attachment is in fact effected and does not apply to a case where the attachment is applied for and has not in fact been levied. The remedy by way of a suit is allowed where the aggrieved party claims a larger compensation than Rs. 1,000. But that does not make the basis of the suit any way different from the basis on which compensation is allowed in the suit itself where the process has been wrongly put into effect, excepting that in a suit something more is required than under Section 95 and not that something less is required namely, that under Section 95 it is sufficient to prove that attachment was applied for on insufficient grounds, while in a suit the plaintiff has to show not merely that it was applied for on insufficient grounds but that it was so done maliciously and without reasonable and probable cause. AIR (Vol 12) 1925 Bom 357: 87 Ind Cas 1026 49 Bom 629: 27 Bom LR 525.

——S. 95 — Malice in law — Attachment of property of person not party to suit.

There is a distinction between cases where the plaintiff in the suit for damages for wrongful attachment was a party to the suit in which the goods were wrongfully attached and cases where the plaintiff in the suit for damages was not a party to the suit in which the goods were attached. In the former case it is necessary to prove that the prosecution was undertaken maliciously and without reasonable and probable cause. In the latter case a suit will lie even although the attachment may have been made in good faith but wrongfully. AIR (Vol 11) 1924 Rang 302: 2 Rang 181: 83 Ind Cas 433.

——S. 95 (1) (a) — Attachment — Grounds for.

To justify an attachment before judgment it is not enough that the defendant is in straightened circumstances but it must be proved that he was actually about to dispose of his property.

Compensation may be given for improperly obtaining a temporary attachment though the same is set aside on notice. An order refusing compensation is appealable. AIR (Vol 6) 1919 Mad 20 : 25 MLT 46 : 9 LW 69 : 49 Ind Cas 86 (DB).

——S. 95 — **Attachment — Grounds for — Want of reasonable and probable cause — Malice — Special damage.**

Plaintiff must prove want of reasonable and probable cause in a suit for damages for attachment before judgment and malice. Malice is any improper or indirect motive (i.e.) no hatred or enmity is necessary. If the motive for the attachment is to enforce speedy payment and not to defeat any intended fraud of the debtor, it will amount to malice. The plaintiff in such a suit must prove special damage. It will be sufficient if it is shown that the allegations against him must damage his reputation and credit. The fact that the defendant is a man of slender means ought not to be taken into consideration as a ground for reducing the amount available as damages to the plaintiff. (1911) 35 Mad 598 : 21 MLJ 1052: 10 MLT 365: (1911) 2 MWN 414: 12 Ind Cas 507 (DB).

——S. 95 — **Malice — Proof of —Abuse of legal process — Improper injunction, arrest or attachment before judgment.**

Liability for improper injunction, arrest or attachment before judgment in a suit for compensation therefor, is subject to the same conditions as an order under C. P. C., S. 95. So proof of malice is unnecessary. Where the goods of a shop have been seized it is the duty of the officer of the Court to see that the rent is paid and proper watch kept. (1911) 13 OC 357: 9 Ind Cas 60 (DB).

3. Compensation when and how granted.

(a) General damages.
(b) Measure of damages.
(c) Proof.

——S. 95 — **Person whose property is ordered to be attached before judgment but not actually attached.**

Compensation will only be granted where damage has resulted.

Where only an order of attachment before judgment has been passed but the property has not actually been attached in pursuance of such an order, it cannot be said that the mere order of attachment has resulted in damages. A person whose property has been ordered to be so attached cannot, therefore, claim compensation under S. 95, Civil P. C. AIR (Vol 26) 1939 Rang 260: 183 Ind Cas 174.

——S. 95 — **Attachment before judgment — Defendant humiliated — Whether ground for awarding compensation.**

In order that a claim under Section 95, be admissible, it is necessary that the Court should find that the attachment or arrest or injunction was applied for on insufficient grounds, and it can only award compensation for the expense or injury caused to the defendant. Any claim whatsoever that the defendant may choose to put forward in such an application is not admissible. The claim must be in respect of some damage caused to him as the proximate result of the attachment, arrest or injunction that had been applied for on insufficient grounds.

A Court is not, therefore, justified in awarding compensation under Section 95, to the defendant on the ground that his prestige had suffered or that he felt humiliated by reason of attachment before judgment. (1936) 164 Ind Cas 73: 39 CWN 915.

——S. 95 — **Application for compensation before setting aside order of attachment.**

An application for compensation for wrongful attachment cannot be made until, in appropriate proceedings, the order of attachment has been set aside. AIR (Vol 21) 1934 Mad 638: 67 MLJ 448: 40 MLW 638: (1934) MWN 1187: 151 Ind Cas 994.

——S. 95 — Right to give compensation is independent of the passing of a prior absolute order of attachment. (1931) 1931 MWN 956.

——S. 95 — **Suit for compensation — Malice in law — Attachment of property of person not party to suit.**

The attaching creditor is liable in damages to the person whose property was wrongfully attached even if he has acted honestly. AIR (Vol 16) 1929 Lah 200: 112 Ind Cas 848.

——S. 95 — **Injunction granted after hearing both parties.**

It is doubtful whether an award of compensation can be made in a case where the order of injunction was passed after hearing both the parties and after it was found that there were sufficient grounds and the plaintiff has not ultimately failed in his suit. To allow a petition for compensation immediately after such main petition for injunction was disposed of and without fresh materials as for a review or such as may appear at the trial of the suit, will be generally to permit a court to come to a conclusion inconsistent with and opposed to its prior order. Such an anomaly is not intended by S. 95. AIR (Vol 10) 1923 Mad 352: 71 Ind Cas 450: 17 MLW 150.

——S. 95 — **Awardability of compensation.**

The plaintiff may be entitled to compensation, even though the attachment was not completed, if, notwithstanding that, he sustained injury by what was actually done. The absence of reasonable and probable cause for taking legal action in execution or otherwise is, some evidence, from which malice may be inferred. The termination of the proceedings in the plaintiff's favour, is essential, but this is applicable only to cases in which a distinct termination in favour of one party or other is possible, and not to a case in which the proceedings cannot end by their nature in any judicial disposal. AIR (Vol 9) 1922 Mad 206: 66 Ind Cas 760: 30 MLT 269: 1922 MWN 242: 15 MLW 442: 45 Mad 527 (DB).

——S. 95 — **Measure of damages — Compensation for wrongful arrest.**

Expense or injury in Section 95 for wrongful arrest include also general damages such as damages for injury to reputation or humiliation. No special procedure is necessary for wrongful arrest. AIR (Vol 4) 1917 Mad 885 (2): 3 LW 30: (1916) 1 MWN 76: 32 Ind Cas 592.

——S. 95 (Ss. 491, 483 old Code) — **General damages — Suit for compensation for wrongful attachment before judgment, awardable.**

General damages are recoverable in a suit for compensation for wrongful attachment before judgment. (1908) 18 MLJ 490: 32 M 170: 2 Ind Cas 345 (346) (DB).

——S. 95 (S. 491, old Code) — **"Awarded in its decree" — Compensation for attachment before judgment on insufficient grounds.**

The order awarding compensation under Section 491 should be embodied in the decree itself & the determination of the question cannot be postponed to a date subsequent to the passing of the decree. (1907) 17 MLJ 310 (311).

(a) General damages.

——S. 95 — **Absence of evidence as to damage suffered.**

Where in an action for damages for arrest before judgment on insufficient grounds, no evidence as to damages suffered is given, the Court should award general damages. AIR (Vol 13) 1926 Mad 962: 24 MLW 252: 97 Ind Cas 684.

(b) Measure of damages.

——S. 95 — For wrongful attachment the decree-holder moving the court is responsible for any loss suffered by the person whose goods are wrongfully attached. He is a trespasser and is responsible for all damages though he may have acted innocently and mistakenly. (1911) 4 Bur LT 220 : 12 Ind Cas 26.

(c) Proof.

——S. 95 — 'Injury' in S. 95.

Quaere: — Whether the "injury" in S. 95 must be proved in terms of financial damages. AIR (V 29) 1942 All 261 : (1942) ALJ 284 : ILR (1942) All 360 : 1942 AWR (HC) 114 : 201 Ind Cas 184.

——S. 95 — Special damage — Facts to be proved.

There is nothing in the language of S. 95 to justify the inference that special damage need be proved in application under S. 95 for damages for wrongful attachment. The words "expense or injury" indicate that either the particular damage upon which a monetary value can obviously be placed or the more general damage which the Court endeavours with difficulty to assess in terms of money, is contemplated by the section.

It is incumbent upon the person, if he wishes to get compensation for wrongful attachment, to prove affirmatively that the attachment was applied for on insufficient grounds. It is not sufficient for this purpose to show that he has properties which are greater in value than the amount at stake in the suit. AIR (V 27) 1940 Mad 77 : 50 MLW 640 : 1939 MWN 1084 : (1940) 1 MLJ 782 : 189 Ind Cas 887.

4. Court which can grant.

——S. 95 — Attachment withdrawn on deposit of amount — Subsequent application for compensation.

An application under S. 95 is not maintainable unless the order of attachment in respect of which the application has been made has been already set aside by the Court as having been made on insufficient grounds.

Similarly it cannot be open to a defendant in a suit, against whom an order of attachment has been made and who has complied with that order with the result that it automatically terminated and with the result that the money deposited by him became available to the plaintiff in satisfaction of his decree, to apply to the Court for compensation, upon the ground, that the order of attachment, in respect of which the Court is 'functus officio', was obtained upon insufficient grounds, 'a fortiori' when that was not the basis of the only application he has ever made for the vacation of the order of attachment.

And an application of the defendant under S. 95, was not maintainable and the Court has no jurisdiction to take any action against the plaintiff under S. 95. AIR (V 29) 1942 All 261 : (1942) ALJ 284 : ILR (1942) All 360 : 1942 AWR (HC) 114 : 201 Ind Cas 184.

——S. 95 — Order for compensation by Small Cause Court — Appeal — Provincial Small Cause Courts Act (IX of 1887), Ss. 24, 27, 17.

No appeal lies against an order under S. 95, passed by the Small Cause Court. AIR (V 24) 1937 Nag 126 : ILR (1938) Nag 361 : 169 Ind Cas 614.

——S. 95 — Bombay High Court original side.

Section 95 applies to the mofussil Courts, but does not apply to suits under the ordinary original civil jurisdiction of the High Court by virtue of R. 329 and therefore the amount of damages to be awarded to the defendant is not limited to Rs. 1,000/-. AIR (V 13) 1926 Bom 523 : 97 Ind Cas 763 : 28 Bom LR 1077.

——S. 95 — Provincial Small Cause Court — If can order compensation — Appeal.

An order under S. 95 of the C. P. C. passed by a Small Cause Court dismissing an 'interim' attachment issued by itself is valid and such an order cannot be questioned on appeal. AIR (V 2) 1915 Mad 1072 : 26 Ind Cas 359 (DB).

——S. 95 — Small Cause Court — To award compensation for attachment before judgment on insufficient grounds — C. P. C., S. 491, old Code — Improper arrest.

A Small Cause Court is competent to award compensation under S. 491, C. P. C., old Code for procuring an attachment before judgment on insufficient grounds.

Obiter. — It has no jurisdiction to award compensation in cases of improper arrest. (1902) 26 M 504 (505).

5. Scope and applicability.

——S. 95 — Applicant under S. 95 cannot be non-suited for want of final order on connected application.

The requirements of an application under S. 95, should be based on the language of the section and not on rules obtaining in Common Law with reference to a similar but not identical Common Law remedy. Remedy given by S. 95 should not be hedged round with restrictions which the section itself does not import. In any case, when the cancellation of the attachment has been prayed for and orders thereon have been withheld pending an adjudication on the application for compensation, it is unfair to non-suit the applicant under S. 95 for want of a final order on the connected application. In such a case the setting aside of the order of attachment is not an essential preliminary to the grant of compensation. AIR (V 27) 1940 Mad 77 : 1939 MWN 1084 : 50 MLW 640 : (1940) 1 MLJ 782 : 189 Ind Cas 887.

——S. 95 — Application under O. 38, R. 5 for attachment, when to be granted.

The question to be decided under S. 95, is whether there were in fact no sufficient grounds for applying under O. 38, R. 5, for attachment, and not whether there were no reasonable grounds stated in his application. AIR (V 24) 1937 Nag 126 : ILR (1938) Nag 361 : 169 Ind Cas 614.

——S. 95 — Application under S. 95 dismissed without giving any reasons.

Where the Judge had given no reasons for refusing the application under S. 95:

Held, that the discretion had to be exercised in a judicial manner and the order clearly ignored the terms of S. 95 and was not one according to law. AIR (V 21) 1934 Oudh 429 (2) : 11 OWN (CC) 1135 : 10 Luck 199 : 151 Ind Cas 283.

——S. 95 — Section 95 does not apply where the amount claimed exceeds Rs. 1.000/-. AIR (V 20) 1933 Mad 691 : 38 MLW 385 : 65 MLJ 342 : (1933) MWN 985 : 56 Mad 989 : 145 Ind Cas 1011.

6. Suits.

(a) When not bar.
(b) When bar.

(a) When not bar.

——S. 95 — Injured party, whether can sue next friend for compensation.

The word "plaintiff" in S. 95 must be confined to the plaintiff alone and does not include a next

friend of a minor plaintiff. The Court, therefore, has no jurisdiction to order the next friend of the minor plaintiff to pay compensation under S. 95. This, however, does not prevent the injured party from instituting a suit to recover compensation from the next friend if he wishes to do so. AIR (V 28) 1941 Mad 719 : ILR (1941) Mad 985 : 53 MLW 675 : (1941) 1 MLJ 765 : 1941 MWN 567 : 200 Ind Cas 13.

——S. 95 — **Want of probable cause.**

Apart from malice or want of probable cause, a plaintiff cannot recover damages in an independent suit upon mere proof that an injunction was granted to restrain him from doing what has since been held to be within his rights. 16 CLJ 34, Diss.

If A maliciously and without probable cause brings a suit against B and without suppression of facts, mis-statements or other improper means, obtains an interlocutory injunction, an action will not lie at common law for the damage done to his business by the injunction.

The granting of an injunction is a judicial act in the fullest sense; it is not a ministerial order or an order of course or mesne process or a necessary incident of any particular jurisdiction. There is nothing in the second sub-s. of S. 95 of the Code or in Art. 40, Limitation Act, 1908, which is inconsistent with the above proposition. AIR (V 15) 1923 Cal 1 : 46 CLJ 455 : 106 Ind Cas 277 (DB).

——S. 95 — **Maintainability.**

Where a temporary injunction is wrongfully obtained on insufficient grounds a suit for damages is maintainable. AIR (V 14) 1927 Cal 247 : 100 Ind Cas 318 : 53 Cal 1008 (DB).

——S. 95 — **Maintainability of — Malice.**

A separate suit for compensation in respect of tortious temporary injunction lies. Malice can be properly inferred on proof that there were no sufficient grounds for an application for temporary injunction and that the plaintiff has sustained some substantial injury. AIR (V 9) 1922 Lah 303 : 69 Ind Cas 523 : 45 PLR 1922 (DB).

——S. 95 — **Perpetual injunction.**

A suit for damages cannot be maintained against a defendant for obtaining maliciously and without reasonable cause a perpetual injunction which was dissolved on appeal. AIR (V 2) 1915 Cal 173 : 42 Cal 550 : 18 CWN 1189 : 21 CLJ 68 : 26 Ind Cas 296 (DB).

——S. 95 (S. 497, old Code) — **Suit for damages for a wrongful injunction — Title defective for want of registration — Right to recover damages dependent on title.**

Damages under S. 497 must be awarded by an order of Court in the suit in which the injunction is obtained wrongfully and even then only when it appears to the Court deciding the suit that there is no probable ground for instituting the suit. A person whose title could not be recognised for want of registration and against whom an injunction had been obtained pending a suit for perpetual injunction which was ultimately dismissed as against him on the ground that the conduct of the plaintiff in that suit was fraudulent could not maintain a suit for damages for a wrongful injunction as he could not prove his title to recover damages, and S. 487, old Code would not help him in such a case. (1902) 13 MLJ 70 (71) (DB).

(b) When bar.

——S. 95 — **Separate enquiry under in small cause suits — If necessary — Procedure to be followed.**

In Small Cause Suits an independent inquiry regarding claim for compensation for wrongful attachment before judgment is not necessary and the evidence on the point can be taken in the course of the suit proceedings. No separate enquiry under S. 95, C. P. Code, is called for in such suits. AIR (V 38) 1951 Madh-B 79.

——S. 95 — The remedy under S. 95 is optional with the defendant and discretionary with the Court and does not bar an independent suit. Such a suit is governed by the principles regulating suits for damages for abuse of the process of the Court which are in no way affected by the section. AIR (V 31) 1944 Cal 289 : ILR (1944) 2 Cal 358 : 48 CWN 348.

——S. 95 — Application under S. 95 is no bar to a subsequent suit for damages. (1932) 1932 MWN 536.

——S. 95 (3) — **Bar of suit — Attachment before judgment — Suit for damages — Bar.**

A claim for compensation for wrongful attachment of property before judgment made in a counter affidavit disputing the propriety of the 'interim' order, is no bar to a suit for damages. Section 95, C. P. C. operates as a bar only if the claim is made at a stage at which either of the conditions postulated by the section have been fulfilled, but not otherwise. AIR (V 7) 1920 Mad 397 : 38 MLJ 324 : (1920) MWN 192 : 11 LW 479 : 55 Ind Cas 786 (DB).

——S. 95 — **Limitation Act — Application — Suit.**

An application under S. 497 for damages for wrongful obtaining of injunction against the applicant, which application was subsequently treated as a plaint, is not barred if made within three years from the date of dismissal of the suit on appeal in which the injunction was obtained. (1912) 16 CLJ 34 : 16 Ind Cas 443 (DB).

——S. 96.

See also (1) "Appeal".
(2) Civil P. C., O. 41, Rr. 1 to 8.

1. **Appeal.**
2. **Consent decree.**
   See also (1) Civil P. C., O. 23, R. 3.
   (2) Civil P. C., O. 43, R. 1.
3. **Court-fee and valuation.**
4. **Decree.**
   See also, Civil P. C., S. 2 (2).
5. **Effect of appeal.**
6. **Interpretation.**
   See Notes 1 & 2.
7. **Jurisdiction.**
8. **Nature of right.**
   See Note 9.
9. **Right of appeal.**
   1. **Appeal.**
   (a) **Competency.**
   (b) **Small Cause suits.**
   (c) **Whether lies.**
   (d) **Amended decree.**
   (e) **Observations in judgment.**

——S. 96 — **Appeal — Maintainability — Suit decreed in its entirety against one defendant and dismissed against others — Appeal by plaintiff without impleading that defendant for a decree against other defendants.**

A plaintiff whose suit has been decreed in its entirety against one defendant cannot appeal against the decree without impleading that defendant on the sole ground that the other defendant against whom the suit had been dismissed should also be held liable for his claim. AIR (V 37) 1950 HP 30.

——S. 96 — **Partition suit — Suit dismissed — Defendant's appeal.**

When, in a suit for partition, the defendants' plea that the suit does not lie as the plaintiff does not ask for full partition, is accepted, the defendant cannot appeal against the decree because he felt dissatisfied with some of the statements in the judgment. AIR (V 32) 1945 Mad 39 : (1944) 2 MLJ 181 : 57 MLW 470 : 1944 MWN 527.

——S. 96 — Whether re-hearing of suit or application.

An appeal in India cannot be regarded to be a re-hearing of the suit itself. Nor is there warrant for the proposition that an appeal from an order passed in execution proceedings could itself be regarded as a re-hearing of the application which had led to the passing of that order. AIR (V 31) 1944 Lah 29 : ILR (1943) Lah 666 : 46 PLR 115 : 212 Ind Cas 144.

——S. 96 — Temporary injunction — Suit for specific performance of contract of sale — Plaintiff in possession — Trial Court granting temporary injunction restraining defendant from interfering with plaintiff's possession:

Held, that the order granting injunction need not be interfered with in appeal. AIR (V 31) 1944 Mad 254 : (1944) 1 MLJ 51 : 1944 MWN 71 : 57 MLW 150 : 220 Ind Cas 174.

——S. 96 — Only some issues decided and decree passed with respect to them — Appeal.

In a suit for maintenance by the wife, six issues were framed in the suit. The first three related in substance to the question whether the suit was maintainable in view of the previous maintenance deed. The fourth and fifth related to the right to future maintenance and arrears of maintenance and the sixth to the question of a charge for the maintenance on the defendant's property. The trial Court decided the first three issues first, wrote a separate judgment giving its reasons for holding that the claim for enhanced maintenance was not maintainable, and issued a decree to that effect:

Held, that the decree passed with regard to the first three issues had determined those issues as conclusively as if the decree had been one passed in the usual course after all the issues had been heard and the result incorporated in a single decree and the same was appealable. AIR (V 30) 1943 Mad 767 : (1943) 2 MLJ 348 : 56 MLW 539 : 1943 MWN 589 : 211 Ind Cas 63.

——S. 96 — Appeal must be against whole decree.

An appeal must be preferred against the whole decree, though for the purpose of valuation, the subject-matter in dispute in appeal only is valued. AIR (V 28) 1941 Pat 269 : 20 Pat 459 : 7 BR 906 : 22 PLT 736 : 195 Ind Cas 344 (SB).

——S. 96 — Vacating decree on ground of fraud —Knowingly making false allegation in written statement — Whether fraud — Remedy of party suffering.

The allegation of fraud for vacating a judgment must be extraneous to everything which has been adjudicated on by the Court and not any fraud which has already been dealt with by the Court. The making of a false statement knowing it to be false, in the written statement, cannot be regarded as extrinsic to the proceedings in the Court.

The whole of the written statement must be deemed to have been considered by the Court before it pronounced its judgment and if for some reason or other the Court accepted a certain allegation as true which is subsequently alleged to be false, there is no ground for vacating the decree on the ground of fraud. The remedy is either by way of appeal or by way of review. AIR (V 26) 1939 Mad 146 : 48 MLW 946 : 1939 MWN 67 : (1939) 1 MLJ 154 : 180 Ind Cas 246.

——S. 96 — Appeal against mere judgment.

There can be no appeal against mere judgment where no order for decree is passed nor a decree sheet drawn. (1934) 35 PLR 471.

——S. 96 — Order allowing party to draw amount "on giving security to the satisfaction of the District Court" — District Judge finding security sufficient — Appeal from order of District Judge on ground that security furnished was not sufficient is not maintainable. AIR (V 18) 1931 Mad 38 : 32 MLW 742 : (1930) MWN 1096 : 59 MLJ 892 : 54 Mad 237 : 129 Ind Cas 462.

——S. 96 — Right of, whether modified by act of party.

The fact that a District Board had passed a resolution that no appeal should be preferred against the decision of the trial Judge in a particular matter is no ground for throwing out the appeal preferred by the Board which is otherwise competent. AIR (Vol 17) 1930 Oudh 434 : 7 OWN 843 (DB).

——S. 96 — Land Acquisition Act, S. 30 — Decision in reference under S. 30 though not under S. 54, is appealable under C. P. Code, S. 96. AIR (V 16) 1929 Mad 223 : 56 MLJ 387 : 115 Ind Cas 345 : 29 MLW 237 : 1929 MWN 62 (DB).

——S. 96 — "Appeal" meaning of.

The words 'an appeal' in S. 96 do not exclude the entertainment of a fresh appeal if the dismissal of the first appeal does not bar the hearing of the fresh appeal. AIR (V 10) 1923 Pat 514 : 75 Ind Cas 284 : 4 PLT 405 : 1923 PHCC 213 : 2 Pat 739.

——S. 96 — Sustainability of — Decree set aside on review during pendency of the appeal.

Where a decree appealed from has since been set aside on review the appeal cannot be heard and must be dismissed. AIR (V 7) 1920 Lah 333 : 140 PR 1919 : 54 Ind Cas 966 (DB).

——S. 96 — Adverse finding — Not appealable if decree favourable.

When a suit is dismissed for want of cause of action there cannot be an appeal by defendant on finding of certain facts. AIR (V 3) 1916 Pat 306 : 20 CWN 1354 : 35 Ind Cas 837 (DB).

——S. 96 — Decree — Order of Assistant Commissioner — Dismissal for default.

An order of Assistant Commissioner refusing to restore a suit dismissed for default is not appealable. The remand by appellate court of such a case after allowing an appeal is 'ultra vires'. (1910) 7 ALJ 675 : 6 Ind Cas 464 (DB).

——S. 96 — Requisites of a valid appeal.

The requisites of a valid appeal are, first that no one can appeal from a judgment or decree unless he was a party to the action or was treated as such or is the legal representative of a party or has privity of estate, title or interest, apparent on the face of the record; secondly, that the appellant has an interest in the subject-matter of the suit; and thirdly, that the appellant is prejudicially affected by the decree complained of. (1910) 6 Ind Cas 244 (247) : 11 CLJ 580 (DB).

——S. 96 — Appeal, meaning of — Right of appeal — Nature of.

An appeal means a removal of a cause or suit from an inferior to a superior tribunal in order that the latter may revise, and if need be, reverse or amend the decision of the former. It is the continuation of a litigation commenced by a suit. The right of appeal is not a birthright of a party to a suit. Appeals must be given by statute or some equivalent authority. It cannot be denomi-

nated as the part of the practice of the inferior tribunal. (1908) 1908 AWN 211 (213, 214) (DB).

——**S. 96 (1), (2) (S. 540, old Code) — Cross-appeal — Appeal from finding in judgment by successful party — Procedure.**

Plaintiff brought an action for ejectment which was dismissed on the ground that it had been brought for a part of the tenancy, and therefore, not maintainable. The plaintiff appealed and the defendant also filed an appeal against a finding in the judgment as to the nature of the tenancy. The Judge decreed the defendant's appeal and affirmed the order of dismissal.

Held, that the procedure was erroneous. As the suit had been dismissed, the defendant could not appeal. The plaintiff's appeal should have been heard first, and if his grounds proved to have been well-founded, the defendant's objections should have been considered. (1906) 8 CLJ 552 (553) (DB).

——S. 96 — Discretion wrongly exercised — Remedy — Where the discretion vested in a court is wrongly exercised through over-sight, the proper course is to apply for review and not to appeal. (1902) 4 Bom LR 816 (817) (DB).

——**S. 96. O. 41, R. 4 (Ss. 540, 544, old Code) — 'Locus standi' of appellant — Common ground — Suit upon mortgage by Hindu widow — Son of next reversioner made defendant.**

Where in a suit upon a mortgage by one of two widows, the next reversioner and his son are brought in as claiming under a settlement executed by the other widow and a decree is obtained, the son of the next reversioner who is so impleaded as defendant has a 'locus standi' to maintain an appeal and to appeal against the whole decree under S. 540, C. P. C. (old Code). (1902) 14 MLJ 139 (140) (DB).

(a) Competency.

——S. 96 — Appeal — Maintainability — Test — Court giving findings on points in controversy — Appealability. (1947) 2 MLJ 523 : 1947 MWN 732.

——**S. 96 — Appeal against preliminary decree — Final decree during pendency — No application for stay — No appeal against final decree.**

An appeal from a preliminary decree is competent even though pending this appeal, the lower Court has made a final decree and the appellant has not asked for a stay of the proceeding after he instituted his appeal, nor has he filed an appeal against the final decree. AIR (V 25) 1938 Bom 222 : 40 Bom LR 164 : 175 Ind Cas 43.

——S. 96 — Appointment of trustees for 'waqf' property — Trustees dying — Application by certain persons for their appointment — Some persons found managing the property — Application dismissed — Appeal from the order of dismissal:

Held, that the appeal was incompetent. AIR (V 24) 1937 Oudh 381 : 1937 OWN (CC) 730 : 13 Luck 523 : 168 Ind Cas 803.

——**S. 96 — Plaintiff asking for decree against both defendants — Decree given against one.**

An appeal from a decree granting the plaintiff relief against only one of the two defendants whereas he asks for decree against both of them, is competent. AIR (Vol 24) 1937 Pat 428: 18 PLT 337: 3 BR 729: 170 Ind Cas 451.

——S. 96 — Appeal from order granting review without appeal from revised decree itself is competent. AIR (Vol 19) 1932 Cal 552: 36 CWN 212: 55 CLJ 98: 138 Ind Cas 713.

——S. 96 — Prayer of party granted — No appeal lies at the instance of that party. AIR (Vol 17) 1930 Lah 190.

——**S. 96 — Continuing Judge's opinion prevails.**

Appeal from the mofussil — Differences of opinion between the two judges of the High Court hearing the appeal — Confirming Judge's opinion prevails — Letters Patent (Madras), Cls. 15, 16 and 36. AIR (Vol 12) 1925 Mad 1032: 86 Ind Cas 857: 21 MLW 721 (DB).

——**S. 96 — Right of appeal.**

Where the point adversely decided to the defendant is correctly and substantially in issue and where in other proceedings the matter would be res judicata, it would be contrary to all principles of justice and equity to hold that he is precluded from agitating the matter in appeal merely because the suit was decided in his favour on some other ground.

In suits where declaration and consequential relief are sought and the consequential relief is refused because the Court is against the plaintiff's rights which he seeks to declare, it would be better if the decree formally embodied the result of the declaration; but even if it does not do so but simply dismisses the suit the decree in substance is one where the declaration is refused. AIR (Vol 11) 1924 Mad 689: 83 Ind Cas 960: 20 MLW 63: 1924 MWN 491: 47 Mad 633.

(b) Small Cause Suits.

——S. 96 — When the suit is tried by an ordinary Court after the plaint is returned by a Small Cause Court, the decision would be open to appeal under S. 96, Civil P.C., though the suit being a Small Cause Court suit, the right of second appeal would be subject to the provisions of S. 102 of Civil P. C. AIR (Vol 30) 1943 Cal 464: 47 CWN 664: 209 Ind Cas 302.

——**S. 96 — Small Cause — Suit transferred under S. 23 of the Prov. Sm. C. C. Act — Appeal — Remand.**

An appeal lies from a decree in a suit transferred from the Small Cause Court to the original side under S. 23 of the Prov. Sm. C.C. Act and the Appellate Court can remand the suit. AIR (Vol 6) 1919 Cal 1065: 45 Ind Cas 645 (DB).

——**S. 96 — Small cause suit tried on the original side — Appeal from decree.**

Where a suit of a small cause nature is instituted in a Court the presiding officer of which is not invested with small cause jurisdiction and is decided as an ordinary suit by the successor of the first officer who is invested with such jurisdiction, the nature of the suit is not altered and an appeal from the decree to the District Judge is competent. AIR (Vol 6) 1919 Cal 389: 51 Ind Cas 967 (DB).

(c) Whether lies.

——**S. 96 — Order of trial Court rejecting an application for final decree for foreclosure on the ground that Civil Court had no jurisdiction as scheme had been framed by Debt Relief Court — Appeal — Maintainability.**

The trial Court's order rejecting an application for a final decree for foreclosure on the ground that the Civil Court has no jurisdiction to entertain such an application as a scheme had been framed by Debt Relief Court is an adjudication conclusively determining the right of the parties and is as formally expressed as an order of that sort requires it and is, therefore, a decree and an appeal lies against it. AIR (Vol 32) 1945 Nag 68: 1944 NLJ 526: 219 Ind Cas 367.

——**S. 96 — No right when application made — Right subsequently conferred.**

The president and certain members of a Panchayat Board filed an application in the District Court against an order of surcharge made against them by the Examiner of Local Fund Accounts

and at that time there was no provision in the Local Boards Act for an appeal against the order of the District Judge.

The Act was amended subsequently providing for appeal and the order was passed thereafter. The president and the members who were unsuccessful in the application filed an appeal to the High Court:

Held, that an appeal did not lie even though at the time the order was passed there was provision for appeal. AIR (Vol 31) 1944 Mad 148: 1943 MWN 595: 215 Ind Cas 65.

——S. 96 — Appeal not existing when applications were filed — No appeal lies unless subsequent rule conferring right of appeal has retrospective effect.

Where when the applications were filed no right of appeal existed, no appeal would lie against the orders on such applications unless the subsequent rule establishing the right of appeal "expressly or by necessary intendment" gives it retrospective effect. AIR (Vol 30) 1943 Mad 208: 55 MLW 778: (1942) 2 MLJ 667: 1942 MWN 755: ILR (1943) Mad 501: 207 Ind Cas 612.

——S. 96 — Two altenative modes of seeking remedy — Court finally deciding one of them not available — That branch of case is finally decided and relates to substantive rights and raises a matter of controversy and therefore an appeal lies. AIR (Vol 28) 1941 Nag 84: ILR (1941) Nag 90: 1940 NLJ 663: 195 Ind Cas 91.

[Overruled in AIR (Vol 30) 1943 Nag 204 : 207 Ind Cas 625 (FB).]

——S. 96 — In the case of a suit under S. 33, U.P. Agriculturists Relief Act XXVII of 1934, an appeal would lie under S. 96, Civil P.C., against a decree passed in the suit to the District Judge. AIR (V 27) 1940 Oudh 196: 1940 OWN (CC) 271: 1940 RD 112: 15 Luck 456: 1940 AWR (CC) 138: 186 Ind Cas 663.

——S. 96 — Finding that there was no compromise.

An appeal lies from the decision of the Court that there was no compromise arrived at between the parties during the pendency of the suit. AIR (Vol 27) 1940 Pat 629: 6 BR 767: 189 Ind Cas 232.

——S. 96 — By the principle underlying S. 96 (3) no appeal lies against a consent decree. Hence a formal order releasing a portion of property from attachment with consent of parties is not appealable. AIR (Vol 24) 1937 Lah 29: 39 PLR 210: 169 Ind Cas 870.

——S. 96 — Order under the Tenancy Act — Special Acts.

If any order is passed under the Tenancy Act, then no appeal would lie from it unless it is provided in the Act itself. AIR (Vol 23) 1936 All 376 : (1936) ALJ 337 : 1936 RD 144 : 1936 AWR (HC) 393: 162 Ind Cas 954.

——S. 96 — Both plaintiff and defendant stating that decree may be granted in favour of plaintiff as claimed — Decree passed accordingly — Decree, if a consent decree — Appeal, competency of.

Where both the plaintiff and the defendant in their statements pray specifically that a decree be granted in favour of the plaintiff against the defendant as claimed and that decree is granted, it is impossible to say that it is not a decree passed by the Court with the consent of the partners, and no appeal lies against it under the provisions of S. 96, Civil P. C. 156 Ind Cas 1035 (Pesh).

——S. 96 — Tests.

The question whether an appeal lies or not from an order depends on the question whether the lower Court has conclusively determined the rights of the parties with regard to any of the matters in controversy in the suit. AIR (Vol 22) 1935 Pat 456: 2 BR 101: 159 Ind Cas 586.

——S. 96 — Departure from ordinary procedure — No appeal lies.

Dispute regarding land — Parties ask for departure from ordinary course of procedure calling upon court to inspect spot and decide questions from oral statements at spot — Court deciding question accordingly — No appeal lies. AIR (Vol 17) 1930 All 127: 122 Ind Cas 685: 1930 ALJ 452 (DB).

——S. 96 — District Board's resolution that no appeal be preferred — It is no reason for throwing out appeal when preferred by Board itself as incompetent. AIR (Vol 17) 1930 Oudh 434 (DB).

——S. 96 — Suit compromised in appeal and judgment passed in terms of compromise — Some terms of compromise omitted from judgment — Omission corrected in the presence of both parties under S. 152 — No second appeal lies against the order correcting omission. 24 Mad 646 Diss. from:

Held further, that the court had jurisdiction to make the order it did under S. 152. AIR (Vol 15) 1928 Lah 352: 119 Ind Cas 257: 9 Lah 176: 30 PLR 135 (DB).

——S. 96 — Original decree dismissing a suit — Decree passed on review decreeing the suit — Appeal therefrom setting aside that decree and mentioning that suit be dismissed — Appeal from original decree does not lie. AIR (Vol 12) 1925 PC 174 (2): 89 Ind Cas 185: 6 LRPC 128: 26 PLR 526.

——S. 96 — Costs — Question of principle must be involved.

An order as to costs is ordinarily a matter in the discretion of the trial court and unless some question of principle is involved no appeal can ordinarily be entertained. 80 Ind Cas 39 : 5 LRA Civ 573 : AIR (Vol 11) 1924 All 794.

——S. 96 — Prayers granted in part — Appeal lies.

Decree refusing exclusive but awarding joint possession aggrieves plaintiff. 82 Ind Cas 386 : 28 CWN 865 : 40 CLJ 90 : AIR (Vol 11) 1924 Cal 850 (DB).

——S. 96 (3) — Consent order — Not appealable.

No appeal lies from an order made by consent of parties especially if the appellant has derived some benefit under it. 30 CLJ 231 : 57 Ind Cas 70 : AIR (Vol 7) 1920 Cal 724 (DB).

——S. 96 (3) — Compromise — Excess of pleader's authority — Appeal.

An appeal lies against a decree passed on compromise entered into by a vakil without reference to his client. AIR (Vol 5) 1918 Mad 656: 41 Mad 233: 22 MLT 149: 41 Ind Cas 429 (DB).

——S. 96 (3) — Compromise — Dismissal of suit under O. 23, R. 3.

No appeal lies against an order of dismissal of a suit under O. 23, R. 3 of the C.P.C. AIR (Vol 3) 1916 Cal 80: 20 CWN 752: 34 Ind Cas 186 (DB).

——S. 96 — Costs — Order as to, on withdrawal.

Where on withdrawal of a claim against some defendants, a decree is passed which makes the defendants liable for their own costs, an appeal does lie. AIR (Vol 3) 1916 Mad 575: 18 MLT 460: (1915) MWN 1021: 31 Ind Cas 312.

——Ss. 96 (3) and 104, Cl. (2) O. 43, R. 1 (m) — Compromise — Petition — Objection — Appeal.

A second appeal lies against the decree of the Dist. Judge confirming on appeal the decree of the first Court passed in accordance with the terms of a compromise. All terms forming the consideration for the adjustment of matters in dispute be-

came related to the suit and can be embodied in the decree. AIR (Vol 2) 1915 Mad 322: 27 MLJ 173: 1 LW 541: 16 MLT 125: 25 Ind Cas 56 (DB).

——S. 96 — **Decree — Decision on issue — Suit for damages — Set off — Suit decided on limitation — Appeal.**

The plaintiff sued for damages for breach of contract. The defendant claimed a set off. The Court decided that plaintiff's claim was barred by limitation. On appeal it was held that the decision of the plaintiff's claim was not a decision of the suit which was one embracing both the claim and the set off and therefore no decree could be passed and that no appeal lay under S. 96. (1913) 6 SLR 287: 19 Ind Cas 922 (DB).

——S. 96 — **Order of single Judge of High Court.**

An appeal lies against an order of a single Judge sitting on the original side if that order decides a question of some right between the parties. An order directing one of the parties to file a suit was held to be an order deciding a question of right. (1908) 10 Bom LR 488: 33 B 216 (218-219) (DB).

(d) Amended decree.

——Ss. 96 and 152 — **Amendment of decree — Appeal — Material alteration.**

An appeal lies from an amended decree where an amendment has the effect of appreciably adding to the right of the decree-holder. AIR (Vol 2) 1915 Nag 37: 11 NLR 92: 29 Ind Cas 589.

——S. 96 — **Amendment of decree.**

No appeal lies against an order of amendment of decree but an appeal does lie from the amended decree. (1910) 11 CLJ 81: 5 Ind Cas 304 (DB).

(e) Observations in judgment.

——S. 96 — No appeal lies simply because finding on a particular matter was against appellant though suit against him was dismissed. AIR (Vol 12) 1925 Mad 264 (2): 84 Ind Cas 945: 20 MLW 734: 1925 MWN 141: 47 MLJ 743 (DB).

——S. 96 — **Appeal is only against decree.**

No appeal lies from judgment but only from decree where the order was to the effect that certain defendants are not liable for mesne profits. AIR (Vol 11) 1924 Cal 1006: 81 Ind Cas 527: 39 CLJ 251 (DB).

——S. 96 — Where suit is dismissed, findings in judgments as between co-defendants not embodied nor implied in decree are not res judicata nor appealable.—C.P. Code, S. 96. AIR (Vol 11) 1924 Mad 858: 47 MLJ 612: 85 Ind Cas 868: 1924 MWN 867: 22 MLW 384 (DB).

——S. 96 — **Adverse finding — Decree in favour of party.**

An appeal is not maintainable agaist opinions in a judgment when the decree is in favour of a party. AIR (Vol 6) 1919 Lah 418 (1): 53 PWR 1919: 51 Ind Cas 622.

——S. 96 — **Adverse finding — Not res judicata.**

No appeal lies from a decree merely on the ground that certain observations made in the judgment of the Court below are unfavourable to the person in whose favour the decree is passed.

An opinion of the Appellate Court in the course of a judgment in such an appeal cannot operate as res judicata when, in point of law, no appeal lay and the Court had no power to adjudicate on the rights of parties on an appeal from such a decree. AIR (Vol 5) 1918 Nag 91: 44 Ind Cas 723.

2. Consent Decree.

(a) Fraud.
(b) Award.
(c) Procedure — Extra cursum curiae.
(d) Order — recording compromise.
(e) Persons not party to compromise.
(f) Construction.

——S. 96 (3) — **Scope — Suit under S. 92 — Compromise decree — Appeal — Bar of.**

S. 96 (3) clearly and absolutely bars any appeal from a decree passed on consent or compromise, including a decree on compromise in a suit under S. 92, C. P. Code. 26 Pat 83: AIR (Vol 35) 1948 Pat 97 (DB)

——S. 96(3) — Mortgage suit — Compromise by parties whereby defendant agreeing to execute sale deed in favour of plaintiff of mortgaged property — Dispute as regards property comprised in mortgage deed referred to Court for decision — Court passing decree in terms of compromise and also entering in decree decision arrived at on matter in dispute:

Held, that no appeal lay. AIR (Vol 26) 1939 Pat 514: 5 BR 524: 18 Pat 261: 181 Ind Cas 42.

——S. 96 (3), O. 23, R. 3, O. 43, R. 1(m) — **Order recording compromise under O. 23, R. 3 — Appeal from such order.**

A reference to S. 96, Civil P. C., shows quite clearly that there is a clear and distinct prohibition of appeals against decrees passed by a Court with the consent of the parties. But S. 96, Civil P. C., clearly applies only to a case of a decree by consent of parties while O. 23, R. 3, Civil P. C., clearly applies to an order recording a compromise and O. 43, R. 1, cl. (m), Civil P. C., allows an appeal against an order passed under R. 3, O. 23, Civil P. C. AIR (Vol 23) 1936 Sind 59: 29 SLR 437: 163 Ind Cas 240.

——S. 96 — **Party offering to be bound by oath — Decree passed, if a consent decree.**

When a party offers to be bound by the statement of a certain person, that statement becomes conclusive evidence under the Oaths Act and it is on the basis of that evidence that the Court decides the case. It cannot, therefore, be said that the decree in such a case is passed with the consent of the parties. AIR (Vol 21) 1934 Lah 67: 15 Lah 305: 36 PLR 456: 149 Ind Cas 1102.

——S. 96 (3), O. 23, R. 3 — **Compromise — Order recording compromise — Decree — Appeal, if lies.**

Where a compromise has been recorded and it has not been challenged in any way by the lower Court which has passed a decree according to its terms, the recording of the compromise must be held to have been done by consent and S. 96 (3), Civil P. C., read with S. 108 will bar an appeal therefrom, nor does an appeal lie from the decree incorporating the terms of the compromise. AIR (Vol 20) 1933 Bom 205: 35 Bom LR 127: 57 Bom 206: 144 Ind Cas 448.

——S. 96 — **Compromise decree — Applicability.**

When an appeal against a decree recording a compromise for failure to pay court-fee is dismissed, the dismissal does not bar an appeal against an order recording the compromise, even if the compromise be disputed. For a consent decree to come within the prohibition of S. 96 (3) of the Civil P. C. it is not necessary that the consent should continue till the passing of the decree.

An order recording a compromise, followed by a decree, merges into the decree, and it is the decree that is appealable, and not the order. AIR (Vol 20) 1933 Pat 306: 14 PLT 1 Sup.: 12 Pat 359: 145 Ind Cas 1.

——S. 96 — **Agreement not to prefer appeal — — Contract Act (IX of 1872), S. 23.**

Where after the passing of a decree, the parties compromised their disputes and the party aggrieved by the decree agreed not to prefer an appeal, but he preferred an appeal in spite of the agreement:

Held, that the agreement was binding on the parties and the appellant could not be allowed to

prosecute the appeal. AIR (Vol 18) 1931 Nag 126: 14 NLJ 36: 134 Ind Cas 262.

——S. 96 — Consent — What is not.

The Court has jurisdiction to set aside an order made by consent which is not in the nature of final order or judgment but which is merely an interlocutory order in the suit provided proper grounds are made out. Such order can be set aside by an application made in the same suit. 32 Bom LR 667: AIR (Vol 17) 1930 Bom 362.

——S. 96 (3) — Consent — Finality of — No appeal lies.

Workmen's Compensation Act (VIII of 1923), Ss. 28 and 30 — Commissioner has power to pass any decree or order by consent of parties — Such decree or order is not appealable. 114 Ind Cas 372: 30 Bom LR 1610: AIR (Vol 16) 1929 Bom 68 (DB).

——S. 96 (3) — Consent — Compromise.

Decree on compromise — Party verifying or admitting compromise on behalf of other without authority — Other party can appeal against decree. 118 Ind Cas 753: 6 OWN 604: 4 Luck 562: AIR (Vol 16) 1929 Oudh 385 (FB).

——S. 96 — Consent decree — When appeal lies.

Where a compromise relates not only to property in dispute in the suit but also to other property, the order directing that a decree be passed in terms of the compromise not limited merely to the subject-matter of the suit, can be appealed against. 114 Ind Cas 101: AIR (Vol 16) 1929 Sind 32 (DB).

——S. 96 — Nature of compromise — Appeal as to, lies.

Roy, J.— Where the dispute is over the nature of a compromise, the appellant has a right in appeal to show what the compromise was. 106 Ind Cas 509 : 46 CLJ 353 : AIR (Vol 15) 1928 Cal 108 (DB).

——S. 96 — Consent — Objection.

Objection by a consenting party to a compromise decree can be entertained only by review or by a separate suit for setting it aside but not by way of appeal. 91 Ind Cas 620 : AIR (Vol 13) 1926 Cal 512 (DB).

——S. 96 — Does not apply to execution proceedings. 79 Ind Cas 594 : 4 PLT 735 : AIR (Vol 11) 1924 Pat 346 (DB).

——S 96 — Consent — Award.

Where the parties ask the Judge to dispose of a case on documentary evidence alone or request him to dispose of a case on the examination of the marks in a trade mark case, the Judge is not converted into an arbitrator so long as the parties have not bound themselves to abide by his decision. 76 Ind Cas 309: 18 SLR 306: AIR (Vol 11) 1924 Sind 134 (DB).

——S. 96 — Consent given by pleader under mistake of fact — Order cannot be set aside unless grave injustice is likely to happen otherwise. 77 Ind Cas 355: 40 CLJ 272: 18 MLW 437: 26 Bom LR 189: 33 MLT 376: 5 LR PC 30: AIR (Vol 10) 1923 PC 184: 46 MLJ 160: 47 MLJ 164.

——S. 96 (3) — Confession of judgment — Decree — Appeal.

A decree on a confession of judgment cannot be appealed from by the party so confessing where upon the offer of the plaintiff to be bound by oath of the defendant, the latter agreeing to the proposal filed a document purporting to be his statement on oath and was accepted by the court and the parties. The plaintiff cannot urge in appeal that the statement was really not on oath. 80 PLR 1913: 109 PWR 1913: 18 Ind Cas 758 (DB).

——S. 96 (3) — Compromise decree — Amended decree — Appeal.

The plea that a decree does not accord with the compromsie is an attack on the decree and can be taken only in an appeal and not in revision. 24 PR 1911: 10 Ind Cas 850: 186 PLR 1911: 56 PWR 1911.

——S. 96 — By consent, when can be set aside. (1905) 7 Bom LR 659 : 30 B 101 (107 - 108).

(a) Fraud.

——S. 96 — Compromise effected by Vakil by fraud — Remedy of party — Question of fraud, whether can be gone into in appeal.

If a party is owing to the fradulent action of his Vakil or others, committed to a compromise to which he did not wish to consent, his remedy is not by adducing evidence of fraud in an appeal against the order recording the compromise, but by taking proper action to get the decree set aside as having been obtained by fraud. AIR (Vol 23) 1936 Mad 385: (1936) MWN 86: 70 MLJ 400: 43 MLW 722: 163 Ind Cas 161.

——S. 96, O. 23, R. 3 — Decree on adjudication and consent decree — Distinction — When can be set aside — In case of consent decree, allegation of fraud, if essential, in suit to set it aside.

A suit to set aside a decree passed on adjudication does not lie unless the decree is attacked on the ground of fraud. But consent decrees stand on an entirely different footing. Such decrees derive their force primarily from the consent of the parties. If in fact no consent was given, or if the parties had not been 'consensus ad idem', or if the consent of one was procured by misrepresentation, undue influence or coercion, the foundation of the decree is shaken. If a party has to get rid of the decree, he can do so on any of the grounds on which a contract can be avoided and this relief he can also obtain in a suit. 164 Ind Cas 561: 61 CLJ 193: 39 CWN 938: 62 Cal 642.

——S. 96 — Suit to set aside — Grounds other than fraud.

Where a decree is passed by the court upon an adjudication of the merits of the cases, no separate suit will lie except on the ground of fraud. The only remedy of a minor in other cases is by an application for review. But where the court comes to no decision, and the decree is passed upon a compromise, a suit will lie to set aside the decree upon grounds other than fraud (e.g.,) that the pleader entered into a compromise contrary to instructions. (1906) 34 C 83 (89, 90) (DB).

(b) Award.

——S. 96 — Appeal from award provided — Proceeding in appeal declared nullity — Original award is not merged in appellate decision. AIR (Vol 31) 1944 PC 76: (1944) ALJ 395: 48 CWN 590: (1944) 2 MLJ 17: 1944 MWN 561: 57 MLW 520: 71 IA 106: ILR (1944) Bom 469: ILR (1944) Kar 230: 216 Ind Cas 169.

——S. 96 — Award — Objections to, rejected as time-barred — Decree passed in terms of award — Appeal against order, held not competent — Revision, held maintainable. AIR (Vol 20) 1933 Rang 38: 142 Ind Cas 835.

——S. 96 — Reference to arbitration — Consent of parties — Decree passed in accordance with award — Award becomes final — Decree is not open to either appeal or revision. AIR (Vol 19) 1932 Oudh 156: 9 OWN (CC) 191: 7 Luck 642: 137 Ind Cas 151.

——S. 96, Sch. II, paras. 15, 16 — **Decree on award — Appeal attacking validity of award — Competency of.**

No appeal lies from a decree where such decree is passed in accordance with an award though the award may be invalid. (1931) 132 Ind Cas 180 (Lah).

(c) **Procedure extra cursum curiae.**

——S. 96(3) — **Parties asking Court to follow procedure not contemplated by Code — Decree — Appeal.**

Where the party invites the Court to adopt a procedure which is not contemplated by the Civil P. C., and in fact the procedure is extra cursum curiae, he cannot turn round and say that the Court is to blame for the very procedure which he invited the Court to follow. In each case the Appellate Court will try to find as to what the true intention of the party was and the question whether an appeal lies or not will depend upon the conclusion arrived at by the Court.

The intention of the parties must be gathered in each case and if the intention is clear that the parties are binding themselve by the decision that might be given by the Court, no appeal would lie, but if such an intention cannot be gathered, then the right to appeal is not shut out. AIR (Vol 26) 1939 Pat 514: 5 BR 524: 18 Pat 261: 181 Ind Cas 42.

——S. 96 — **Agreement between parties to abide by decision of Court — Decree whether consent decree — Appeal, competency — Guiding principles.**

Where the parties to a proceeding agree to abide by the decision of the Court on the evidence already on record, the principle to be applied in determining whether an appeal lies from the decree is this, namely, that if the proceeding is extra cursum curiae, the decision is in the nature of a consent order and generally the right of appeal is barred. If, on the other hand, it is not extra cursum curiae, unless there is a clear waiver of the right, the right of appeal will not be lost; in that case, the person who contends that no appeal will lie, must clearly show that the right has, either expressly or by necessary implication, been given up.

Where the material portion of the statement put in by the parties to a pending suit ran as follows:-

"Both the parties by consent pray that the Court may be pleased to consider the evidence already on the record and the documents filed so far and give a final, decisive adjudication between the parties without there being any necessity for examining further witnesses and so on. Both the parties further agree to be bound by the decision and to act according to it by giving full effect thereto":

Held, that though the proceeding was not extra cursum curiae, the right of appeal was nevertheless barred by the agreement. AIR (Vol 21) 1934 Mad 397 : 66 MLJ 622 : 39 MLW 637 : (1934) MWN 640 : 58 Mad 31 : 151 Ind Cas. 234.

——S. 96 — Where the parties give their consent to the Court as to the procedure which the Court is to adopt in matter of coming to a decision on the merits of the case and they also give their consent that such a decision will be binding on them, it is tantamount to saying that the decision will be final and no right of appeal will be exercised by the parties.

The parties cannot resile from the agreement and an appeal is incompetent. S. 28, Contract Act, does not appiy to the case and it is not necessary that the agreement should be considered to be an adjustment within the meaning of O. 23, or that the effect of the agreement should be to constitute the Court an arbitrator in the controversy: AIR (Vol 16) 1929 Oudh 451 : 120 Ind Cas 826 : 6 OWN 771 (DB).

——S. 96 — **Consent — Agreement.**

Parties agreeing to produce only documentary evidence and to be bound by the decision thereon — Decision is not open to appeal. Where in pursuance of an agreement between the parties the Court proceeds outside its ordinary jurisdiction the proper inference would be that there was to be no appeal from the decision as would be in the case if the trial were in the ordinary way. But it does not follow that unless the Court has proceeded outside its ordinary jurisdiction a right of appeal always exists. AIR (Vol 13) 1926 All 90: 89 Ind Cas 586 : 6 LRA Civ. 541.

(d) **Order, recording compromise.**

——S. 96 — No appeal would lie against a compromise decree but an appeal would lie against the order recording the compromise and a petition for revision would lie to the High Court against the appellate order. AIR (Vol 23) 1936 Lah 963: 168 Ind Cas 328.

—S. 96 — Appeal lies against an order recording compromise even when there has been no dispute or contention before the trial Court as to the factum of the compromise and the order was made ex parte. AIR (Vol 23) 1936 Mad 347: (1936) MWN 199: 43 MLW 386: 70 MLJ 471: 161 Ind Cas 728.

——S. 96 — No second appeal lies from an order recording a compromise when the factum or legality of the compromise is questioned. AIR (Vol 22) 1935 Cal 239: 60 CLJ 173: 39 CWN 480: 62 Cal 229: 155 Ind Cas 915.

——S. 96 (3), O. 23, R. 3, O. 43, R. 1 (m) — **Order recording compromise — Appeal from order after passing of decree — Maintainability.**

An appeal from an order under O. 23, R. 3, Civil P. C., recording a compromise is not incompetent merely because it was preferred after a decree had been made. It is not necessary to prefer an appeal both from the order and decree passed in pursuance of the order. AIR (Vol 20) 1933 Cal 94: 36 CWN 1013: 57 CLJ 26: 141 Ind Cas 732.

——S. 96 — **No appeal lies.**

Order recording compromise — Decree passed thereafter — Appeal filed afterwards from order recording compromise is incompetent — C. P. Code., S. 11. AIR (Vol 13) 1926 Cal 412: 87 Ind Cas 248: 29 CWN 928 (DB).

—S. 96 — There can be no appeal from an order regarding compromise, when it has become merged into a subsequent decree in terms of the compromise. AIR (Vol 9) 1922 Mad 446: 70 Ind Cas 425: 16 MLW 440: 1922 MWN 495: 31 MLT 132: 43 MLJ 290 (DB).

——S. 96 (3) — **Compromise decree — Civil P. C., O. 23, R. 3.**

A decree under O. 23, R. 3 can be passed only after there has been an order that the compromise be recorded; this being not a mere matter of form, a consent decree passed without such order is liable to be set aside on appeal notwithstanding the bar under S. 96 (3). AIR (Vol 4) 1917 Cal 607: 43 Cal 85: 33 Ind Cas 769. (DB).

——S. 96 (3) and O. 43, R. 1 (m) — **Compromise — Order directing compromise to be recorded — Appeal.**

An order directing a compromise to be recorded does not cease to be such simply because it directs at the same time a decree to be passed in accordance with it; such an order is appealable under O. 43, R. 1 (m); S. 96 (3) is not applicable. AIR (Vol I) 1914 Lah 112: 134 PWR 1914: 96 PR 1914: 212 PLR 1914: 24 Ind Cas 630 (DB).

(e) Persons not party to compromise.

——S. 96 (3) — Ex parte decree — Consent decree — Party not consenting may appeal.

Where a consent decree is passed, a party who has not consented to the compromise by his abstention from appearance, is still a party to the decree and if he thinks that he is injured by the compromise behind his back, it is open to him to apply to have the decree against him set aside or to appeal against that decree which, although it is a consent decree so far as the other parties were concerned, is not a consent decree so far as he is concerned. AIR (Vol 15) 1928 Mad 922: 108 Ind Cas 784 (DB).

——S. 96 — Party not consenting may appeal.

Party not joining in the compromise can appeal if prejudicially affected. AIR (Vol 12) 1925 Cal 421: 85 Ind Cas 168: 40 CLJ 535 (DB).

——S. 96 (3) — Compromise — Person not party can appeal.

A person who is not a party to the compromise, though a party to suit, can appeal against the compromise decree which binds only those who are parties to the compromise. AIR (Vol 3) 1916 Cal 783: 22 CLJ 333: 20 CWN 178: 31 Ind Cas 426. (DB).

——S. 96 (3) — Consent decree — Partition suit.

An appeal may be prefered by persons not parties to a consent decree. A consent decree in a partition suit as between some of the parties is not binding on any of the parties. AIR (Vol 2) 1915 Cal 473: 27 Ind Cas 242 (DB).

(f) Construction.

——S. 96 (3) — Applicability — "Consent decree" — Meaning of — Appeal, when barred.

The cases in which an appeal is barred under S. 96 (3), C. P. Code, are those in which the decree is passed on consent of the parties. It is not necessary for the application of S. 96 (3) that there should have been a compromise duly recorded under O. 23, C. P. Code. But there must be consent of the parties to the particular decree.

The fact that the parties make certain admissions of fact and even express their view of the law, would not make the decree a consent decree, when they leave the decision to the Court and do not intimate either expressly or impliedly that they would accept that decision. Hence an appeal is not barred in such a case under S. 96 (3). (1949) ILR (1949) A 604 (DB).

——S. 96 — Parties agreeing to certain test as basis of decree — Court putting test and passing decree.

Where parties to a suit come to an agreement that if one of the parties alleged to be congenitally deaf and dumb would, in the presence of the Court, talk a little, and if she can hear anything spoken by the Court, or in the presence of the Court can hear things said by some one else and can speak a little, then the claim of such party to inheritance would be decreed, and in pursuance of the agreement the Court calls that party and comes to a decision that the party is somewhat hard of hearing, but is not deaf; cannot speak distinctly, but is not dumb; and holds that the party is neither congenitally deaf nor dumb, and that she is entitled to inheritance, the decision is in effect a consent decree based on an agreement amounting to a compromise and consequently the decree is not appealable. AIR (Vol 27) 1940 All 190: 1940 ALJ 38: ILR (1940) All 185: (1940) AWR (HC) 50: 188 Ind Cas 114.

——S. 96 (3) — Oaths Act (10 of 1873), S. 11 — Party offering to be bound down by evidence of witness — Decree, if consent decree — Appeal — Separate suit to set the decision aside.

Consent decree means decree in suit which has been compromised. An agreement to be bound by the evidence of a witness is not an agreement to compromise the suit and the suit is eventually decided on the evidence of that witness, who may or may not be a party. Such a decree is not a consent decree and is appealable. An appeal, for example, might succeed on the ground that the evidence did not justify the decision. The remedy of the aggrieved party, in such a case is, therefore, to appeal against the decision and not to bring a separate suit to set it aside. AIR (Vol 25) 1938 Nag 64: ILR (1940) Nag 310: 172 Ind Cas 421.

——S. 96 — Decree on compromise.

Decree passed on compromise is a consent decree, whether the compromise is admitted by both or disputed by one of the parties. AIR (Vol 22) 1935 Cal 239: 60 CLJ 173: 39 CWN 480: 62 Cal 229: 155 Ind Cas 915.

——S. 96 — Consent decree is still a contract which must be construed as such, although it has the sanctity of a judgment. AIR (Vol 22) 1935 Pat 123: 1 BR 597: 156 Ind Cas 302.

——S. 96 — Consent — Scope.

Where counsel for defendant conceded that he was not prepared to contest what had been the previous finding of the District Judge, that finding having been maintained by the High Court in appeal in another case but about the same transaction and allowed the decree to be passed, such a decree is a consent decree and no appeal lies from it. (1928) 109 Ind Cas 713: 10 LLJ 333.

——S. 96 — Where illegitimate daughters, though not entitled to maintenance from their father's family, were given a decree for maintenance by the trial Court in order to avoid any further litigation with the consent of the opposite party, but they appealed against the decree for maintenance:

Held, that it was not a consent decree and since there was a breach of agreement on the part of the daughters, they are not entitled to maintenance. AIR (Vol 15) 1928 Mad 127: 53 MLJ 861: 1927 MWN 750: 107 Ind Cas 419 (DB).

——S. 96 — Where in a suit under S. 92, C. P. Code, the plaintiffs through their counsel merely approved of the appointment of certain gentlemen as a committee of management.

Held, that this did not make the decree a consent decree, when in other matters decided by the Judge, there was no consent by either party to his conclusions. AIR (Vol 14) 1927 Lah 382: 100 Ind Cas 838 (DB).

——S. 96 — Where both the parties stated that the Court may inspect the locality in dispute and they will be bound by the decision on inspection and agreed not to give evidence.

Held, that a decree passed in accordance with that decision is a consent decree, not subject to provisions of Sch. 2, C. P. Code, and is final and non-appealable. (1926) 94 Ind Cas 7 (All).

——S. 96 — Consent to decree on Court's compulsion — Decree is not consent decree. AIR (Vol 10) 1923 Lah 129: 69 Ind Cas 653 (DB).

——S. 96 — Consent — Appeal.

Decrees in accordance with adjustment are decrees passed with the consent of parties within the meaning of S. 96 (3)—No appeal lies. AIR (Vol 9) 1922 Lah 309: 3 Lah 175: 66 Ind Cas 258 (DB).

——S. 96 — A decree passed with consent does not mean only a decree passed with the consent of the parties expressed at the moment the de-

cree is passed. (27 MLJ 173 and 41 Mad 233, Diss. from). So, a decree passed on the basis of consent originally given but subsequently withdrawn is a consent decree. 27 MLJ 173 and 41 Mad 233, Diss. from. AIR (Vol 8) 1921 Mad 696 : 16 MLW 155 : 1922 MWN 83 : 66 Ind Cas 837 (DB).

——S. 96(3) — Consent decree — Waiver of limitation — Appeal.

Where the plea of limitation is waived though the suit is time-barred, the decree following is a consent decree and thus not appealable. AIR (Vol 7) 1920 PC 139: 13 ALJ 625: (1920) MWN 366: 39 MLJ 68: 28 MLT 97: 12 LW 260: 24 CWN 1055: 2 UPLR 122 (PC): 56 Ind Cas 539.

——S. 96 (3) — Consent decree — What is — Appeal.

Every decree incorporating an agreement, compromise or satisfaction ordered to be recorded under O. 23, R. 3, is not ipso facto a decree 'passed with the consent of the parties' within S. 96 (3) which is limited to cases where the parties invite the Court to pass a particular decree and the Court acts accordingly.

A decree based on a finding against the consent of a party, that the matter has been compromised is not within S. 96 (3) and is appealable. A decree dismissing the suit on the ground that a plea in bar of the suit on the basis of an alleged compromise is established cannot properly be said to be one made under O. 23, R. 3. AIR (Vol 5) 1918 Nag 129: 46 Ind Cas 775.

——S. 96 (3) — Consent decree — Decree without objection by defendant.

The fact that defendant does not raise any objection to a particular relief cannot make the decree a consent decree when the relief is eventually decreed. AIR (Vol 5) 1918 Nag 66: 15 NLR 39: 49 Ind Cas 840.

——S. 96 (3) — Consent order — Appointment of Commissioner — Scope.

An order directing the appointment of a Commissioner with the consent of parties does not come under Cl. (3) of the section. AIR (Vol 3) 1916 Mad 795: 29 MLJ 219: 30 Ind Cas 357 (DB).

3. Court-fee and valuation.

——S. 96 — Appeal dismissed for non-payment of deficit court-fees demanded.

An order dismissing an appeal for non-payment of deficit court-fees demanded by the Court following an adjudication on the classification of the suit and the appropriate court-fees payable therein, is appealable. Even if such an order is not appealable, an appeal lies against an order adjudicating the valuation of the suit and the court-fee payable. AIR (Vol 29) 1942 Cal 539: 46 CWN 697: 75 CLJ 393: ILR (1942) 2 Cal 253: 201 Ind Cas 683.

——S. 96, O. 7, R. 11 — Decision that suit falls within a particular class.

Though there is no appeal against a decision as to the correct valuation for any particular class of suits, still there is an appeal against a decision that any particular suit falls within a particular class. AIR (Vol 23) 1936 Bom 166: 38 Bom LR 218: 162 Ind Cas 227.

——S. 96 — Non-payment of court-fee — Rejection of plaint.

Dismissal of a suit on the ground that proper court-fee is not paid within time allowed, amounts to rejection of plaint under O. 7, R. 11, Cls. (b) and (c). An appeal and second appeal lie from that order but no revision lies from the order of the Appellate Court dismissing the appeal. AIR (Vol 22) 1935 Cal 157 (1): 38 CWN 1063: 60 CLJ 197: 154 Ind Cas 820.

——S. 96 — Practice — Appeal — Court-fees — Appeal by defendant — Valuation.

Liability found to exist by trial Court denied in toto or liability denied for portion of claim which has been definitely valued in plaint—Defendant appealing—He can value his appeal otherwise than at the value which the plaintiff has placed upon his relief. AIR (Vol 18) 1931 Pat 335: 10 Pat 458: 133 Ind Cas 365.

——S. 96 — Appeal — Practice — Valuation.

The appellant is not entitled to value his appeal on the assumption that a ground which he proposes to take in argument, which he has not even taken in his memorandum of appeal is on the face of it likely to be successful. AIR (Vol 17) 1930 Pat 605.

4. Decree.

See also S. 2(2).

(a) Ex parte.

(b) Orders amounting to.

(c) Orders not amounting to.

——S. 96 — Partition suit — Interlocutory order — Application for taking accounts after preliminary decree — Order on appeal, if lies.

There can only be one decree after the passing of the preliminary decree for partition and not several decrees. Any orders which the Court may pass antecedent to the passing of the final decree for partition in course of proceedings for the preparation thereof cannot be designated a decree liable under S. 96.

An order passed after the preliminary decree on an application by one of the parties for accounts, can very well be challenged by him in the appeal from the final decree, the order being of an interlocutory character and not a formal expression of an adjudication which conclusively determines the rights of the parties within the meaning of S. 2(2), open to appeal. AIR (Vol 32) 1945 Oudh 312: 1945 AWR (CC) 214: 1945 OWN (CC) 363: 222 Ind Cas 34.

——S. 96 — The dismissal of the application for a final decree for sale on a mortgage, being appealable as a decree under S. 96, is not open to revision under S. 115. AIR (Vol 28) 1941 Mad 817: ILR (1942) Mad 60: (1941) 2 MLJ 125: 54 MLW 107: 1941 MWN 741: 200 Ind Cas 520.

——S. 96 — Decree contemplated by S. 96 is a decree made in a suit. An order in a proceeding under S. 26-G, Bengal Tenancy Act, cannot be said to be an order in a suit, since such proceeding is started by an application and not by a plaint. AIR (Vol 26) 1939 Cal 717: 43 CWN 1108: 185 Ind Cas 368.

——S. 96 — 'Decree' in S. 2(2), Civil P. C. includes the dismissal of a suit under S. 112 (2) of the Berar Land Rev. Code and an appeal lies from the order of the dismissal. AIR (Vol 26) 1939 Nag 110: 1939 NLJ 157: ILR (1939) Nag 452: 182 Ind Cas 52.

——S. 96 — Point that plaintiff had failed to carry out decree of trial Court.

When an appellant goes to an Appellate Court, he makes his appeal against the decree of the trial Court and not against the failure of the opposite party to carry out that decree subsequently. There is no legal obligation on the defendant-appellant, to raise the point in the Court of appeal that the plaintiff has failed to carry out the decree of the trial Court and no result can follow against his interest on account of his not raising this point. AIR (Vol 25) 1938 All 497: 1938 AWR (HC) 495: (1938) ALJ 673: 177 Ind Cas 824.

——S. 96 — Application under O. 34, R. 5 for making preliminary decree absolute — Application by judgment-debtor stating that he intends applying to Local Government under U. P. Agriculturists' Re-

lief Act, and praying for dismissal of application under O. 34, R. 5 — Application of judgment-debtor dismissed — Appeal by judgment-debtor.

Held, that the appeal was not one under Ss. 47 and 96 against a decree but one against an order under the U. P. Agriculturists' Relief Act and hence was not maintainable. (1938) 168 Ind Cas 721: 13 Luck 593: 1937 OWN (CC) 594: 1937 RD 324.

——S. 96 — An application under S. 144 on the Original Side, long after the suit had been determined and the rights of the parties fully settled by final judgment, is not an application in a suit at all; nor is the order made on it a judgment. Neither it is a final judgment.

It is merely an order and not a "judgment" under the Letters Patent and is not a decree and there is no right of appeal under S. 96 since the jurisdiction of the Appellate Court in matters decided on Original Side is regulated by the Letters Patent and not by Civil P. C. AIR (Vol 25) 1938 Rang 446: 178 Ind Cas 562.

——S. 96 — Memorandum of appeal rejected for want of sufficient stamp — Appeal.

Where a memorandum of appeal is rejected on the ground that the deficient court-fee has not been paid, the order does not amount to a decree and no further appeal lies from it. AIR (Vol 23) 1936 Pesh 140: 163 Ind Cas 462.

——S. 96 — Appeal lies against decree passed on review — Appellant can claim in such appeal that the amount awarded by the original decree should be increased. AIR (Vol 19) 1932 Nag 143: 28 NLR 245: 140 Ind Cas 21.

——S. 96, O. 47, R. 4 — Decree modified in review — Appeal from original decree, competency of — Effect of review on original decree.

If an application for review is successful to however slight an extent it may be, the modified decree is the final decree for the purposes of an appeal & the fact that no decree was drawn up or that a decree was drawn up to the extent of the modification does not affect the question. Consequently, an appeal against a decree anterior to review, filed pending the review, without any appeal from the amended decree, is not competent. AIR (Vol 18) 1931 Cal 323: 34 CWN 1002: 131 Ind Cas 258.

——Ss. 96, 115 — The mere fact that the judgment is headed "order" does not make it any the less a judgment; nor does the fact that the office chose to endorse upon the decree that it was a decretal order make any difference. AIR (Vol 18) 1931 Mad 471: 60 MLJ 167: 33 MLW 143: 54 Mad 337: (1931) MWN 590: 132 Ind Cas 654.

——S. 96 — Consolidation of suits — One appeal enough.

When two suits undoubtedly are in respect of the same transaction and have been connected by making the plaintiff in one, the defendants in the other, and vice versa, it must be assumed that they were consolidated, and even though separate copies of the judgment and the decree be placed on the record of the cases it must be held that there was one consolidated decree and it is not necessary for a party to file more than one appeal provided the party against whom he wants to press his appeal is impleaded as respondent, pro forma or otherwise. AIR (Vol 17) 1930 All 706: 1930 ALJ 842 (DB).

——S. 96 — Decree amended on review — Need for filing fresh appeal.

It is possible for a party to make an application for review and at the same time before that is decided to file an appeal. The right course where parties adopt simultaneous remedies or endeavour to do so if the review measures are successful to any extent whatever is that a new decree should be drawn against the decree as it appears in its final shape.

Per Suhrawardy, J.—In a proper case the Court may grant time to a party to file an appeal from the final decree in the place of the appeal from the original decree. AIR (Vol 18) 1931 Cal 323: 34 CWN 1002 (DB).

——S. 96 — No cross-appeal when there is no decree.

Where a suit is decreed against some of the defendants & dismissed against the minor defendants as they were not represented it is not at all open to the plaintiff to prefer a cross-appeal against such dismissal as it does not amount to a decree. AIR (Vol 16) 1929 Cal 669: 33 CWN 742 (DB).

——S. 96 — What is.

To be "decree" decision must be final whichever way decided. AIR (Vol 16) 1929 Mad 404 (DB).

——S. 96 — Appeal against preliminary decree — — Subsequent final decree does not affect.

Where there has been a preliminary decree and a final decree and the dates permit the appellants to challenge both the preliminary decree and the final decree within the time allowed by law it is unreasonable to allow the appellant to avoid the provisions of the Court-fees Act and obtain a reversal of the final decree by a circuitous method.

The proper course is to allow the appellant a reasonable time within which to amend his appeal. 18 Bom LR 76 and 18 Bom LR 80 not Foll. Where the appeal against the preliminary decree was filed before the final decree was made and the date did not allow of an appeal against both the preliminary decree and the final decree.

Held, that subsequent passing of the final decree did not render the appeal against the preliminary decree nugatory but that the final decree being dependent on the preliminary decree if the latter was set aside the former would fall with it. AIR (Vol 12) 1925 Sind 178: 18 SLR 133: 78 Ind Cas 978 (DB).

——S. 96 — What is.

An order rejecting the claim of a person to be the legal representative of a deceased plaintiff which does not conclusively determine the right of the parties in the suit is not appealable and therefore is revisable. AIR (Vol 11) 1924 Mad 813: 35 MLT 82: 1924 MWN 763: 47 MLJ 370: 80 Ind Cas 942.

——S. 96 — Effect of appeal.

Appeal being a continuation of the original proceeding, the Appellate Court's decree is the decree in the suit. AIR (Vol 4) 1917 Mad 597: (1916) 1 MWN 223: 30 MLJ 379: 19 MLT 268: 33 Ind Cas 9 (DB).

(a) Ex parte.

——S. 96 — Appellate Court is to look to the merits only.

In an appeal from an ex parte decree, the only question with which the appellate Court is ordinarily concerned is whether the evidence on the record is sufficient to support that decree, and that the question of due service of summons is the subject-matter not of an appeal from the decree but of the special proceeding under O. 9. AIR (Vol 11) 1924 Rang 137: 2 Bur LJ 282: 2 Rang 108: 79 Ind Cas 506 (DB).

——S. 96 and O. 9, R. 6 and O. 17, R. 2 — Decree — Defendant — Absent — Plaintiff examined — Decree ex parte — Application for rehearing rejected — No appeal preferred — Appeal against decree — No interference in second appeal.

On an adjourned hearing of a suit, the defendant, his pleader and his witnesses were absent; the Court passed a decree after hearing the plaintiff. An application for rehearing the case by the

defendant was rejected as the Munsif had no jurisdiction and the defendant was left to appeal in the regular way. The appeal by the defendant against the original decree was dismissed.

Held, on second appeal that the decree passed by the Munsif in the absence of the defendant was a decree ex parte, and upon the dismissal of his application for rehearing he could have appealed against the order to the District Judge, but cannot appeal against the decree under S. 96. As he had preferred an appeal against the decree and as the appeal was dismissed on the merits, the High Court could not interfere. AIR (Vol 4) 1917 All 475: 39 All 143: 14 ALJ 1226: 36 Ind Cas 277 (DB).

(b) **Orders amounting to.**

——**S. 96 — Dismissal of application under O. 34, R. 6.**

An order dismissing an application for a personal decree under O. 34, R. 6 has a force of a decree and is appealable under S. 96 and not under O. 43, R. 1(q). AIR (Vol 32) 1945 Nag 289: ILR (1945) Nag 643: 1945 NLJ 409.

——**S. 96 — Restitution.**

An order of restitution under S. 151 as opposed to one under S. 144 is appealable as a decree. AIR (Vol 27) 1940 Nag 349: ILR (1940) Nag 538: 1940 NLJ 350: 191 Ind Cas 566.

——**S. 96 — Order under O. 22, R. 3.**

An order dismissing an application by the legal representative of a deceased appellant for being brought on the record on the ground that the right to sue did not survive, is appealable at the instance of such legal representative as it amounts to a decree within S. 2(2). AIR (Vol 22) 1935 Lah 47: 36 PLR 359.

——**S. 96 and O. 22, R. 34 — Decree — Abatement.**

An order declaring a suit to have abated is a decree from which an appeal lies. Although Rr. 3 and 4 of O. 22, C. P. C. do not expressly state that the abatement of a suit has the same effect as a dismissal of a suit, that appears to be the meaning of the legislature (for purposes of appeal and second appeal.) AIR (Vol 4) 1917 Mad 285: 19 MLT 364: 30 MLJ 486: (1916) 1 MWN 301: 34 Ind Cas 372 (DB).

——S. 96 (S. 540 old Code) — An order dismissing a suit as abated is a decree from which an appeal and a second appeal will lie. (1902) 12 MLJ 380 (381): 26 M 224 (DB).

(c) **Orders not amounting to.**

——**S. 96 — Order directing preparation of final decree in a partition suit — Appealability.**

An order passed in a partition suit giving directions for the preparation of a final decree cannot by itself be treated as a decree and the C. P. Code does not allow an appeal against such an order. (1950) 1950 AWR 280.

——S. 96 — An order on petition praying that the value of certain property sought to be sold by the Court in execution of a decree should be settled and stated in the proclamation, is not a decree under S. 47 and is not appealable under S. 96. The order does not amount to a "judgment" also within the meaning of Cl. 15, Letters Patent (Bombay.) AIR (Vol 26) 1939 Bom 182: 41 Bom LR 328: ILR (1939) Bom 389: 182 Ind Cas 409.

——S. 96 — Order by Appellate Court under O. 41, R. 5 refusing to stay execution is not a decree and no appeal lies therefrom. AIR (Vol 26) 1939 Bom 65: 40 Bom LR 1198: 180 Ind Cas 34.

——**S. 96 — Order between preliminary and final decree.**

In a suit for partition there are only two decrees; a preliminary decree and a final decree. No third decree can be passed by the trial Court and where an order is passed between a preliminary and final decree, the order does not amount to a decree although it may finally decide the rights of the parties so far as the trial Court is concerned. Such an order is an interlocutory one and no appeal lies therefrom. AIR (Vol 24) 1937 All 694: (1937) ALJ 809: 1937 AWR 692 (HC): 171 Ind Cas 839.

——S. 96 — An order on an application under S. 44, Madras Hindu Religious Endowments Act not being a decree is not appealable. AIR (Vol 22) 1935 Mad 373: 68 MLJ 423: 41 MLW 682: (1935) MWN 657: 158 Ind Cas 530.

——S. 96 — District Judge passing order setting aside rejection of plaint — Order is neither a decree nor an appealable order — No appeal lies under O. 43, R. 1(a). AIR (Vol 21) 1934 Pesh 88: 152 Ind Cas 241 (2).

——**S. 96 — Decree — Interlocutory order — Appealable.**

Interlocutory order for the examination of the account of the Receiver is not a decree and is not appealable. (1910) 13 CLJ 459: 6 Ind Cas 323 (DB).

5. Effect of appeal.

——S. 96 — It is well-settled principle of law that where an order of a Court is vacated in appeal all the proceedings taken in consequence of the vacated order fall to the ground. AIR (Vol 20) 1933 Pat 209: 144 Ind Cas 309.

——**S. 96 — Sustainability of — Appeal — Fruitless even if successful.**

In execution, the Court directed the properties of the judgment-debtor to be sold in a particular order. The judgment-debtor appealed but before the appeal was heard, the properties were sold and objections to the sale were rejected.

Held that the appeal was incompetent and should be dismissed, because even if it were successful, it would be fruitless, as the sale could now be set aside. (1912) 15 Ind Cas 529 (Cal) (DB).

——**S. 96 — Effect of appeal on decree appealed against.**

The decree of the lower Court does not cease to be binding upon the parties by the mere fact of appeal, though the pendency of the appeal would open the whole question for the appellate Court. (1902) 12 MLJ 360 (366) (DB).

6. Interpretation.

See Notes 1 and 2.

7. Jurisdiction.

——S. 96 — Special jurisdiction conferred on existing Court — Its decisions are subject to revision or appeal if provided by statute. AIR (Vol 31) 1944 Cal 401: 48 CWN 699.

——S. 96 — Appellate and revisional jurisdiction — Distinction between, explained. AIR (Vol 30) 1943 Bom 42: 44 Bom LR 924: ILR (1943) Bom 33: 204 Ind Cas 567.

——S. 96 — It is the plaintiff's valuation in his plaint which controls the jurisdiction not only of the first Court but of the Appellate Court. AIR (Vol 26) 1939 All 273: 1939 AWR (HC) 59: (1939) ALJ 133: ILR (1939) All 172: 181 Ind Cas 939.

——**S. 96 — Pecuniary jurisdiction.**

The plaintiff collateral brought a declaratory suit alleging that a certain alienation, total consideartion of which was Rs. 13.000. made, was without consideration and legal necessity and therefore should not affect his reversionary rights. The trial Court held that the plaintiff was a collateral of the vendor, that the property was ancestral but that the alienation was made for consideration and valid necessity except for a sum of Rs. 1,500 or thereabouts, and as the total conside-

ration was Rs. 13,000, he refused to set aside the sale and dismissed the plaintiff's suit with costs.

On appeal the District Judge held that consideration to the extent of Rs. 6,608 was alone proved to be for necessity. But the District Judge was of opinion that as the sum of Rs. 6,608 was outside his appellate jurisdiction, he was not entitled to pass such a decree and therefore he returned the appeal to the plaintiff for presentation to the High Court:

Held, that the District Judge had jurisdiction to pass a decree setting aside the sale and fixing the charge on the property at the sum of Rs. 6,608. AIR (Vol 25) 1938 Lah 765: 181 Ind Cas 810.

——**S. 96 — Forum — Valuation of suit above Rs. 5,000 — R. 268, Oudh Civil Rules.**

Where the valuation of a suit under S. 33, U. P. Agriculturists' Relief Act, is over Rs. 5,000, and has been decided by the subordinate Judge before the Chief Court added an explanation to R. 268 of the Oudh Civil Rules the effect of which is that suits under S. 33 of the U. P. Agriculturists' Relief Act have to be valued for the purposes of the Suits Valuation Act at such amount exceeding Rs. 100, and not exceeding Rs. 500 as the plaintiff may state in the plaint, an appeal against the decree lies to the High Court. AIR (Vol 24) 1937 Oudh 12: 1936 OWN (CC) 740: 1936 RD 398: 12 Luck 586: 164 Ind Cas 684.

——**S. 96 — Suit for accounts being unclassed.**

Where the suit on the face of it is a suit for accounts, such suit being an unclassed suit the appeal lies to the District Judge and not to the Subordinate Judge. AIR (Vol 21) 1934 Lah 416: 36 PLR 55: 150 Ind Cas 735.

——**S. 96 — Account suit — Valuation of appeal.**

In an account suit it is the value of the amount decreed that determines the Court of appeal. AIR (Vol 20) 1933 Lah 568: 144 Ind Cas 627.

——S. 96 — The mere fact that the suit was originally instituted in the Court of Small Causes and was transferred therefrom under S. 24, cannot alter its nature when it was in fact not cognizable by that Court. AIR (Vol 20) 1933 Lah 509: 34 PLR 262: 146 Ind Cas 845.

——**S. 96 — Valuation for purposes of appeal.**

Where the suit is not one for accounts but for the recovery of a specific sum of money, though this sum is composed of several items, the reduction of the amount as a result of adjudication by Court or by a compromise between the parties does not alter the valuation of the suit for purposes of appeal. AIR (Vol 20) 1933 Lah 8: 140 Ind Cas 223.

——**S. 96 — Coram non judice.**

A judgment passed on appeal where no appeal lies under the law is coram non judice and must be set aside on further appeal. AIR (Vol 18) 1931 Lah 344: 12 Lah 602: 32 PLR 863 & 33 PLR 224: 134 Ind Cas 292.

——**S. 96 — Right of.**

Jurisdiction by way of appeal or revision will not be inferred, but must be expressly given by statute. AIR (Vol 17) 1930 Bom 486 (DB).

——**S. 96 — Forum — Valuation in plaint if conclusive.**

The general rule is that the value fixed by the plaintiff in his plaint must prima facie be the basis for determining the forum of the suit or appeal arising out of it. But the position is different if it is found that the plaintiff has deliberately undervalued or overvalued his claim with the object of having the suit tried or the appeal heard by a Court which would not have jurisdiction to try the suit or hear the appeal in case the claim is properly valued. The position is also the same where the plaintiff has acted recklessly in fixing the valuation of the suit. AIR (Vol 18) 1931 Oudh 58: 7 OWN 1188 (DB).

——**S. 96(2) and O. 41, R. 27 — Ex parte decree — Appeal — Additional evidence.**

An appellate Court has power under O. 41, R. 27 to direct the production of additional evidence which has been wrongly excluded by the original Court, even in appeals against ex parte decrees. AIR (Vol 3) 1916 Sind 34 (2): 9 SLR 191: 34 Ind Cas 493 (DB).

——**S. 96 — Forum of appeal — Transfer of venue.**

Where the jurisdiction of Court which passed a decree in a suit based on a contract is removed as regards the place of contract and transferred to another civil Court, the proper Court to which an appeal lies is the Court authorised to hear appeals from the latter Court and not the Court authorised to hear appeals from the former. AIR (Vol 2) 1915 Mad 362: 37 Mad 477: 26 Ind Cas 519.

——**S. 96 — Forum — Divisional Court — Chief Court.**

In a suit for accounts where the plaintiff has valued his claim below Rs. 5,000 an appeal against the preliminary decree lies to the Divisional Court, and not to the Chief Court. 87 PLR 1909: 4 Ind Cas 929 (DB).

8. Nature of right.

See Note 9.

9. Right of Appeal.

(a) **Nature of right.**
(b) **Lost by agreement.**
(c) **Prejudicially and adversely affected parties.**
(d) **Aggrieved parties.**
(e) **Adverse findings.**

——**S. 96 — Appeal — Competency.**

No appeal lies unless it is expressly provided by statute. AIR (V 33) 1946 Nag 42 : ILR (1945) Nag 719 : 1945 NLJ 447.

——**S. 96 — Relief not asked for granted — Plaintiff's right of appeal.**

Where the plaintiffs claimed for recovery of possession or, in the alternative, a mortgage-decree by sale of the 'rehan' property, but they did not state in the plaint that they would be satisfied with a simple money-decree and the trial Court gave a simple money-decree, it could not be said that the plaintiffs had succeeded in getting one of the two reliefs, which they had claimed so as to bar their right of appeal.

Obiter. — It is doubtful if a general rule can be laid down that in all cases where an alternative relief has been granted, the plaintiff has no right of appeal for getting a decree for the other relief which he had claimed in the plaint. AIR (V 33) 1946 Pat 231 : 12 BR 218 : 221 Ind Cas 683.

——**S. 96 — Specific performance — Suit — Parties — Right of appeal — Parties.**

The specific performance of a contract to sell cannot be decreed in the absence of some of the parties to the contract. Where a suit for specific performance has been dismissed, it is not open to some only of the plaintiffs to appeal and get the Appellate Court to pass a decree of that nature. AIR (V 32) 1945 All 21 : 1944 AWR (HC) 284 : 1944 OWN (HC) 280 : ILR (1945) All 1 : 218 Ind Cas 199.

——S. 96 — Court holding under S. 47 a stranger to decree to be representative of party to the suit and passing orders against him — Stranger can appeal against the order. AIR (V 30) 1943 Mad

381 : 1943 MWN 89 : 56 MLW 756 : ILR (1943) Mad 702 : (1943) 2 MLJ 539 : 213 Ind Cas 406.

——**S. 96 — Decree or order wholly in favour of party — Right of appeal.**

A party has no right to appeal against a decree or order wholly in his favour simply because there is some error in the reasoning which led to the making of the order. AIR (V 30) 1943 Mad 297 : (1942) 2 MLJ 768 : 1943 MWN 68 : ILR (1943) Mad 357 : 208 Ind Cas 361.

——**S. 96 — Party not party to proceedings, if can show decision to be inaccurate.**

It is no doubt open to a party not bound by the proceedings to adduce new facts, or fresh points of law which might indicate the previous decision to be inaccurate. AIR (V 28) 1941 PC 128 : 22 PLT 1027 : 8 BR 261 : 1941 AWR PC 109 : (1942) 1 MLJ 1 : 44 PLR 51 : 55 MLW 79 : 1942 OWN 43 : 46 CWN 374 : (1942) ALJ 149 : 74 CLJ 557 : 1942 MWN 326 : ILR (1941) Kar (PC) 150 : 44 Bom LR 324 : 21 Pat 243 : 197 Ind Cas 399.

——S. 96 — Party joined in suit to protect his interest can appeal. (1941) 1941 NLJ 657.

——**Ss. 96, 2 (2) — Suit under S. 33, U.P. Agriculturists' Relief Act (XXV of 1931), for accounts — Trial Court not exercising any special jurisdiction — Right of appeal—Order by Court declaring certain amount to be due by plaintiff to defendant, whether decree.**

Where a suit for accounts is instituted in a Civil Court exercising original jurisdiction, under S. 33 (1), U.P. Agri. Relief Act, and the Court does not exercise any special jurisdiction under U.P. Agri. Relief Act, the right of appeal against the decree passed in the suit is governed by S. 96, Civil P. C. and an appeal lies from an order passed by the Court in such a suit, declaring certain amount to be due by the plaintiff to the defendant, as such order amounts to a decree. AIR (V 26) 1939 All 233 : 1939 RD 71 : 1939 AWR (HC) 105 : 181 Ind Cas 282.

——**S. 96 — Right of appeal not availed of — Effect.**

Where there is an appeal against a decision, the effect of not appealing is that the decision holds good for what it is worth; so far as concerns any other modes of relief available, the person not appealing is in no worse position than if he had appealed and failed. AIR (V 25) 1938 Lah 129 : 182 Ind Cas 785.

——**S. 96 — 'Pro forma' defendant, if can appeal.**

Where no relief is claimed by the plaintiff against the 'pro forma' defendant, and the suit is dismissed, the 'pro forma' defendant has no 'locus standi' to appeal. AIR (V 24) 1937 All 368 : (1937) ALJ 296 : 1937 RD 151 : 1937 AWR (HC) 260 : 169 Ind Cas 395.

——S. 96 — When suits have been consolidated there is only one judgment and one decree and there can be only one appeal. AIR (V 24) 1937 Nag 132 : ILR (1937) Nag 6 : 173 Ind Cas 124.

——**Ss. 96, 146 — Hindu joint family — Manager — Suit against, both in individual and representative capacity — Coparcener not mentioned as separate party but merely as member — Such member adversely affected by decree — Whether can appeal.**

Under Hindu Law it is the manager or 'karta' who is alone competent to represent the family, to act for it and to bind it, and as a coparcener cannot sue alone, so he cannot appeal alone. The fact that he makes all others 'pro forma' respondents, does not affect the matter. To allow every coparcener to sue as and when he chooses would be to permit the authority of the manager to be usurped and bring confusion into the affairs of the joint family.

Every person who is adversely affected by a decree need not be a party within the provisions of S. 96, Civil P. C. for the purpose of an appeal. Where a suit is filed against a 'karta' both in his individual and representative capacity and a coparcener is joined in the suit not as a separate party but is merely mentioned as a member of the joint family, no right of appeal is given to such coparcener from a decree which adversely affects him. AIR (V 24) 1937 Sind 94 : 30 SLR 467 : 161 Ind Cas 801.

——**S. 96 — Appeal is only from matters on which appellant is adversely affected.**

It is only from the parts of the decree that affects a person that he can appeal and not from every part of the decree. AIR (V 21) 1934 All 677 : 3 AWR 737 : 151 Ind Cas 25.

——**S. 96 — Terms of decree not abided — Party if disentitled to appeal.**

Where a plaintiff, who does not accept the correctness of the finding as to the pre-emptive price, has not paid it, he is not bound to pay the decretal amount in accordance with the terms of the first Court as a condition precedent to the hearing of the appeal. AIR (V 21) 1934 All 531 : 154 Ind Cas 168.

——**S. 96 — Provincial Insolvency Act (V of 1920), S. 75 (2) — Sale of properties of insolvent without impleading Official Receiver — Suit under O. 21, R. 103 — Decree against Official Receiver — Creditor's right to appeal.**

A person obtained a decree against his debtor and purchased some of his properties in Court auction without impleading the Official Receiver though the debtor had been adjudicated an insolvent before the date of the sale and instituted a suit under O. 21, R. 103, Civil P. C., against the Official Receiver to set aside orders for delivery of possession that had been passed in favour of the Official Receiver.

The decree was partly in favour of the plaintiff. The Official Receiver did not appeal and the Indian Bank, one of the creditors of the insolvent debtor, appealed against the decree, though it was not a party to the suit:

Held, that the appeal was governed by the provisions of the Civil P. C., and not by those of the Provincial Insolvency Act and consequently the Indian Bank had no right to appeal from the decree to which it was not a party and further there was no provision of law or rule of practice under which leave to appeal could be granted in a case of this nature. AIR (V 21) 1934 Mad 360 : 39 MLW 624 : 66 MLJ 532 : 57 Mad 670 : (1934) MWN 697 : 150 Ind Cas 538.

——**S. 96 — Exists in all civil proceedings.**

Right of appeal under C. P. Code exists in civil proceedings though not called suits unless expressly taken away. AIR (V 16) 1929 Mad 223 : 56 MLJ 387 : 29 MLW 237 : 1929 MWN 62 : 115 Ind Cas 345 (DB).

——**S. 96 — Party not consenting may appeal.**

There is nothing in O. 23, R. 3. or in O. 43, R. 1, Cl. (m) to suggest that if the Court fails to demand satisfactory proof of the alleged compromise, a party to the suit who is deprived of his right to contest the compromise, is also deprived of his right to appeal against the order. Section 96, Cl. (3) presupposes that the party appealing has consented to the decree being passed.

It does not purport to deal with a case where the aggrieved party was not a consenting party and had never been asked by the Court whether

he had consented to a decree being passed or not. In such a case he does not appeal against the decree passed by consent, but attacks the very foundation on which the decree is passed. Section 96 (3) does not bar a right of appeal by a person who denies that he was a party to the alleged compromise. AIR (V 16) 1929 Sind 32 : 114 Ind Cas 101 (DB).

——S. 96 — Competency.

Where one of the issues, which the Judge of the Court below had to decide, was whether the case was covered by section 144, C. P. C. and he applied his mind to the question and decided it,

Held, that the appellant cannot be deprived of his right of appeal because one of his grounds for challenging the decree is that the decision on this issue was wrong. AIR (V 11) 1924 All 64 : 73 Ind Cas 602.

——S. 96 — Adverse finding — Appeal, if competent.

A party has no right to appeal against a decision in his favour on the ground that one of the findings is against him. AIR (V 1) 1914 All 83 (1) : 24 Ind Cas 36 (DB).

——S. 96 — Right to appeal — Acceptance of order of Court.

A party who has adopted an order of the Court and enjoyed a benefit under the order cannot contend that it is valid for one purpose and invalid for another. But if the party accepts the order under protest, he can appeal against it. (1910) 12 CLJ 556 : 8 Ind Cas 79 (DB).

——S. 96 — Right to appeal — Party to proceedings.

A person made a defendant under an order which it was within the discretion of the Court to pass, has a right of appeal. (1909) 12 OC 390 : 4 Ind Cas 781 (DB).

——S. 96 — Right of appeal — Loss of appellant's interest in the subject-matter of the appeal before appeal filed — Subsequent re-vesting of property in appellant ineffectual to validate appeal.

Where an appellant, after suit but before the appeal was filed, lost all her interest in the property, the subject-matter of the appeal, it was held, that the appeal must be dismissed; nor would it avail the appellant (if it was the fact) that she regained her interest in the property in dispute after the filing of the appeal. (1905) 1905 AWN 162 (162) (DB).

(a) Nature of Right.

——S. 96 — Right of appeal is a creation of statute and cannot exist apart from it. AIR (Vol 33) 1946 Nag 24: ILR (1945) Nag 826: 1945 NLJ 588.

——S. 96 — It must be expressly given.

A right of appeal must be given by express enactment and cannot be implied. AIR (Vol 31) 1944 Nag 152: 1944 NLJ 167: ILR (1944) Nag 447: 216 Ind Cas 214.

——S. 96 — Per Grille, C. J. and Digby, J.

The mere commission of crime creates no vested right of any kind whatever in the criminal to particular mode of trial, to any right of appeal etc. No substantive right, in civil cases can arise before a suit is instituted and the cause of action itself cannot bring such a right into existence. The suit brought will be regulated by the procedure in force when the suit is brought and it will make no difference that valuable rights such as the right of appeal are included in the law of procedure. AIR (Vol 30) 1943 Nag 36: ILR (1943) Nag 73: 1943 NLJ 16: 44 Cr LJ 237: 205 Ind Cas 161.

——S. 96 — An appeal is a creature of the statute; it cannot exist without clear legislative provision. But the Legislature may create an appeal while enacting a statute or in the statute itself it may delegate the power to create it to another authority and if such authority acts within the power conferred on it, the rules framed by it have the force of law, as if they were enacted by the Legislature itself. AIR (Vol 29) 1942 Lah 201: 44 PLR 253: ILR (1943) Lah 569: 201 Ind Cas 667.

——S. 96 — Right of appeal is governed by S. 96 and the definition of "decree" in S. 2 shall be deemed to include determination of any question within S. 47. AIR (Vol 29) 1942 Mad 406: 1942 MWN 190: 55 MLW 159: (1942) 1 MLJ 386: 205 Ind Cas 91.

——S. 96 — Right of appeal is a statutory right and cannot be inferred by implication. AIR (Vol 29) 1942 Mad 73: ILR (1942) Mad 236: 54 MLW 382: 1941 MWN 855: (1941) 2 MLJ 529: 201 Ind Cas 97.

——S. 96 — Right of appeal is a creature of statute. AIR (Vol 28) 1941 All 355: (1941) ALJ 513: 1941 AWR (Rev.) 702: 1941 RD 772: 197 Ind Cas 114.

——S. 96 — Right of appeal is substantive right.

A right of appeal is not a mere matter of procedure. It is a substantive right and is primarily a creature of statute. As such it can be exercised only by those in whom the power vests either expressly or by necessary implication. AIR (Vol 28) 1941 Mad 577: (1941) 1 MLJ 531: 53 MLW 479: 1941 MWN 366: 200 Ind Cas 366.

——S. 96 — Pre-emption suit — Issue before Court being whether plaintiff can maintain suit for partial pre-emption — Issue decided in favour of plaintiff — Appeal.

An appeal is a creature of statute and cannot be held to exist unless the right is given expressly by the statute. In order to succeed that an appeal lay against, the finding arrived at by the trial Court in the plaintiffs' favour, the appellants have to show that the finding in question amounts to a decree within the definition of that term in S. 2 (2) and as such an appeal lies under S. 96.

Where a preliminary point raised in defence in a suit may possibly be decided against the plaintiffs and may terminate in dismissal of the suit on that point alone, the adjudication would no doubt amount to a formal expression conclusively determining the rights of the parties, but where such an adjudication does not put an end to the suit, no right of appeal against such an adjudication will come into existence as the adjudication does not amount to decree as defined in S. 2 (2).

To hold otherwise would lead to reductio ad absurdum and would enable every finding on every issue arrived at by a trial Court to be assailed by way of appeal to the higher Court irrespective of the fact whether there was a decree or not. A trial Court has to record its finding on issues of law first if in its opinion the suit can be disposed of on those issues without going into the issues of fact arising in the case.

If the decision of the Court on the issues of law results in the defendant's favour, the plaintiff's suit must stand dismissed and the trial Court need not proceed to determine the issues of fact. In that case the decision having resulted in a decree will be appealable under S. 96. But where the decision of the preliminary issues is in favour of the plaintiff, no decree follows and the suit must proceed for the settlement of other issues in the case, and no appeal is maintainable from this decision, it being not a decree.

Thus where in a pre-emption suit the preliminary issue before the Court is whether the plaintiff can claim partial pre-emption and the issue is answered affirmatively in favour of the plaintiff,

the adjudication does not amount to a decree and no appeal is maintainable against the decision, though the decision would amount to a decree, if trial Court had dismissed the suit on this preliminary issue. AIR (Vol 28) 1941 Oudh 590: 1941 OWN (CC) 957: 1941 RD 700: 195 Ind Cas 615.

——S. 96 — When a question is said to be referred to an established Court, it imports that the ordinary incidents of the procedure of that Court are to attach, and also that any general right of appeal from its decision likewise attached. AIR (Vol 26) 1939 All 233: 1939 RD 71: 1939 AWR (HC) 105: 181 Ind Cas 282.

——S. 96 — The right of appeal given to a person by statute should not ordinarily be taken away, unless the appellant brings himself definitely within those classes of cases in which it has been laid down that by his conduct he had lost the right of appeal. The principle, however, ought not to be extended. The right of appeal is the creature of statute and is a very valuable right; the Courts should be jealous in guarding that right, and ought not to curtail it. AIR (Vol 23) 1936 Cal 424: 40 CWN 553: 165 Ind Cas 606.

——S. 96 — An appeal is a creature of the statute, and it cannot be assumed that there is a right of appeal in all matters coming for consideration of the Court; unless a right of appeal is expressly given, it does not exist, and the litigant may have independently of any statute a right to institute a suit for nullifying the effect of any decision of a Court.

It is incumbent upon an appellant to show that there is a statutory right of appeal; an appeal does not exist in the nature of things; a right of appeal from any decision must be given by express enactment, and it cannot be implied. (1936) 163 Ind Cas 75 : 39 CWN 567 : 61 CLJ 353: 62 Cal 701.

——S. 96 — Statutory condition.

Appeals exist merely by statute and unless the statutory conditions are fulfilled, no jurisdiction is given to any Court of Justice to entertain them. AIR (Vol 22) 1935 PC 5: 1935 ALJ 44: 41 MLW 84: 1935 AWR 101: 153 Ind Cas 896.

——S. 96 — There is no right of appeal in every matter which comes under the consideration of a Judge; such right must be given by statute or by some authority equivalent to a statute. AIR (Vol 22) 1935 Pat 261: 14 Pat 236: 1 BR 757 (2): 157 Ind Cas 477.

——S. 96, O. 43, R. 1 — Right to appeal.

In considering whether an appeal is admissible, the Court always looks to the substance rather than the form of the order, so as not to deny a party his right of appeal, but it would be a very dangerous analogy to deny a party the right of appeal on the ground that only the substance and not the form can be looked into. AIR (Vol 21) 1934 Mad 484: 57 Mad 777: (1934) MWN 412: 39 MLW 738: 67 MLJ 43: 150 Ind Cas 98.

——S. 96 — The right of appeal is a special creature of statute and it can be exercised only by those in whom the power is vested expressly or impliedly by the statute. AIR (Vol 21) 1934 Mad 360: 66 MLJ 532: 57 Mad 670: 39 MLW 624: (1934) MWN 697: 151 Ind Cas 538.

——S. 96 — Dictum.

A right of appeal is a creature of statutory enactment and such right must be affirmatively given and not presumed. AIR (Vol 19) 1932 Sind 88: 26 SLR 200: 33 Cr LJ 898: 139 Ind Cas 783.

——S. 96 — Where a right of appeal has to be expressly conferred by statute, it cannot be presumed to exist by recourse to a rule of analogy or a rule of logic. AIR (Vol 18) 1931 All 72: (1931) ALJ 13: 134 Ind Cas 454.

——S. 96 — Appeal and revision.

There is a clear distinction between an appeal and an application for revision. Right of appeal is a substantive right created by statute and the powers of the Court in appeal are conterminous with those exercised by the Court of original jurisdiction. But revisional jurisdiction is discretionary and when an application for revision is rejected, the subsisting order is that of the lower Court and not the order passed in revision. AIR (Vol 18) 1931 Nag 17: 27 NLR 251: 130 Ind Cas 145.

——S. 96 — Appeal — Right of — Right of appeal is a substantive right.

A right of appeal is a substantive right; an applicant in an application for revision, is entitled to urge, that a Court which has no jurisdiction should not take up a matter and dispose of it itself, depriving the applicant of his right of appeal. AIR (Vol 17) 1930 All 873.

——S. 96 — Is a substantive right.

Interpretation of Statutes — Right to appeal is substantive right and cannot be taken away by subsequent enactment passed during pendency of action. AIR (Vol 17) 1930 All 706: 1930 ALJ 842 (DB).

——S. 96 — Analogy of Letters Patent is not applicable.

It does not follow that because an appeal lies under the Letters Patent there is similar appeal in the Code. The right of appeal is a right conferred only by express provision and in cases under the Code, unless the right is given by the Code, there can be no appeal. AIR (Vol 16) 1929 Rang 198: 120 Ind Cas 693.

——S. 96 — Right to appeal — Statutory grounds.

If the competency of an appeal is in question the appellant must establish that he has a right of appeal, for a right of appeal is not a natural right but must be given by express rules of statute. AIR (Vol 3) 1916 Cal 361: 43 Cal 857: 20 CWN 594: 23 CLJ 443: 34 Ind Cas 634 (FB).

——S. 96 — Right to appeal — Statute — Effect on right.

The new code does not deprive the litigant of the right of appeal which he had under the old code even though such right could not be exercised immediately on the introduction of the new code. (1911) 1 MWN 143: 9 MLT 259: 21 MLJ 631: 9 Ind Cas 937 (DB).

(b) Lost by agreement.

——S. 96 (3) — Agreement by parties to abide by decision of Court after local inspection — Appeal from decision — If lies.

Where the parties to a suit after producing some oral evidence agree that the Court should decide the suit after inspecting the spot and that they would be bound by its decision, such an agreement implies that the decision is to be accepted as final and there is to be no right of appeal to another forum. (1948) 50 PLR 189.

——S. 96 — Departure from prescribed procedure — Right of appeal.

Where a Court has general jurisdiction, the parties to a proceedings can by agreement adopt a different procedure quite contrary to the ordinary cursus curias and the Court is bound to give effect to such an agreement. AIR (Vol 24) 1937 Pat 113: 17 PLT 940: 16 Pat 202: 3 BR 579: 169 Ind Cas 483 (FB).

——**S. 96 — Judge departing from usual practice with acquiescence of parties — Right of appeal, if lost.**

Where with the acquiescence of both parties a Judge departs from the ordinary course of procedure, it is incompetent for the parties afterwards to assume that they have an alternative mode of proceedings and to treat the matter as if it has been heard in due course and to claim a right of appeal. But before a party is deprived of his right of appeal in respect of any matter in dispute, it must be shown that he had acquiesced in the Judge departing from the ordinary course and deciding it extra cursum curiae so as to render his decision in the nature of an arbitrator's award.

In suit for partition, the parties agreed to certain arrangement and filed statement that "as for mesne profits, produce and costs, we leave it to the Court" whereupon the Court decided the question of mesne profits only up to the date of the suit. There was no mention whatsoever in the judgment one way or the other with regard to mesne profits from the date of the decree. It was argued that as the parties left the decision of mesne profits to the Judge, he was in the position of an arbitrator, that the suit having been referred to him extra cursum curiae, there was no right of appeal and that mesne profits subsequent to the suit must be deemed to have been disallowed by the Judge below :

Held, that the expression 'as for mesne profits and costs we leave it to the Court' did not ipso facto convey the idea that the parties did not wish to keep themselves in curiae but to leave it to the Judge to determine the mesne profits extra cursum curiae, so as to deprive them of a right of appeal.

Held, also that the Judge had no power to deal with subsequent mesne profits. But even assuming that this question was left to him as arbitrator, he had not dealt with it. Consequently, it was open to the Appellate Court to do so, and such profits should be ordered to be determined in execution. AIR (Vol 23) 1936 Sind 72: 30 SLR 17: 163 Ind Cas 570.

——**S. 96 — Agreement to accept decision of Court as final as that of arbitrator — Appeal from decision, whether lies.**

Where the parties agreed to accept the decision of the Court as that of an arbitrator and raised no objection to it, there would be no right of appeal. An agreement to accept the decision as that of an arbitrator without any objection implies that the decision was to be accepted as final. AIR (Vol 21) 1934 Lah 176 (2): 15 Lah 726: 36 PLR 494: 154 Ind Cas 248.

——S. 96 — Where both parties to a suit agree in a particular matter to abide by the finding of the Court in respect to it, such finding is final and binding on the parties and no appeal lies against it, the decision in such cases being in the nature of an arbitrator's award. (1929) 113 Ind Cas 365: 11 NLJ 247.

——S. 96 — Agreement arrived at during suit and signed by both parties — Decree passed in terms of the agreement — No appeal lies — C. P. Code, O. 23, R. 3. AIR (Vol 13) 1926 Bom 39: 91 Ind Cas 294: 27 Bom LR 1279 (DB).

——S. 96 — Parties agreeing to be bound by Court's finding — No appeal lies against finding. AIR (Vol 8) 1921 All 310: 59 Ind Cas 787: 19 ALJ 14: 43 All 266 (DB).

(c) Prejudicially and adversely affected parties.

——**S. 96 — Right of appeal — Test.**

The test for determining whether a person has got a right of appeal is whether any part of the decree affects his interest adversely. If the answer to the question is in the affirmative, he will have a right of appeal. It is a question of fact to be determined in each case according to its peculiar circumstances. Where the existence of this right is in doubt, the benefit ought to go to the appellant. AIR (Vol 37) 1950 Assam 22 (DB).

——**S. 96 — Right to appeal — Decree in favour of plaintiff on unamended plaint — Order refusing prayer for amendment of plaint.**

A party may appeal from a decree if he is prejudicially affected by the decree complained of. If the plaintiff's prayer for the amendment of his plaint is refused and a decree is passed in favour of the plaintiff upon the plaint as it stands, it is extremely doubtful if it can be said that the decree prejudicially affects the plaintiff. (1949) ILR (1949) 1 Cal 76: 54 CWN 37.

——**S. 96 — Person not affected.**

It is doubtful whether a person not adversely affected by order of remand can appeal from that order. AIR (Vol 18) 1931 Oudh 242: 8 OWN 243: 132 Ind Cas 78.

——**S. 96 — Right to appeal — Improperly joined party.**

If a person who ought not to have been made a defendant is impleaded as such, he cannot appeal. No person has a right of appeal from a decision unless his interest is prejudicially affected by it. AIR (Vol 4) 1917 Pat 585: 2 Pat LW 103: 41 Ind Cas 468 (DB).

——**S. 96 — Right to appeal — Party to decree — Prejudice — Validity — Ingredients.**

The appellant must be a party in the previous suit or must be the legal representative of some party, must have interest in the subject matter of suit, and he must be prejudicially affected by the decree of the lower court. (1910) 11 CLJ 580: 6 Ind Cas 244 (DB).

(d) Aggrieved Parties.

——**S. 96 — Suit dismissed against defendant — Adverse finding not incorporated in decree — Defendant's right to appeal against decree.**

A defendant has the right to appeal notwithstanding that the suit has been dismissed as against him, if he is aggrieved by the decree. The question whether he is aggrieved by the decree is a question of fact to be determined in each case according to its peculiar circumstances. In order to find out whether a defendant is aggrieved by a decree dismissing the suit against him, it is not merely the form but the substance of the decree and the judgment that should be looked into. Where the point adversely decided to such a defendant is directly and substantially in issue and where it will operate as res judicata in subsequent proceedings, the defendant should have the right of appeal against the decree though the particular finding is not embodied or incorporated in the decree. AIR (Vol 37) 1950 Assam 119 (DB).

——S. 96 — The Civil P. C., by the provisions relating to the right of appeal as they now stand, does not provide for an appeal against a finding contained in a judgment. The rule engrafted on the statute by a current of decisions by High Courts in this country is that an aggrieved party may have a right of appeal and that the test to be applied in such cases is whether the finding sought to be appealed against is one to which the rule of res judicata may be held to be applicable, so as to disentitle the aggrieved party to agitate the question covered by the finding in any other proceeding. (1936) 163 Ind Cas 75: 39 CWN 567: 61 CLJ 353: 62 Cal 701.

——S. 96 — **Pro forma defendant.**

The appellant having sold his proprietary title to the vendees, the latter sued the defendants on the allegation that they were their tenants. The appellant was joined as a pro forma defendant in the suit in which the defendants were declared to be proprietors and not tenants. The appellant (vendor) preferred an appeal from the decree :

Held, that the appellant was a party aggrieved by the decree and could appeal against the decree. AIR (Vol 22) 1935 All 984: 1935 RD 472: 1935 AWR 1181: 159 Ind Cas 447 (1).

——S. 96 — Appeal dismissed — Respondent is not aggrieved — He cannot appeal. AIR (Vol 10) 1923 Lah 504: 77 Ind Cas 477 (DB).

——**S. 96 — Right to appeal — Aggrieved party.**

A party against whom no decree is passed can appeal if the result of the decree is to make him aggrieved by it. (1910) MWN 719: 9 MLT 39: 8 Ind Cas 337 (DB).

——**S. 96 — Appeal — Right of appeal by defendant against whom suit has been dismissed — Case under old Code.**

Held, on review of authorities, that a defendant has the right to appeal notwithstanding that the suit has been dismissed against him if he is aggrieved by the decree. The question whether a party is aggrieved by a decree is a question of fact to be determined in each case according to its peculiar circumstances. (1905) 9 CWN 584 (588).

(e) Adverse findings.

——S. 96 — The mere fact that there are adverse findings of fact or even of law on the other issues in the judgment of the District Court gives the party no right of appeal whatever. AIR (Vol 26) 1939 Rang 59: 179 Ind Cas 946.

——S. 96 — Finding against party — Decree in his favour not based on the finding — Party has no right of appeal. AIR (Vol 16) 1929 Pat 586: 8 Pat 617: 10 PLT 643: 119 Ind Cas 554 (DB).

——**S. 96 — Adverse findings.**

In a suit by a mortgagee against A for possession, mortgagor was joined for the express purpose of determining rights of all parties concerned. A denied title & possession of either & Court holding that neither the mortgagors, nor the mortgagee had any title, dismissed the suit.

Held, that though the decree was formally in favour of the mortgagors there were findings against their contentions on which the Court acted dismissing the plaintiff's suit and therefore they had a right of appeal. AIR (Vol 13) 1926 Mad 974: 24 MLW 292: 1926 MWN 761: 97 Ind Cas 346: 51 MLJ 211.

——**S. 96 — Adverse finding — Suit decided in favour of a party.**

A finding upon a point necessarily arising in the case operates as res judicata between the parties and the aggrieved party can prefer an appeal against that finding, although the decree is in his favour. AIR (Vol 4) 1917 Pat 350: 40 Ind Cas 771.

——**S. 96 — Adverse finding — Right of Appeal — Suit dismissed.**

A defendant in a suit has no right of appeal against a finding as such when the suit has been dismissed by the court below. The apprehension that the finding may operate as res judicata unless set aside is not enough. AIR (Vol 3) 1916 Mad 618: 2 LW 101: 17 MLT 85: 27 Ind Cas 861 (DB).

——**S. 96 — Adverse finding — Appeal.**

Notwithstanding a suit is dismissed, a deft. has a right of appeal and for that purpose it is open to the parties to go behind the decree and see really what the adjudication is. **14 MLT 189 : (1913) MWN 690: 25 MLJ 379: 21 Ind Cas 15 (DB).**

(also AIR (Vol 7) 1920 Mad 871: 36 MLJ 641: 52 Ind Cas 34;

(Contra) AIR (Vol 6) 1919 Mad 212: 1919 MWN 34: 52 Ind Cas 258;

AIR (Vol 6) 1919 Bom 81: 43 Bom 568: 51 Ind Cas 109;

AIR (Vol 6) 1919 Mad 1097: 34 MLJ 431: 45 Ind Cas 975;

AIR (Vol 5) 1918 Pat 329: 3 Pat LJ 178: 44 Ind Cas 723;

(1913) 40 Cal 29: 15 Ind Cas 453).

Ss. 97, 98, 99.

——**S. 97.**

1. **Amendment of pleadings.**
2. **Appeal against both final and preliminary decrees.**
3. **Appeal against preliminary decree after final decree.**
4. **Applicability and scope.**
5. **Court-fees.**
6. **Effect of variation, modification and reversal of preliminary decree.**

See N. 3 and 7.

7. **Final decree during pendency of appeal against preliminary decree.**
8. **Preliminary decree.**
9. **Where no appeal has been preferred.**

1. Amendment of pleadings.

——**S. 97 — Passing of final decree — Appeal from — Preliminary decree.**

Defendant appealed against the preliminary decree but after the final decree was passed.

Held that as there was nothing of substance left after the preliminary decree was passed, the defendant should have been allowed to amend his memorandum of appeal so as to convert the appeal into one against the final decree, especially when he had paid the court-fee for the latter. (1913) MWN 140: 16 Ind Cas 380 (DB).

2. Appeal against both final and preliminary decrees.

——S. 97 — It is not necessary for a party aggrieved by preliminary decree to appeal both from that decree and against the final decree in order to maintain his appeal against preliminary decree, although the final decree apart from its being based on the preliminary decree may be otherwise correct. AIR (Vol 16) 1929 Cal 689: 50 CLJ 566: 34 CWN 66 (FB).

——**S. 97 — Success in appeal from preliminary order.**

An appeal against a preliminary order if allowed makes an appeal against the final order on the same grounds unnecessary, though another appeal may have to be filed if it has reference to what happened after preliminary order was passed. AIR (Vol 15) 1928 Mad 107: 39 MLT 563: 27 MLW 267: 1928 MWN 132: 107 Ind Cas 793 (DB).

——**S. 97 — After final decree appeal against preliminary decree alone is incompetent.**

After a final decree has been made, whether or not an appeal has been preferred against the preliminary decree, it is the duty of the party aggrieved by the final decree to prefer an appeal against the final decree and an appeal, therefore, against the preliminary decree, after the passing but before the signing of the final decree, and without challenging by appeal the final decree, is useless and cannot be entertained. AIR (Vol 8) 1921 Lah 265: 82 PLR 1922: 67 Ind Cas 278.

——**S. 97 — Passing of final decree — Before filing appeal against preliminary decree.**

Where before the filing of an appeal against a preliminary decree, a final decree was passed and no appeal was preferred against the final decree:

Held, no appeal lay against the preliminary decree as it had been confirmed by the final decree. AIR (Vol 3) 1916 Cal 178: 20 CWN 231: 27 Ind Cas 135 (DB).

——S. 97 — Passing of final decree — Appeal from preliminary decree filed when final decree not appealed from.

The appeal against the preliminary decree preferred after the passing of the final decree must fail if the final decree is not appealed from because S. 97, C. P. C., does not relieve the person appealing from the preliminary decree from appealing against the final decree too. (1913) 18 CLJ 321: 21 Ind Cas 516 (DB).

——S. 97 — When final decree is passed in a partition suit, a party cannot challenge the preliminary decree unless he also challenges the final decree. (1910) 32 All 225: 2 ALJ 210: 5 Ind Cas 276.

——S. 97 — Passing of final decree — Appeal from preliminary decree.

An appeal from a preliminary decree in a suit for partition is incompetent after the final decree is made and if no appeal is filed against the final decree, the appellant loses his right to prefer an appeal against the preliminary decree because the right of appeal from interlocutory orders ceases with the disposal of the suit. (1909) 36 Cal 762: 10 CLJ 113: 1 Ind Cas 413 (DB).

3. Appeal against preliminary decree after final decree.

——S. 97, O. 34, R. 4 — Preliminary decree in mortgage suit — Nature and effect of — Passing of final decree — Appeal from preliminary decree — Competency of.

The preliminary decree in a mortgage suit has an independent existence and as the person aggrieved by it is bound to appeal from it, that right cannot be taken away by a final decree being passed either before or after the presentation of an appeal from the preliminary decree. Consequently, even after the passing of a final decree, it is open to a party to prefer an appeal against the preliminary decree and if that appeal is accepted, the final decree falls with the preliminary decree. AIR (Vol 22) 1935 Lah 482: 17 Lah 53: 38 PLR 1121: 157 Ind Cas 416.

——S. 97 — Appeal from preliminary decree after passing of final decree, competency of.

Quaere.—Whether an appeal from a preliminary decree filed after the passing of the final decree is competent. AIR (Vol 20) 1933 Lah 33: 140 Ind Cas 177.

——S. 97 — Right to appeal is not affected by final decree.

Per Kulwant Sahay, J.—The law not only gives an aggrieved party a right to appeal against the preliminary decree but it imposes the restriction that if he does not prefer an appeal against that decree he is precluded from disputing its correctness in an appeal against the final decree. There is no provision anywhere in the Code which takes away the right of a party to appeal against the preliminary decree if a final decree has been made before the appeal is preferred. 18 CLJ 321, Diss. from. AIR (Vol 17) 1930 Pat 177 : 11 PLT 61 (FB).

——S. 97 — Appeal is competent.

An appeal from a preliminary decree is not incompetent even if a final decree is made before the appeal is presented. Nor is it necessary for a party aggrieved by a preliminary decree to appeal both from that decree and against the final decree in order to maintain his appeal against the preliminary decree, although the final decree apart from its being based on the preliminary decree may be otherwise correct. AIR (Vol 16) 1929 Cal 689: 50 CLJ 566: 34 CWN 66 (FB).

——S. 97 — Appeal is competent.

An appeal filed against a preliminary decree after the final decree is passed is competent even though no appeal is filed against the final decree. AIR (Vol 8) 1921 Cal 109, Not Foll. AIR (Vol 16) 1929 Nag 349: 120 Ind Cas 334.

——S. 97 — Appeal does not nullify final decree.

Filing of an appeal from preliminary decree after the passing of final decree cannot possibly have the effect of nullifying the final decree. AIR (Vol 13) 1926 All 291, Not Foll. AIR (Vol 15) 1928 All 192: 26 ALJ 87: 107 Ind Cas 581 (1) (DB).

——S. 97 — Right of appeal not taken away.

Right of appeal from a preliminary decree cannot be taken away by a final decree being passed either before or after the person appeals from the preliminary decree. AIR (Vol 15) 1928 Cal 720: 48 CLJ 28: 32 CWN 858 : 117 Ind Cas 557 (DB).

——S. 97 — Appeal is incompetent.

Appeal against preliminary decree only after final decree has been passed is incompetent. AIR (Vol 15) 1928 Lah 73: 107 Ind Cas 610 (DB).

——S. 97 — Decree — Appeal against preliminary decree after passing of final decree — No steps taken to set aside final decree — Appeal is infructuous. AIR (Vol 14) 1927 Cal 492: 54 Cal 328: 31 CWN 550: 103 Ind Cas 538 (DB).

—S. 97 — Appeal against preliminary decree is not maintainable if final decree passed before filing the appeal is not appealed against. 37 Mad 29, not foll. AIR (Vol 13) 1926 Cal 557: 91 Ind Cas 358 (DB).

—S. 97 — Preliminary decree — Appeal against, after final decree does not lie. AIR (Vol 9) 1922 Nag 179: 67 Ind Cas 261.

——S. 97 — Appeal incompetent.

Appeal from preliminary decree alone after passing of final decree is incompetent. AIR (Vol 8) 1921 Cal 109: 48 Cal 1036: 33 CLJ 414: 25 CWN 776: 61 Ind Cas 923 (DB).

——S. 97 — Passing of final decree — Preliminary decree — Appeal after final decree passed but before it is signed.

An appeal against the preliminary decree after the final decree is passed but before it is signed is not incompetent as no copy can be got for the final decree until it is signed and drawn up and the only appealable decree is the preliminary decree. AIR (Vol 6) 1919 Cal 893: 22 CWN 831: 46 Ind Cas 802 (DB).

——S. 97 — Passing of final decree — Pending appeal.

An appeal against a preliminary decree can be maintained in spite of the fact that a decree has been passed in pursuance of the preliminary decree especially when the preliminary decree is in accordance with the final decree and does not in any way modify or supersede it. AIR (Vol 6) 1919 Mad 91: 52 Ind Cas 697 (DB).

——S. 97 — Court-fees — Appeal.

Where a party who has the facility of time of appealing against the final decree, appeals against the preliminary decree only he cannot be allowed to do so as by so doing he has the chance of getting a reversal of the final decree without paying court fee for the same. The section does not prevent a party from filing a combined appeal against a preliminary and final decree if the dates permit him to do so. AIR (Vol 3) 1916 Bom 228: 18 Bom LR 76: 33 Ind Cas 146 (DB).

——S. 97 — Passing of final decree — Preliminary decree appealed against.

Under the section an appellant, who has not appealed against the preliminary decree, is pre-

vented from questioning it in subsequent proceedings. He may not appeal against the final decree, but may appeal against the preliminary decree, and the final decree will be amended according to the decision of the appeal from the preliminary decree. AIR (Vol 3) 1916 Cal 249: 22 CLJ 90: 30 Ind Cas 321 (DB).

——S. 97 — **Passing of final decree — Effect.**

An appeal filed against a preliminary decree can be heard though final decree made after the appeal was passed and lodged, is not appealed against. AIR (Vol 3) 1916 Cal 43: 19 CWN 1132: 33 Ind Cas 59 (DB).

——**S. 97 — Passing of final decree — Appeal from preliminary decree — Effect on.**

An appeal against the preliminary decree in a partition suit can be heard even after the final decree therein is passed and even though no appeal has been preferred against it provided the appeal against the preliminary decree was preferred before the final decree was passed. AIR (Vol 3) 1916 Pat 370: 20 CWN 1174: 1 Pat LJ 406: 1 Pat LW 13: 35 Ind Cas 873 (FB).

——**S. 97 — Passing of final decree — Appeal from preliminary decree — No appeal against final decree.**

Though no appeal against the final decree is preferred it is no reason for not hearing the appeal against the preliminary decree in a suit for partition. When the preliminary decree is set aside on appeal, the final decree based upon it falls to the ground. AIR (Vol 1) 1914 All 380: 36 All 532: 12 ALJ 876: 24 Ind Cas 827 (DB).

——**S. 97 — Appeal against preliminary decree after passing of final decree.**

The passing of a final decree does not preclude a party from preferring an appeal against the preliminary decree. AIR (Vol 1) 1914 Mad 473: 37 Mad 455: 11 MLT 69: 22 MLJ 217: (1912) MWN 117 and 530: 14 Ind Cas 394 (DB).

——**S. 97 — Passing of final decree — Partition suit — Appeal — Final decree.**

When final decree is passed in a partition suit, a party cannot challenge the preliminary decree, unless he also challenges the final decree in appeal. (1910) 32 All 225: 7 ALJ 210: 5 Ind Cas 276 (DB).

4. Applicability and scope.

——**S. 97 — Combined appeal.**

Section does not prevent a party from filing a combined appeal against a preliminary and final decree if the dates permit him to do so. AIR (Vol 3) 1916 Bom 228: 18 Bom LR 76: 33 Ind Cas 146 (DB).

——**S. 97 — Combined appeal — Preliminary and final decree.**

Section 97 does not prevent a party from filing a combined appeal against a preliminary and final decree if their dates permit him to do so. AIR (Vol 3) 1916 Bom 202: 18 Bom LR 80 (Note): 33 Ind Cas 137 (DB).

—S. 97 — Under the old Code, objections to a preliminary decree could be taken in an appeal against the final decree, without appealing from the preliminary decree. AIR (Vol 2) 1915 Cal 118: 21 CLJ 459: 24 Ind Cas 18 (DB).

——**S. 97 — Preliminary decree — Findings.**

The right to appeal under S. 97 lies only from a preliminary decree and not from a preliminary finding in a suit directing accounts to be taken. AIR (Vol 1) 1914 Bom 23: 38 Bom 331: 16 Bom LR 67: 23 Ind Cas 605 (DB).

——**S. 97 — Object of.**

The legislature in enacting S. 97 of the present C. P. C. intended to prevent preliminary questions being raised in the form of an appeal after the decision of a case on merits. (1912) 36 Bom 536: 14 Bom LR 560: 16 Ind Cas 159 (DB).

——**S. 97 — Preliminary decree — If may be questioned in appeal from final decree.**

Under the Old Code, in an appeal against the final decree, the propriety of the preliminary decree could also be questioned. (1909) 13 CWN 493: 9 CLJ 367 (371) (DB).

——**S. 97 — (Case under Old Code) — Preliminary decree — Final decree — Appeal — Objection to preliminary decree, admissibility of.**

Held, by the Full Bench (Maclean, C. J., and Rampini, J., dissenting) that in an appeal against the final decree in a partition suit it is open to the appellant to question the correctness of the preliminary order or decree for partition when no appeal was preferred against such order within the time allowed by law. 23 C 279, overruled. (1901) 5 CWN 617: 29 C 758 (763-767) (FB); (1908) 10 Bom LR 514 (DB).

5. Court fee.

——**S. 97 — Appeal from order granting application for final decree.**

Appeal from an order passed on the application for final decree in a mortgage suit against the judgment debtor who objected on the ground that he had satisfied the decree, is chargeable with 'ad valorem' Court-fee and not only 8 annas. AIR (Vol 12) 1925 Oudh 102: 84 Ind Cas 742: 27 OC 225 (DB).

——**S. 97 — Single appeal from both decrees.**

Appeal suit for accounts — Preliminary and final decrees.

Single appeal from both is permissible but court fee merely in respect of final decree is not enough. If the appeal in a suit for accounts is from whole decree the appellant is bound by the plaintiff's valuation in the plaint. 22 All 517 Diss. from. AIR (Vol 8) 1921 Mad 406: 70 Ind Cas 392: 14 MLW 389: 1921 MWN 558.

——S. 97 — Where a party who has the facility of time of appealing against the final decree, appeals against the preliminary decree only he cannot be allowed to do so as by so doing he has the chance of getting a reversal of the final decree without paying court fees for the same. The section does not prevent a party from filing a combined appeal against a preliminary and final decree if the dates permit him to do so. AIR (Vol 3) 1916 Bom 228: 18 Bom LR 76: 33 Ind Cas 146 (DB).

6. Effect of variation, modification and reversal of preliminary decree.

See N. 3 and 7.

7. Final decree during pendency of appeal against preliminary decree.

——**S. 97 — Appeal filed against preliminary decree — Final decree passed pending appeal — Appeal, if maintainable.**

The passing of a final decree subsequent to the institution of the appeal against the preliminary decree will not affect the maintainability of the appeal. There is no provision in the Code making an appeal filed against the preliminary decree infructuous if an appeal against the final decree is not filed. AIR (Vol 36) 1949 Nag 56 : 1947 NLJ 258 : ILR (1947) Nag 412 (DB).

——**S. 97 — Appeal — Preliminary and final decree passed — Appeal from preliminary decree — Appellate Court can give necessary and consequential directions regarding final decree.**

Where no appeal has been preferred against the final decree but only the preliminary decree is appealed against but a copy has been placed on the records of the appeal, it is the duty of the Appellate Court in dealing with the appeal to give

necessary and consequential directions regarding the final decree. AIR (Vol 29) 1942 Cal 153: 74 CLJ 61: 46 CWN 33: ILR (1942) 1 Cal 326: 201 Ind Cas 353.

——S. 97 — Final decree pending appeal from preliminary decree.

Final decree during pendency of appeal from preliminary decree — No stay of proceedings asked for by appellant — No appeal against final decree — Appeal against preliminary decree is competent. AIR (Vol 25) 1938 Bom 222: 40 Bom LR 164: 175 Ind Cas 43.

——S. 97 — Appeal from preliminary decree — Final decree passed pending appeal.

An appeal from a preliminary decree does not cease to be competent simply because pending it a final decree has been passed and no appeal has been filed against it. (1938) 40 PLR 123.

——S. 97 — ('Obiter') — Preliminary decree, appeal from — Final decree before decision of appeal — Appeal if competent.

'Obiter. — An appeal from a preliminary decree is competent even if a final decree is made before the appeal is presented; it is not necessary for a party aggrieved by a preliminary decree to appeal both from that decree and against the final decree in order to maintain his appeal against the preliminary decree, although the final decree apart from its being based on the preliminary decree may be otherwise correct. AIR (Vol 21) 1934 Pesh 57: 152 Ind Cas 323.

——S. 97 — Final decree pending appeal — Decree is valid.

Appeal from preliminary decree pending — Final decree passed is valid — C. P. Code, S. 11 and O. 34, R. 5. Principle of 'res judicata' would also apply to such case. AIR 1926 All 291, Expl. and not Foll. AIR (Vol 16) 1929 All 287: 119 Ind Cas 510 : 51 All 640 : 1929 ALJ 480 (DB).

——S. 97 — If appeal is allowed, final decree falls to the ground.

Under the C. P. Code (1908) a preliminary decree has an independent existence and by the appeal against the final decree one cannot attack the preliminary decree. The final decree is really dependent upon the preliminary decree, and if there is no appeal from the final decree but, the preliminary decree is set aside on appeal, the final decree will necessarily fall to the ground. AIR (Vol 15) 1928 Cal 167: 106 Ind Cas 128 (DB).

—S. 97 — Appeal from a preliminary decree filed before passing of the final decree is competent and is not rendered nugatory by reason of a final decree having been passed and not being appealed against. AIR (Vol 15) 1928 Nag 68: 105 Ind Cas 567.

——S. 97 — Second appeal.

—Final decree passed — Appeal from preliminary decree already filed and dismissed — Right to second appeal is not barred by the passing of the final decree. AIR (Vol 14) 1927 Cal 559: 101 Ind Cas 15 (DB).

——97 — Appeal against preliminary decree.

No stay ordered — Final decree by lower Court — Appellant must appeal or at least inform of the final decree to the appeal Court when the appeal comes on for hearing. AIR (Vol 13) 1926 Bom 43 : 92 Ind Cas 545 : 27 Bom LR 1492 (DB).

——S. 97 — Preliminary decree in redemption suit.

An appeal against a preliminary decree in a redemption suit when filed before the passing of a final decree therein cannot be treated as an appeal against the final decree when such final decree has been passed. AIR (Vol 11) 1924 Oudh 299 : 74 Ind Cas 485 (DB).

——S. 97 — Appeal against preliminary decree — Passing of final decree will not render appeal incompetent. AIR (Vol 10) 1923 Cal 282 (1): 68 Ind Cas 475 (DB).

——S. 97 — Passing of final decree — Preliminary decree — Appeal — Reversal of preliminary decree.

If a preliminary decree is reversed on appeal the final decree passed on the footing of that preliminary decree ceases to be operative.

The same result will follow in cases of modification of the preliminary decree which imperils the original final decree. AIR (Vol 6) 1919 Mad 870 : 35 MLJ 361 : 48 Ind Cas 7 (DB).

——S. 97 — Passing of final decree — Competency — Appeal against preliminary decree.

An appeal against only a preliminary decree for partition, cannot be proceeded with when a final decree has been passed, though it may be after the appeal was preferred. AIR (Vol 1) 1914 All 380: 8 ALJ 604: 33 All 528: 36 A 532: 24 Ind Cas 827 (DB).

[Contra 34 All 493: 16 Ind Cas 157: 37 Mad 455: 14 Ind Cas 394: AIR (Vol 1) 1914 Mad 473].

——S. 97 — Passing of final decree — Preliminary decree — Appeal against final decree during pendency of appeal — Effect.

Where the preliminary decree in a suit for partition had been appealed against and was modified by the High Court in second appeal, a final decree passed by the original court during the pendency of the appeal is inoperative on account of the modification of the preliminary decree. (1913) 18 CLJ 223: 21 Ind Cas 510 (DB).

——S. 97 — Passing of final decree — Pending appeal from — Preliminary decree.

A final decree passed during pendency of an appeal against the preliminary decree must be deemed to be subject to the result of the appeal, and is not operative where the preliminary decree is materially varied in appeal. (1913) 18 CLJ 214: 20 Ind Cas 576 (DB).

——S. 97 — Passing of final decree — Preliminary and final decrees.

A final decree, passed before the appeal from the preliminary decree must be brought to the appellate court's notice, otherwise the appellate court's decree supersedes the final decree also. (1913) 17 CWN 868: 18 CLJ 209: 19 Ind Cas 630 (DB).

——S. 97 and O. 34, Rr. 4 and 5 — Passing of final decree — Appeal from — Preliminary decree.

If a preliminary decree is reversed in appeal the final decree, so far as it is dependent thereon, falls with it and becomes inoperative. The passing of the final decree pending appeal against the preliminary decree is no bar to the hearing of the appeal even though no appeal has been preferred against the final decree. (1913) MWN 173: 24 MLJ 190: 13 MLT 209: 18 Ind Cas 730 (N) (DB).

——S. 97 — Passing of final decree — Appeal from preliminary decree.

Plaintiff in a partition suit appealed from a preliminary decree and defendant subsequently appealed from final decree. Held plaintiff's appeal is not barred; if an appeal from preliminary decree succeeds, the final decree passed later on falls to the ground. (1912) 34 All 493: 10 ALJ 19: 16 Ind Cas 157 (DB).

8. Preliminary decree.

——S. 97 — Partnership, dissolution and accounts, suit for — After preliminary decree but before final decree Court ordering Commissioner to credit plaintiff with certain sum — Order held interlocutory.

The orders passed for the guidance of the Commissioner appointed for taking accounts or mak-

ing partition or ascertaining mesne profits are not preliminary decrees. Where in a suit for dissolution of partnership and accounts what the Court does after passing the preliminary decree but before the final decree is to order the Commissioner to credit the plaintiffs with a particular amount on a particular day in the accounts, the order is an interlocutory order and does not conclusively determine the rights of the parties. AIR (Vol 27) 1940 Pat 204: 19 Pat 1: 6 BR 653: 188 Ind Cas 337 (DB).

——S. 97 — Mortgage suit.

Where a preliminary decree contains a provision that if sale proceeds are insufficient, plaintiff would be at liberty to apply for personal decree for the balance due, the application for a personal decree cannot be barred by time. Such a provision in a decree for sale constitutes an adjudication which is detrimental to the defendant and must be regarded as awarding to the plaintiff a personal decree in the event of the proceeds of sale being insufficient but merely leaving it open to the plaintiff to apply for a personal decree in such event, and if a party aggrieved by a preliminary decree does not appeal from it, he is under S. 97 precluded from disputing its correctness afterwards. AIR (Vol 22) 1935 Oudh 11: 11 OWN 1196: 10 Luck 233: 151 Ind Cas 1055.

——S. 97 — Effective preliminary decree, if decree of Appellate Court.

After an appeal has been preferred and dismissed, it is the decree of the Appellate Court that constitutes the effective preliminary decree in the cause. AIR (Vol 20) 1933 Nag 236: 29 NLR 130: 147 Ind Cas 699.

——S. 97 — Provisions of personal decree in preliminary decree.

The provision that if the net proceeds of the sale are insufficient to pay the amount decreed with interest and costs, the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance gives the mortgagee an actual right the existence of which is detrimental to the mortgagor. A mortgagor is aggrieved by a preliminary decree containing such a provision and if he wants to take exception to it, he must appeal against the preliminary decree within the period of limitation. If he does not do so he is precluded from disputing the correctness of the preliminary decree upon that point. AIR (Vol 17) 1930 Oudh 10: 123 Ind Cas 215: 6 OWN 969 (DB).

——S. 97 — Appeal from preliminary order in execution.

Appeal — Competency — Appeal from preliminary order in execution — Execution subsequently dismissed — Appeal is still maintainable — Execution will proceed as per appellate judgment. AIR (Vol 15) 1928 Cal 804: 115 Ind Cas 591 (DB).

——S. 97 — Preliminary decree, what is not.

Deccan Agriculturists' Relief Act, S. 15 — Decision that plaintiff is an agriculturist is not a preliminary decree. AIR (Vol 9) 1922 Bom 336: 70 Ind Cas 728 (DB).

——S. 97 — Decision on preliminary issue — Decision is not a "preliminary decree".

The finding that a party is an agriculturist within the meaning of the Dekkhan Agriculturists Relief Act is not by itself an adjudication which can be embodied in a decree, though it may result in the plaint being returned for presentation in the proper Court. So such finding is not a preliminary decree within S. 2 or S. 97, C. P. Code.

Per Macleod, C. J.:— Issues of law on which a case may be disposed of most often raise questions of jurisdiction or of limitation. But a finding that the Court has jurisdiction or that the plaintiff has brought his suit within the time prescribed by the law of limitation, does not determine the rights of the parties with regard to all or any of the matters in controversy in the suit; it merely enables the court to proceed to inquire into those rights. So, too, an issue of 'res judicata' found in the plaintiff's favour enables the Court to deal with the merits of the case. It cannot be said that decisions in the plaintiff's favour on such issues as these determine his right to sue which is a matter of controversy in the suit, for there is no such right known to law as the 'right to sue'. A plaintiff in a suit claims to be entitled to a remedial right on the consequences of an infraction of an antecedent right. 'Holland's Jurisprudence' pp. 290 and 291, Ref. But an aggrieved party is not debarred from appealing at the end of the case from certain findings during the hearing of the case which merely decide that the suit must proceed, or which decided questions without disposing wholly or partially of the case. AIR (Vol 8) 1921 Bom 220: 60 Ind Cas 885: 23 Bom LR 92: 45 Bom 627 (DB).

——Ss. 97 and 2 — Preliminary decree — Decision on — Preliminary issue.

A decree is an order granting or refusing any of the reliefs and hence the decision that notice was necessary under S. 80, C. P. C. does not amount to a preliminary decree, when the plaintiff alleges that he has given notice and the decision is not therefore appealable. AIR (Vol 5) 1918 Upp Bur 28: (1917) 3 UBR 1: 11 Bur LT 95: 40 Ind Cas 677.

——S. 97 — Preliminary decree — What is — Order of remand.

The order remanding after settling certain issues is a preliminary decree and must be appealed. AIR (Vol 4) 1917 Cal 701: 20 CWN 43: 32 Ind Cas 866 (DB).

——S. 97 — Preliminary decree — Decision on preliminary issues.

A decision as to misjoinder, limitation or jurisdiction does not amount to a preliminary decree within the meaning of S. 97; so a decision in plaintiff's favour upon a preliminary defence that the matters in dispute were caste questions outside the Court's jurisdiction is not a preliminary decree and is not appealable. AIR (Vol 1) 1914 Bom 149 : 39 Bom 339: 16 Bom LR 954 : 26 Ind Cas 885 (FB).

——S. 97 — Preliminary issue — Finding recorded but no decree drawn up — Whether preliminary decree.

Where there is only a preliminary finding and no decree is drawn up, there is no preliminary decree and no appeal under S. 97. The finding can be appealed against in the appeal against the decree and can be determined by the appellate court. (1913) 37 Bom 480: 15 Bom LR 382: 19 Ind Cas 894 (DB).

——S. 97 — Preliminary decree — What is.

Though a party can appeal from a preliminary decree, he can do so only if the decree exists in formal shape. The Court must, if applied to, after passing of the preliminary decree, have the decree drawn up to enable the aggrieved party to appeal from it. (1913) 37 Bom 60: 14 Bom LR 916: 17 Ind Cas 637 (DB).

9. Where no appeal has been preferred.

——S. 97 — Scope — Direction in preliminary decree for accounts — Failure to appeal — Claim to take accounts as final decree contrary to decision — Maintainability.

It is the duty of a party aggrieved by a direction in a preliminary decree for accounts passed by the Courts to appeal against it; if he does not do so, he cannot be permitted afterwards to go

behind the direction in question at the time of the taking of the accounts. S. 97, C. P. Code, is a bar to such a course. AIR (Vol 33) 1946 Sind 28: ILR 1945 Kar 368: 223 Ind Cas 50 (DB).

——S. 97, O. 34 R. 6 — Preliminary decree in mortgage suit containing statement that mortgagor shall be liable for any deficiency found due — No appeal —Final decree — Preliminary decree, if can be challenged and altered subsequently.

A Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right, and if that course is not taken, the decision, however wrong, cannot be disturbed.

An application under O. 34, R. 6, Civil P. C., by the mortgagee is necessary for an order for a personal decree for the balance due. But when the preliminary decree contains a statement that the mortgagor shall be liable for any deficiency that may be found due and the mortgagor does not go in appeal and a final decree is subsequently passed, the preliminary decree including such statement cannot be subsequently questioned or altered in view of S. 97 of Civil P. C. AIR (Vol 24) 1937 Rang 494: 173 Ind Cas 770.

——S. 97 — Orders for calculating and determining mesne profits.

C. P. Code, Ss. 97 and 144 — Order passed that party entitled to mesne profits — Another order determining amount — Second order appealed against when appeal against first order time barred — First order being appealable could not be attacked in appeal against second order. AIR (Vol 17) 1930 Lah 24: 113 Ind Cas 270.

——S. 97 — If appeal is not filed, right to object is lost.

Where the Court passed a preliminary decree in a partition suit and therein directed the Commissioner to take evidence and decide the question whether certain lands were 'zerait' or 'raiyat' and a party who did not object to the decree by way of appeal and who in fact submitted to the disposal by the Commissioner objected to the procedure.

Held that the appeal against the latter order embodying the Commissioner's report was barred by S. 97, C. P. Code. AIR (Vol 17) 1930 Pat 557: 11 PLT 456 (DB).

——S. 97 — Final decree — Preliminary decree cannot be re-opened.

At the time of the passing of the final decree Court has no power to go behind the preliminary decree in which the rights and liabilities of the parties had been determined. AIR (Vol 16) 1929 All 252: 1929 ALJ 425: 115 Ind Cas 462 (DB).

——S. 97 — No appeal from preliminary decree — Final decree cannot go behind it.

A Court cannot at the time of passing the final decree go behind its own preliminary decree where it has become final by not being appealed against. AIR (Vol 16) 1929 All 65: 26 ALJ 1370: 111 Ind Cas 713 (DB).

——S. 97 — Right of second appeal after final decree.

Second appeal, from preliminary decree, is not competent if appeal from final decree, is not filed. AIR (Vol 11) 1924 Cal 543 : 71 Ind Cas 290 (DB).

——S. 97 — Preliminary decree — Objection to — Plea of limitation.

A party not pleading limitation as a bar to the suit before passing the preliminary decree cannot plead it in appeal from the final decree. AIR (Vol 6) 1919 Cal 538: 50 Ind Cas 747 (DB).

——S. 97 — Omission to appeal — Preliminary decree — Mortgage — High rate of interest — No appeal.

A Court passing a preliminary decree in a suit on a mortgage is at liberty to fix interest at any rate that may seem suitable. If no appeal is made against the order fixing the rate of interest, then that order becomes final and cannot be questioned in any future proceeding for final decree. It makes no difference that the preliminary decree was made on a compromise between the parties. AIR (Vol 6) 1919 Pat 420: 4 PLJ 506: 51 Ind Cas 738 (DB).

——S. 97 — Omission to appeal — Effect of.

Where no appeal is preferred against a preliminary decree for sale in mortgage suit the points which could have been raised in that appeal, had it been filed, could not be urged in an appeal against the final decree in the same suit. AIR (Vol 3) 1916 Bom 305: 40 Bom 321: 18 Bom LR 38: 33 Ind Cas 749 (DB).

——S. 97 — Preliminary decree — What is — Omission to appeal — Partnership — Dissolution — Decree drawn up.

The C. P. Code, makes no provision for something which is neither a decree nor an order, nor anything which is both; nor does it provide that one adjudication by the Court can be resolved into diverse elements, some of which are decrees and some orders. The question is one of substance, whether an adjudication is a decree or an order.

In a suit for taking accounts of a partnership, the Trial Judge made an order declaring the partnership as dissolved from a particular date and ordered that an enquiry be made by the referee as to who were the partners and as to the dealings of the partners with the assets of the partnership. No appeal was preferred against this adjudication. The inquiry was made, accounts were taken and a final decree was passed. In an appeal against the final decree, the appellant contended 'inter alia', that the trial Judge had no jurisdiction to refer the question as to who were the partners.

Held, that the former adjudication of the trial Judge was a "decree" in so far as it declared the rights of the parties. The appellants were precluded from disputing its correctness by reason of their omission to appeal against it. The adjudication did not cease to be a decree, because a subordinate part of it, if correctly made, might have been separately made as an order. AIR (Vol 2) 1915 PC 116: 42 Cal 914: 42 IA 91: 19 CWN 449: 17 MLT 312: 2 LW 377: 21 CLJ 419: 13 ALJ 540: 17 Bom LR 432: 29 MLJ 70: (1915) MWN 485: 28 Ind Cas 710.

——S. 98.

1. **Connected appeals.**
2. **Difference of opinion.**
3. **Jurisdiction after reference.**
4. **Letters Patent.**

See also N. 9.

5. **Partial reference.**
6. **Partial reversal.**
7. **Powers of Third Judge.**
8. **Procedure.**
9. **Scope and applicability.**

1. Connected Appeals.

——S. 98 — Appeals analogous, hearing of.

Where of two analogous appeals, the preparation of the paper-book of one was delayed by the appellant till long after the other was heard and decided by a Division Bench against the appellant and at the hearing of it before another Division Bench, the Court was asked to differ from that decision and refer the case to a Full Bench, the court disapproved of the course adopted by the appellant as an attempt to introduce a very undesirable precedent. (1904) 8 CWN 843 (859) (DB).

2. Difference of opinion.

——S. 98 (2) — Central Provinces Courts Act (1 of 1917), S. 10 (b) — Judges differing on question of fact — Lower Court's decree, confirmation of.

Where two Judges comprising a Bench in hearing an appeal differ on a question of fact, the lower Court's decree will have to be confirmed under S. 98 (2), Civil P. C., and the point of difference is not to be referred to a third Judge, S. 98 (2), Civil P. C., not being controlled by S. 10 (b), Central Provinces Courts Act. AIR (V 19) 1932 Nag 88 : 28 NLR 80 : 140 Ind Cas 630.

——S. 98 — Confirming Judge's opinion prevails.

Appeal from the mofussil — Differences of opinion between the two Judges of the High Court hearing the appeal — Confirming Judge's opinion prevails — Letters Patent (Madras), Cls. 15, 16 and 36. AIR (V 12) 1925 Mad 1032 : 86 Ind Cas 857 : 21 MLW 721 (DB).

——S. 98 — When section does not apply.

The natural place to find the rules governing the exercise of the appellate civil jurisdiction over the other Judges of the High Court would be the Letters Patent, while the natural place to find the rules governing the exercise of the appellate civil jurisdiction over the Civil Courts of the mofussil subject to the High Court would be the Civil Procedure Code. The Code makes no provision for an appeal within the High Court, that is to say, from a single Judge of the High Court. This right of appeal depends on cl. 15 of the Charter. Appeals under the Letters Patent are governed by the Letters Patent, and appeals under the Code are governed by the Code. Therefore when a Bench of two Judges is hearing an appeal from the decision of a single judge of the same High Court whether on the original side or the appellate, and they differ in opinion, the opinion of the senior judge would prevail. AIR (V 10) 1923 Bom 218 : 76 Ind Cas 317 (DB).

——S. 98 — Judges differing on a question of law — Decision to be arrived at with reservation of point of law.

Under S. 98, where the Judges differ on a point of law, they should come to a complete decision except the question of law on which they differ, so that, by their judgment, they should make it clear that a final result would be arrived at on the decision of the question of law one way or the other. AIR (V 1) 1914 Cal 592 : 18 CWN 33 : 22 Ind Cas 383 (FB).

——S. 98 (2) — Difference of opinion — C. P. C., XIV of 1882, S. 575 — Distinction between.

Under the old Code when two Judges differed the whole appeal was referred to a third Judge, but under the new Code, it is only the point of law that has to be referred. (1911) 14 CLJ 552 : 39 C 353 : 16 CWN 817 : 13 Ind Cas 353 (FB).

3. Jurisdiction after Reference.

——S. 98 — Reference of appeal to the Chief Justice with a view to the appointment of a Full Bench — Appeal remitted to the Bench which made the reference — Jurisdiction.

The jurisdiction of a Division Bench to hear an appeal is not taken away by the fact that the Bench has referred the case to the Chief Justice in order that Full Bench might be constituted to hear it, and the Chief Justice has declined to take action on the reference. 1908 AWN 122 : 5 ALJ 285 (289).

——S. 98 — Per Chandavarkar J. — There is nothing in the language of Section 575 to support the view that the third Judge to whom reference is made under the section cannot sit and hear the appeal alone. (1904) 6 Bom LR 131 (210) (DB).

4. Letters Patent.

See also N. 9.

——S. 98 — Applicability — Appeal in High Court — Difference of opinion between two Judges of Division Bench — Procedure — Letters Patent — (Pat.).

Section 98 has no application to an appeal heard by a Bench of two Judges of a High Court, who differ on a question of law arising in the appeal. The relevant enactment applicable to such a case is the Letters Patent of the High Court. (1948) 27 Pat 332 (DB).

——S. 98 — Judges of Division Bench hearing first appeal disagreeing either on points of law or facts — Procedure to be followed.

Where two Judges comprising a Division Bench hearing a first appeal have disagreed either in law or in fact, the procedure to be followed is that laid down in cl. 27 of the Letters Patent (All.) and not that laid down in S. 98, Civil P. C. AIR (V 25) 1938 All 641 : (1938) ALJ 1027 : ILR (1938) All. 972 : 1938 AWR 712 : 178 Ind Cas 683 (FB).

——S. 98 (3) (as amended by Act XVIII of 1928) — Difference of opinion in Division Bench — Point of difference to be stated by Division Bench — Letters Patent (Lahore), cl. 26.

With the addition of sub-s. 3 to S. 98, Civil P. C. made by the Repealing and Amending Act XVIII of 1928, that section has no application to cases heard by a Division Bench of a Chartered High Court, whether on appeals from decrees of subordinate Courts, or from decrees passed by a Judge of the High Court on the Original Side, and all cases of difference of opinion among the Judges composing the Division Bench are governed by cl. 26, Letters Patent. The Division Bench should state expressly the points of difference. AIR (V 21) 1934 Lah 371 : 35 PLR 760 : 15 Lah 425 : 149 Ind Cas 575 (FB).

——S. 98 — When the Judges of a Division Bench of the High Court differ, even in the case of appeals from the 'mofussil', the case is governed by cl. 26 of the Letters Patent and not by S. 98, Civil P.C. AIR (V 20) 1933 Lah 648 : 34 PLR 584 : 142 Ind Cas 427.

——S. 98 — The effect of the amendment of S. 98, by adding sub-cl. (3) is to make cl. 28, Letters Patent (Pat.) apply to appeals from the decisions of the 'mofussil' Courts as well. AIR (V 20) 1933 Pat 67 : 11 Pat 772 : 14 PLT 374 : 141 Ind Cas 369.

——S. 98 — Section is rule of procedure.

Per Thiruvenkatachariar, J. — Both S. 98, C. P. Code and Cl. 36, Letters Patent, are mere rules of procedure, differing in that respect from Cl. 15, Letters Patent, which gives a right of appeal in certain cases from the decision of a single Judge or of a Division Bench. AIR (V 16) 1929 Mad 641 : 52 Mad 563 : 29 MLW 823 : 116 Ind Cas 343 : 57 MLJ 264 (FB).

——S. 98 — When inapplicable.

Per Full Bench — Whether the appeal is under C. P. Code, or under the Letters Patent, the procedure to be adopted in either case by the High Court in case of an equal division of opinion between the Judges is to be governed by Cl. 36, Letters Patent, and not by S. 98, C. P. Code. AIR (V 16) 1929 Mad 641 : 29 MLW 823 : 52 Mad 563 : 57 MLJ 264 : 116 Ind Cas 343 (FB).

——S. 98 — Letters Patent, how far superseded.

Per Suhrawardy, J. (Walmsley, J. contra.) — To the extent to which S. 98, C. P. Code, is inconsistent with clause 36 of the Letters Patent,

the former has, by virtue of the power conferred on the Indian Legislature by clause 44 of the Letters Patent superseded or modified the latter. AIR (V 12) 1925 Cal 845 : 88 Ind Cas 637 : 41 CLJ 456 : 29 CW 755 : 52 Cal 894 (FB).

——S. 98 — Difference of opinion.

Appeal from the mofussil — Differences of opinion between the two Judges of the High Court hearing the appeal — Confirming Judge's opinion prevails — Letters Patent (Madras), Cls. 15, 16 and 36. AIR (V 12) 1925 Mad 1032 : 86 Ind Cas 857 : 21 MLW 721 (DB).

——S. 98 — Applicability.

Provincial Small Cause Courts Act, S. 25 — In case of difference among Judges forming the High Court Bench, S. 98, C. P. Code does not apply but Cl. 36 of the Letters Patent applies and senior Judge's opinion prevails. Case-law discussed. AIR (V 12) 1925 Mad 281 : 85 Ind Cas 1016 : 47 MLJ 876 (DB).

——S. 98 — Bombay Letters Patent, Clause 36 — No conflict between the Code and Letters Patent.

Per Das and Foster, JJ. — There is no conflict between the Code and the Letters Patent. The special procedure indicated in the Letters Patent applies to Letters Patent appeals; the procedure indicated in S. 98 of the Code applies to appeals from Subordinate Courts. AIR (V 12) 1925 Pat 625 : 88 Ind Cas 141 : 87 Ind Cas 849 : 4 Pat 510 : 6 PLT 634 (DB).

——S. 98 — Effect on Letters Patent.

Letters Patent (Bombay), Cl. 36 — Clause 36 is not controlled by C. P. Code, S. 98. AIR (V 8) 1921 PC 6 : 40 MLJ 519 : 60 Ind Cas 822 : 45 Bom 718 : 19 ALJ 409 : 23 Bom LR 623 : 30 CLJ 488 : 25 CWN 605 : 48 IA 181 : 14 MLW 7 : 1921 MWN 408.

——S. 98 — Reference — Chief Court — Punjab.

A Division Bench of the Punjab Chief Court cannot make a reference under S. 10 (2) (b) of the Punjab Courts Act when the members of that Bench have differed on a point of law. The proper course is to refer the point under the proviso to S. 98, C. P. C. AIR (V 3) 1916 Lah 113 : 109 PWR 1916 : 154 PLR 1916 : 70, 71 PR 1917 : 34 Ind Cas 714 (FB).

——S. 98 — Revision cases — Difference of opinion.

Letters Patent, Cl. 36 and not S. 98, C. P. C., governs the procedure in cases of difference of opinion in revision cases. AIR (V 2) 1915 Mad 1193 : 18 MLT 591 17 Cr. LJ 42 : 32 Ind Cas 330 (DB).

——S. 98 (S. 575, old Code) — Original Side appeal — Letters Patent, Cl. 36.

Where the Appellate Judges are divided in opinion in an Original Side appeal, S. 575, C. P. C. (old Code), has no application, and the opinion of the Senior Judge prevails under Cl. 36 of the Letters Patent. (1905) 29 M 1 (24) (DB).

[Reversed on another point, in (1907) 30 Mad 169 : 17 MLJ 19].

——S. 98 (S. 575, old Code) — Decision when appeal heard by two or more Judges — Does it override S. 27 of the Letters Patent in Letters Patent appeal.

(1904) 26 A 10 (13) : 1903 AWN 162 (DB).

——S. 98 (S. 575, old Code) — Letters Patent, Cl. 15 — Appeal. (1904) 6 Bom LR 230 (231).

——Ss. 98, 141 (S. 575, 647, old Code) — Execution — Delivery — Obstruction — Revision — Difference of opinion — Letters Patent, Cl. 36.

Quaere — Whether under the Letters Patent the opinion of the senior Judge ought not to prevail where there is a difference between two Judges who heard a revision petition against an order under S. 331, S. 575 being inapplicable to the case by reason of the explanation to S. 647 which excludes execution from the operation of the section. (1901) 3 Bom LR 58 : 25 B 478 (483 - 484) (FB).

——S. 98 (S. 575, old Code) — Judgment of the affirming Judge — Decree — Charter Act, Arts. 15 and 36 — Appeal — Points on which the appeal should be heard.

The decree of one of two judges of a Division Bench, whose judgment has prevailed under the provisions of S. 575 of the Code of Civil Procedure, is appealable under S. 15 of the Letters Patent. On appeal under the Letters Patent, the appellate Court has jurisdiction to hear the appeal not merely on the points on which Judges of the Division Bench differed, but also on other points raised in the appeal. (1901) 11 MLJ 10 (15 - 18) (FB).

5. Partial Reference.

——S. 98 — Appeal involving several items — Difference of opinion as to some items only — Procedure to be followed — Applicability of S. 98.

Under S. 98, Civil P. C., where the Judges composing a Bench do not agree in confirming the adjudication made by the lower Court in respect of one item, such decree or adjudication relating to that item shall be confirmed. At the same time, if they agreed in reversing the decree or adjudication by the lower Court as regards another item in dispute, the decree in respect of such item shall be varied. For the purpose of this section where the document described as the "decree' contains adjudications regarding several items, each adjudication is a decree as defined in S. 2 (2), and the provisions of S. 98, Civil P. C., should be applied with reference to the adjudication of each item. AIR (V 20) 1933 All 473 : (1933) ALJ 1425 : 55 All 672 : 150 Ind Cas 262.

6. Partial Reversal.

——S. 98 — Reversal of part of decree.

If the appellate court Judges agree that a part of the lower Court's judgment is erroneous, that part must be reversed, and if as to rest, the Judges are equally divided, it is deemed as confirmed. AIR (V 3) 1916 Cal 582 : 22 CLJ 525 : 31 Ind Cas 965 (FB).

7. Powers of Third Judge.

——S. 98 (2), proviso — Bench of two Judges divided in opinion — Point of law noted in order-sheet — Case referred to third Judge.

It is the practice of the Patna High Court that when a Bench of two Judges hears an appeal and the Judges are divided in their opinion, they should express the same in their separate judgments and note down the point of law on which they differ in the order-sheet for reference to a third Judge. It is not necessary for the differing Judges to state the same in their respective judgments. AIR (V 30) 1943 Pat 433 : 11 BR 149.

——S. 98 — Old law — New law — Point of law alone is to be answered by the 3rd Judge.

Formerly the third Judge could dispose of the case generally; now he must decide the point of law referred and then dispose of the appeal, the referring Judges having indicated how it should be disposed of according to the possible answers to be given. The result is that under the present law a Judge may be asked to decide whether this or that applies when his opinion may be that neither does apply. The third Judge in this case having held that he did not concur with either of the Judges the differing Judges dismissed the appeal under clause (2), that is the part preced-

ing the proviso. AIR (V 9) 1922 Cal 544 : 26 CWN 985 (DB).

——S. 98 — Reference — Powers of third Judge.

Per Woodroffe, J. — Where two judges refer the point of law under S. 98 and the judge to whom it is referred agrees with neither, then he is competent only to express his opinion. AIR (V 9) 1922 Cal 544 : 26 CWN 935 (DB).

——S. 98 — Third Judge is confined to the reference.

Reference to third Judge on point of law — He cannot hear whole appeal and express opinion outside the reference. AIR (V 9) 1922 Oudh 189 : 68 Ind Cas 209 : 9 OLJ 219 : 25 OC 213 (DB).

——S. 98 — Reference to third Judge — Scope of the trial.

Where two judges of a division Bench differ on a point of law and refer the matter to a third Judge, the latter must confine his opinion to the specific point and not dispose of the case 'de novo' on the merits. (1913) 35 All 487 : 40 IA 182 : 16 OC 247 : 17 CWN 1165 : 14 MLT 299 : 25 MLJ 492 : 11 ALJ 901 : 18 CLJ 384 : (1913) MWN 785 : 15 Bom LR 1001 : 21 Ind Cas 288 (PC).

8. Procedure.

——S. 98 — Procedure.

Where an appeal is heard by two Judges and both agree upon reversal of the decree appealed from only as to a portion but differ as to the rest, the decree will be reversed as to the portion with respect to which the Judges have agreed on reversal and will be confirmed as to the rest, namely, with respect to which they have differed. AIR V 13) 1926 Lah 65, Diss. from. AIR (V 15) 1928 Mad 180 : 54 MLJ 703 : 51 Mad 291 : 28 MLW 158 : 109 Ind Cas 153 (DB).

9. Scope and applicability.

——S. 98 — When section and not Letters Patent applicable.

Appeal from subordinate Court — Bench hearing appeal differing in opinion — Section 98 applies and not Letters Patent (Cal.) AIR (V 13) 1926 Cal 121 : 91 Ind Cas 897 : 52 Cal 1018 (DB).

——S. 98 — Rule and exception.

The principle adopted by the Legislature in S. 98 is that the decree of the Subordinate Court must be confirmed unless the majority of the Judges composing the appellate Bench concur in varying or reversing such decree. In other words, the confirmation of the decree appealed from is the rule, and its modification or reversal is only an exception. Where there is no complete agreement between the two Judges as to the variation or reversal of the decree passed by the trial Court, the case is governed by the general rule embodied in sub-s. (2) of S. 98 of the Code, and the decree of the Court of first instance should be confirmed. AIR (V 13) 1926 Lah 65 : 7 Lah 179 : 27 PLR 50 : 8 LLJ 13 : 93 Ind Cas 344 (DB).

——S. 98 — Section when applicable.

Appeal from Subordinate Court heard by a Bench of two Judges — Judges differing in opinion — Procedure is regulated by S. 98 — All other cases are governed by Letters Patent (Lahore), Cl. 26. AIR (V 13) 1926 Lah 65 : 7 Lah 179 : 27 PLR 50 : 8 LLJ 13 : 93 Ind Cas 344 (DB).

——S. 98 — Appeal to High Court under the Code, applicability of Letters Patent (All.) Cl. 27 — Applicability to Letters Patent appeals — Difference in procedure.

Where an appeal filed to the High Court under the Civil P. C. the procedure regulating the hearing and the disposal of the appeal as laid down in the Code must be followed, and consequently in an appeal to the High Court under the Civil P. C., in a case of difference of opinion between two Judges hearing the appeal, the procedure which should be followed is the one indicated in S. 98 (2), Civil P. C., and not the one laid down in cl. 27 of the Letters Patent.

Under cl. 27, the reference is imperative and obligatory and not discretionary as in S. 98 and under cl. 27, the subject of the reference is wider in scope as it may relate to both questions of fact and of law, and is not restricted to questions of law only as in S. 98. AIR (V 19) 1932 All 195 : (1931) ALJ 1157 : 137 Ind Cas 58.

——S. 98 — Second appeal — Difference of opinion — Procedure — Letters Patent, Cl. 36.

The procedure, when Judges differ on second appeals from mofussil is governed by S. 98, C. P. C. and not by cl. 36, Letters Patent. AIR (V 6) 1919 Bom 1 : 43 Bom 433; 492 : 21 Bom LR 157 : 50 Ind Cas 715 (FB).

——S. 98 — Land acquisition appeal — Difference of opinion.

Where in an appeal under the Land Acquisition Act the judges composing a division Bench differ as to the amount of additional compensation the award of the Lower Court should be confirmed under S. 98, C. P. C. AIR (V 6) 1919 Mad 626 : 41 Mad 943 : 8 LW 261 : 24 MLT 155 : 35 MLJ 110 : (1918) MWN 540 : 49 Ind Cas 27 (FB).

——S. 98 — (S. 575, old Code) — Civil revision petition — Heard by two Judges — Difference of opinion. — S. 575 applies and not Art. 36 of Letters Patent.

Where a civil revision petition is heard by two Judges and there is a difference of opinion between them, S. 575, C. P. C., applies and not Art. 36 of the Letters Patent. (1901) 25 M 548 (551) (FB).

——S. 99.

See also C.P.C., O. 1 Rr. 1 and 3; O. 2 R. 3.

1. Causes of action, joinder of.
2. Error, irregularity and defects
3. Joinder of parties.
4. Jurisdiction.
5. Merits of the case.
6. Multifariousness.
7. Remand
8 Waiver.
9. Scope.

1. Causes of action, joinder of

——S. 99 — Application for amendment introducing new cause of action — Amendment allowed and suit tried on that basis — Evidence relating to both causes of action — Suit, if can be rendered abortive.

Even if it be true that the wife of a deceased husband can continue the suit filed by her husband on the cause of action which accrued to her husband, she is not entitled to add to it an alternative cause of action which accrued to her in her personal capacity, yet where the suit has been tried on the amended plaint, and the parties have adduced all the evidence relating to both the causes of action, an objection to the amendment of the plaint by the wife so as to include new cause of action should not be allowed to prevail, and all the time and labour expanded on the trial of the suit should not be thrown away. Assuming that the High Court has erred in overruling the objection to the amendment and in upholding the trial on both the causes of action, the trial should not be rendered abortive, when the alleged misjoinder has affected neither the merits of the case nor the jurisdiction of the Court. AIR (Vol 24) 1937 PC 233 : 3 BR 603 : 1937 OWN 573 : (1937)

MWN 683: 46 MLW 1: 18 PLT 495: 41 CWN 1029 : (1937) 2 MLJ 151 : 39 PLR 698 : ILR (1937) All 655 : 1937 AWR 631 : 65 CLJ 438 : 39 Bom LR 979 : (1937) ALJ 1032 : 31 SLR 590 : 64 IA 250 : 169 Ind Cas 1.

——S. 99 — Where a decree has been passed for damages and an appeal preferred therefrom, even though some particular item or items in an account may be found by the Court of appeal against the respondent and on that footing the amount for which a decree has been granted by the lower Court may have to be enhanced, still the decree might be supported by showing that in respect of some other item, the Court below made a mistake. This rule is sound subject to the qualification that the rule does not apply to decisions founded upon different rights or causes of action. AIR (Vol 20) 1933 Cal 165: 56 CLJ 285: 143 Ind Cas 377.

——S. 99 — Preliminary decree passed — Order for making decree for sale absolute made but formal final decree not passed — Irregularity can be condoned under S. 99 if Court's jurisdiction or merits of case are not affected and the terms of the decree are otherwise ascertainable. AIR (Vol 14) 1927 Bom 131: 100 Ind Cas 956: 51 Bom 125: 29 Bom LR 107 (DB).

——S. 99 — Joint right of action — Necessary party must be on record — Proper party may be added.

The general rule is that if several persons have a joint right of action all must join in suing. If any of them will not come in as plaintiffs they must be added as defendants. Co-trustees are subject to the above rule. If some of several trustees bring a suit for possession of property without impleading their co-trustees and obtain a decree, the High Court on appeal may dismiss the suit or remand the case. Objections as to non-joinder should be taken under O. 1, R. 13 at the earliest opportunity and if so taken fail under two heads:—

(1) If it is absolutely necessary to have the absent party on record, he ought to be added unless the plaintiff refuses to add him when the suit should be dismissed. If the trial Court erroneously proceeds with the suit without following either of these courses the objection can be repeated on appeal.

(2) If it is not a case of imperative necessity but only a matter of convenience or expediency either the absent party may be added or the suit may be tried without him. AIR (Vol 9) 1922 Mad 317: 70 Ind Cas 645: 15 LW 283: 1922 MWN 106: 31 MLT 266: 42 MLJ 133 (DB).

——S. 99 — Misjoinder of causes of action — Interference by High Court.

The High Court will not interfere merely on the ground of misjoidner of causes of action especially when the lower Appellate Court has overruled the plea and decided the case on the merits. S. 99 gives the procedure to be followed in appeals heard after the new Act came into force though the old Code was in force at the time of the institution of the appeal. (1912) 11 MLT 25: (1912) MWN 50: 22 MLJ 225: 13 Ind Cas 788 (DB).

——S. 99 — Misjoinder.

The fact that relief prayed for did not affect each defendant equally does not constitute misjoinder nor is it a ground for upsetting a decree unless the defendant is prejudiced. 108 PWR 1911: 179 PLR 1911 : 46 PR 1911: 10 Ind Cas 515 (DB).

——S. 99 — Misjoinder of causes of action.

One suit by four plaintiffs owning separate plots of land, against the same defendant for trespassing on all plots at the same time is bad for misjoinder, which is not a mere irregularity capable of being curred by S. 99. (1911) 34 Mad 55: 8 MLT 6: (1910) MWN 229: 6 Ind Cas 15 (DB).

——S. 99 — Misjoinder of causes of action.

Appeal — Misjoinder of causes of action is no ground for the reversal of a decree in appeal. (1910) 7 MLT 364: 5 Ind Cas 466 (DB).

——S. 99 — Misjoinder of cause of action.

S. 578 of the C.P. Code of 1882 (S. 99 of the new Code) has the effect of preventing such a ground as misjoinder of cause of action from being made a ground of appeal or being dealt with by a Court on appeal. (1909) 36 Cal 780: 6 ALJ 567: 10 CLJ 58: 13 CWN 920: 5 MLT 423: 11 Bom LR 833: 19 MLJ 548: 93 PR 1909: 146 PWR 1909: 68 PLR 1910: 36 IA 103: 3 Ind Cas 382 (PC).

——S. 99 (S. 578, Old Code) — Misjoinder of causes of action against several defendants.

A misjoinder of causes of action against different defendants is not an irregularity of such a nature as would be covered by S. 578, C.P.C. (1903) 27 M. 80 (84) (DB).

2. Error, irregularity and defects.

(a) Irregularity.
(b) Error.
(c) Defect.

(a) Irregularity.

——S. 99 — Irregularity in transfer owing to administrative order — Curability.

Where an irregularity in the matter of a transfer is owing to an administrative order, the irregularity is curable under S. 99, C. P. Code. AIR (Vol 37) 1950 Ajmer 33.

——S. 99 — Presentation of plaint — Person not properly authorised — Defect is mere irregularity — Decree obtained cannot be set aside merely on ground of that irregularity.

Failure to comply with the provisions regarding presentation of a plaint is a mere irregularity, so that if the person presenting it is not properly authorised to do so, the presentation would be irregular, but it does not oust the jurisdiction of the Court. In such a case the Court would have a discretion to permit the irregularity to be cured, and if the plaintiff has acted in good faith and without gross negligence, the Court would allow it to be cured. The suit must then be deemed to have been filed when it was first instituted, and under S. 99, the decree passed in favour of the plaintiff will not be reversed in appeal on the ground of the said irregularity. AIR (Vol 33) 1946 Bom 174: 47 Bom LR 808.

——S. 99 — Plaintiff minor — Next friend brought on record — Next friend not signing and verifying plaint — Irregularity can be cured and dismissal of the suit is not proper. (1942) 1942 OWN 281.

——S. 99 — Absence of leave under O. 2, R. 4, Civil P. C. is not a ground on which the decree can be reversed or varied. AIR (Vol 28) 1941 Bom 247: 43 Bom LR 293: ILR (1941) Bom 361: 196 Ind Cas 146.

——S. 99 — Suit for rent by landlord — Heirs of deceased tenant not formally substituted as heirs, though already on record as parties — Rent decree, whether reduced to money decree.

A decree in a suit for arrears of rent will not operate as a rent decree, if the tenants are not all impleaded in the suit. But where in such a suit by a landlord against his recorded tenants, the heirs of a deceased tenant are not formally substituted as his heirs but are on record already as parties to the suit, the mere want of formal substitution, may be merely an irregularity but not a material one and it does not reduce the rent-decree into a money-decree. AIR (Vol 24) 1937 Pat 147: 3 BR 536: 169 Ind Cas 304.

——S. 99 — Where the Judge combines the order for filing the award and judgment into one, the procedure is not irregular and even if it is, if it does not mislead either of the parties it is curable under S. 99. AIR (Vol 23) 1936 Nag 246: 167 Ind Cas 260.

——S. 99 — **Suit allowed to be withdrawn with permission to bring fresh suit on payment of costs — Date for payment of costs not fixed — Second suit filed without paying costs.**

Held, that the question whether the money should be paid first and the suit filed later, or the suit be kept pending until the money is paid, is clearly a matter of procedure, and irregularities in procedure which do not affect the merits and which do not result in prejudice or injustice are curable either under S. 99, Civil P. C. or the principles underlying it. But the fresh suit should be treated to have been filed on the date of paying costs of previous suit. AIR (Vol 22) 1935 Nag 56: 62 Cal 233: 39 CWN 744: 36 Cr LJ 1115: 157 Ind Cas 287 (SB).

——S. 99 — What is — Omission to sign and to verify the plaint are mere irregularities within S. 99. AIR (Vol 17) 1930 Lah 735.

——S. 99 — **Allowing appeal on technicality is material irregularity.**

Where the lower Court acts with irregularity in the exercise of its jurisdiction in not paying heed to the provisions of S. 99 and that irregularity is material, in that it results in the appeal being accepted on a pure technicality, its decision is liable to be set aside in revision. AIR (Vol 13) 1926 Lah 402: 93 Ind Cas 938.

——S. 99 — An application for the substitution of the name of the legal representative of a deceased can be made to the Court to which the decree has been transferred for execution and in any case if the application is not made to the Court passing the decree it is a mere irregularity which is covered by S. 99. 28 Mad 466, Not Foll. AIR (Vol 13) 1926 Lah 34: 26 PLR 740: 90 Ind Cas 1050 (DB).

——S. 99 — Failure to comply with the provisions of O. 32, R. 3(4) is only an irregularity covered by S. 99 of the C. P. Code, and where such failure has not prejudiced the minor in any way, the proceedings are not vitiated. AIR (Vol 12) 1925 All 540: 6 LRA Civ. 323: 88 Ind Cas 294.

——S. 99 — Company — Meeting — Validity of votes — Plaintiff disputing validity can claim inspection and discovery of documents — But refusal of inspection is not wrong so as to merit reversal by superior Court, where delay is bad and where inspection is not likely to benefit plaintiff. The restrictions in England in regard to the inspection of ballot papers in elections both to the House of Commons and in regard to Municipal elections, show there are some considerations against a free right of inspection of voting papers in a case like the present, though those restrictions being statutory cannot apply in India. AIR (Vol 12) 1925 Bom 105: 26 Bom LR 907: 84 Ind Cas 363 (DB).

——S. 99 — When a decree is transferred to another Court for execution and after the execution proceedings are started, the judgment-debtor dies and the Court of transfer brings on the record the legal representative of the judgment-debtor and the legal representative acquiesces in the procedure and puts forward objections in the Court of transfer without challenging its jurisdiction to hear the objections, but no application under S. 50, C. P. Code, is made to the Court which passed the decree, no case of want of jurisdiction will arise but there would be an irregularity of procedure curable under the provisions of S. 99 of the C. P. Code. AIR (Vol 12) 1925 Oudh 448: 12 OLJ 146: 2 OWN 73: 28 OC 330: 87 Ind Cas 21 (DB).

——S. 99 — Where the power of attorney on the strength of which the suit was filed was not a general power of attorney within the meaning of the rule as framed by High Court for appearances within its jurisdiction.

Held, that it is only an irregularity in the proceedings in the suit not affecting the merits of the case or the jurisdiction of the Court, and that there is no reason for disturbing the decree appealed from on that ground. AIR (Vol 10) 1923 Bom 44: 24 Bom LR 1302: 47 Bom 227: 76 Ind Cas 34 (DB).

——S. 99 — Where the mother actually appeared as guardian 'ad litem' of her minor son and filed a compromise, agreeing to pay the decretal money within four months and the mortgagee agreed to exempt her from the costs of the suit and the compromise was entered into with the leave of the Court.

Held, from the fact that such sanction had been granted it may be inferred that everything necessary had been done to have the minor properly represented by a guardian 'ad litem'. Where the Court by its action has given its sanction to the appearance of a person as such a guardian, the absence of a formal order of appointment is not necessarily fatal to the proceedings. Even omissions to serve the minors concerned or their mother personally are treated as mere irregularities covered by S. 99 of the Code of Civil Procedure and not errors fatal to the suit. AIR (Vol 10) 1923 Oudh 206: 26 OC 113: 74 Ind Cas 409.

——S. 99, and O. 21, Rr. 54 (g), 89, 90, 91, 92 — **Execution Sale — Want of attachment in execution does not interfere with power of Court to sell property.**

Attachment is only a step in execution, the omission of which does not vitiate a sale of property unless material loss results therefrom. After the confirmation of sale there can be no objection as to attachment, the want of which, being a mere irregularity, does not interfere with the executing Court's power to sell the property. AIR (Vol 5) 1918 Mad 1262: (1917) MWN 89: 37 Ind Cas 964 (DB).

——S. 99 — **Appointment of guardian ad litem — Notice — Irregularity.**

If the Court has allowed a party to appear as the guardian of a minor and to conduct the proceedings in his behalf the mere circumstance that a notice was not issued to the guardian is immaterial and the irregularity is curable under S. 99. 30 Cal 1021 referred to. AIR (Vol 3) 1916 Pat 375: 35 Ind Cas 404 (DB).

——S. 99 — **Suit against firm — Irregularity.**

The irregularity caused in not filing a suit against firm, against the individual partners, is covered by S. 578 (old Code) or S. 99, C. P. C. (1910) 34 Bom 72: 11 Bom LR 255 : 2 Ind Cas 173 (DB).

——S. 99 (S. 578 Old Code) —**Minor appellant — Death of guardian pending appeal — Non-appointment mere irregularity.**

Held where the next friend of a minor appellant died during the pendency of an appeal and the appeal was decreed in his favour without any persons being appointed to act as his next friend, the omission to make such appointment was a mere irregularity, and as no one was prejudiced thereby, the decree passed was not to be disturbed. (1906) 3 ALJ 81 (85) (DB).

——S. 99 — **(S. 578, old Code) — Irregularity — Disposal of a suit on a Sunday.**

Held, that the disposing of a civil suit on a Sunday is a mere irregularity which is covered by

the provision of S. 578 of the Code of Civil Procedure. 1907 AWN 168: 29 A 562: 1908 AWN 43: 5 ALJ 105: 30 A 136 (137) (DB).

——**S. 99 (S. 578 old Code) — Irregularity — Appellate Court's powers — Error or irregularity by reason of non-joinder of necessary parties.**

Under the provisions of S. 578, C. P. C., the appellate Court is not entitled to reverse the decree of the lower Court on the ground that the coparceners of the plaintiff have not been joined on the record unless the appellate Court is satisfied that that omission has affected the merits of the case or the jurisdiction of the Court. The Court must, in a case of this description, look to the essential justice of the case, and keep in view the substance and merits rather than strict adherence to what turns out as in this case to be a matter of form. (1907) 9 CLJ 623: 1 Ind Cas 530 (534) (DB).

——S. 99, (Ss. 578, 562 old Code) — Remand irregular — Cured.

See (1907) 5 CLJ 328 (333).

——**S. 99, (S. 578 old Code) — Recording of evidence in English in ejectment case.**

Recording of evidence in English which is not the language of the Court in an ejectment case (treating the case as one for rent under the Bengal Tenancy Act) is a mere irregularity and is cured by S. 578. (1907) 11 CWN 826: 34 C 396 (398, 399) (DB).

——**S. 99 (S. 578 old Code) — Application for execution against the legal representative made to the executive Court — Irregularity.**

The entertainment of an application to execute the decree against the legal representative by the executing Court (as different from the Court which passed the decree) is not a mere irregularity. (1905) 28 M 466 (472) (FB).

——**S. 99 (S. 578 old Code) — Execution sale — Mortgage decree — Decree Nisi not absolute — Application to stop the execution.**

After an order was passed for sale of the mortgaged property in execution proceedings under a mortgage decree directing the sale of the mortgaged property in default of payment by the mortgagor within a certain time.

An application was made by the mortgagor to stop the execution on the ground that there was no decree absolute and that therefore his right of redemption was not extinguished.

Held, (1) that all the conditions of S. 89, T. P. A., having been complied with except that in the application for the order for sale the word "absolute" did not appear, the application must fail; (2) that even if there had been an error, it was of the most technical description and one manifestly covered by S. 578, C. P. C. (1903) 5 Bom LR 389 (392).

——S. 99 (S. 578 old Code) — Irregularities, cure of — Insolvency — Notice not posted in Court — Effect on jurisdiction.

See (1901) 5 CWN 91 (99).

——**S. 99 (S. 578 old Code) — Verification — Defect — Objection on appeal — Irregularity.**

Though defective verification may be remedied if objection were taken in the first Court, yet if objection was not taken till the case came before the appellate Court the plaint will not be returned for amendment, nor will the suit be dismissed, if there is no prejudice proved to have arisen from such defect. (1901) 5 CWN 94 (98) (DB).

(b) Error.

——**S. 99 — Memo. of appeal not accompanied by copy of directions delivered under R. 12, Payment of Wages (Procedure) Rules, 1937.**

Section 99 would apply to a case where the memo. of an appal under S. 17, Payment of Wages Act is only accompanied with the copy of the order and not the copy of the directions on the form prescribed under R. 12, Payment of Wages (Procedure) Rules, 1937, because no such directions were issued by the lower Court. The appeal does not become incompetent for this reason. AIR (Vol 32) 1945 Nag 244: ILR (1945) Nag 587: 1945 NLJ 281.

——**S. 99 — Appeal filed by mistake — Dismissal of — Second appeal and first appeal filed — Dismissal of first appeal — Finality of.**

Where from an order of the Assistant Collector, by mistake an appeal was filed before the District Judge instead of in the High Court, and it being dismissed, a second appeal was filed in the High Court and at the same time a first appeal was made in the High Court and this was dismissed as barred:

Held, that the order rejecting the first appeal was final and that another appeal would not lie to the High Court from the same order of the Assistant Collector. AIR (Vol 21) 1934 All 624 (2): 18 RD 241: 3 AWR (HC) 673: 151 Ind Cas 356 (DB).

——S. 99 — No man should suffer by an error of procedure committed by the court. AIR (Vol 18) 1931 Oudh 22: 5 Luck 116: 7 OWN 655 (DB).

——**S. 99 — Appeal in non-appealable case.**

Where an appeal is preferred to a Court which is the proper appellate authority, the order of such a Court would be regarded as the order of an Appellate Court, even though no appeal in fact lay. AIR (Vol 18) 1931 Pat 306: 12 PLT 915: 11 Pat 187: 133 Ind Cas 753 (FB).

——**S. 99 — Error of procedure.**

Where during the pendency of execution proceedings of the original Court an appeal is preferred by the other party and the execution proceedings are kept pending and later on an appellate decree is passed, an application simply for revival of the execution proceedings by the party executing the decree, though bad in form, is merely an error of procedure which is curable under S. 99 of the Code. But where the decree of the appellate Court specifically states a condition, then that condition must be complied with and upon a failure to do so S. 99 is of no avail. AIR (Vol 17) 1930 Bom 225: 32 Bom LR 300 (DB).

——**S. 99 — No permission under O. 1, R. 8 — Mere technicality.**

In a previous suit by the Secretary of Religious Association the defendant objected that the suit was not maintainable under O. 1, R. 8 as the plaintiffs were not 'numerous'. But the Court overruled the objection and held that the suit was maintainable without the aid of that rule. In the subsequent suit the defendant contended that R. 8 was bar to the suit as permission of the Court was not obtained. It was clear from the proceedings of the Executive Committee of the Samaj that the Secretary was authorised to institute the suit and presumably the Executive Committee had authority to so authorise him.

Held, that as the questions raised in the previous and the subsequent suit were different ones, the subsequent suit was not barred by the principle of res judicata.

Held, further, that as the objection raised was technical and error did not affect the merits of the case or the jurisdiction of the Court the case would be covered by S. 99. AIR (Vol 16) 1929 Cal 445: 49 CLJ 357.

——S. 99 — Error as to Court-fees not affecting merits of the case or the jurisdiction of the Court does not justify reversal of decree. AIR (Vol 12) 1925 Rang 65: 2 Rang 462: 84 Ind Cas 971.

——**S. 99 — Refusal of prayer to send for a document and to give an opportunity of proof — Prejudice.**

Omission by a Court to send for a document and to give an opportunity to a party to prove the same is not sufficient to set aside a decision, unless such omission has prejudiced the party who wanted the document to be proved. (1909) 10 CLJ 27: 2 Ind Cas 953 (DB).

——S. 99 — An appellate Court cannot, in view of the provisions of section 578 of the Code reverse the decision of the Court of first instance on account of any error, defect or irregularity whether in the decision or in any other order passed in the suit or otherwise, which does not affect the merits of the case or the jurisdiction of the Court. (1909) 13 CWN 797: 10 CLJ 33: 2 Ind Cas 946 (948) (DB).

——S. 99 (S. 578, Old Code) — Order absolute for sale — Appeal as from order — Error immaterial.

When appeal was preferred against an order absolute for sale as from an order and not as from an original decree erroneously according to the Court.

Held, that the error was immaterial and not one affecting the merits of the case or the jurisdiction of the Court. (1902) 29 C. 651 (654).

(c) Defect.

——S. 99 — Applicability — Defect or irregularity not affecting merits or jurisdiction of Court — Non-compliance with O. 3, R. 1 — Decree on basis of plaint presented by person having no authority — If liable to reversal on appeal.

Failure to comply with the provisions of O. 3, R. 1, C.P. Code, would not affect the jurisdiction of the Court, so as to entail a reversal of the decree in appeal, but would only be an irregularity which could be cured with the permission of the Court. A Court receiving a plaint from a person who has no authority to present it is not deprived of jurisdiction to pass a decree on the plaint on that ground. The defect or irregularity does not affect the merits of the case or the jurisdiction of the Court, and the decree therefore is not liable to be reversed in view of S. 99, C.P. Code. AIR (Vol 36) 1949 Ajmer 32: 1949 AMLJ 14.

——S. 99 — Plaint not signed by all plaintiffs — Curing to defect. AIR (Vol 35) 1948 Mad 369: (1948) 1 MLJ 227: 61 MLW 220: 1948 MWN 190.

——S. 99 — Curability under — Failure of Court staff to carry out amendment of plaint ordered by Court.

Where, owing to the failure of the Court clerical staff the amendment of the plaint ordered by the Court is not carried out, the party concerned should not be made to suffer and the defect can be cured by resort to S. 99, C.P. Code. (1948) 1948 RD 397 (2): 1948 AWR (Rev) 302.

——S. 99 — Suit by registered firm — Person signing the plaint as plaintiff not partner but manager and general attorney:

Held, that the defect was one of form and the decree could not be set aside in view of S. 99, Civil P.C. AIR (Vol 31) 1944 Oudh 37: 1943 OWN 368: 1943 AWR 100: 210 Ind Cas 365.

——S. 99 — Remand — Trial Court refusing to decide issue as unnecessary and decreeing suit — Defendant held unprejudiced by refusal and that remand was unnecessary — Defect, if any, held cured by S. 99.

In a suit by the reversioners against the widow for a declaration that the deed of waqf executed by her in favour of deities was void and ineffectual against them, it was pleaded in defence that some of the plaintiffs were not reversioners and were joined as plaintiffs simply because they entered into a champertous agreement. Though an issue was struck on the point the trial Court refused to decide it as unnecessary. The suit was decreed. In appeal the defendant asked for a remand of the case for the trial of the issue:

Held, that there was no reason to remand the case for the decision of the issue. The decree was for the benefit of the reversioners and it was admitted that the persons entitled to sue as next reversioners were included among the plaintiffs. Provided it was made clear, that the decree in no way implied that any particular plaintiffs were the next reversioners, or that the agreement between them was a valid agreement, the defendants could not be prejudiced or embarrassed in any way. Even if any error was committed by the trial Court in not deciding the issue, it did not affect the merits of the case or the jurisdiction of the Court and S. 99, Civil P. C., cured the defect. AIR (Vol 30) 1943 Oudh 109: 1942 OWN 731: 18 Luck 501: 204 Ind Cas 68.

——S. 99 — Where no prejudice has been shown S. 99, Civil P.C., would cure the defect, if any. AIR (Vol 29) 1942 Pat 366: 8 BR 475: 198 Ind Cas 890.

——S. 99 — Plaint presented by agent — No power-of-attorney — Suit proceeded and decree passed — Defect, if cured by S. 99.

Where an agent presents a plaint on behalf of a person, the agent not having a valid power-of-attorney and the case is proceeded without the plaint being signed by that person and a decree is passed, S. 99, Civil P.C., applies and cures the defect of this kind. AIR (Vol 24) 1937 Rang 482: 172 Ind Cas 492.

——S. 99 — Signing plaint is merely procedure.

The signing of a plaint is merely a matter of procedure and any defect therein is remediable at any stage of litigation even in the appellate Court, the reason being that the omission to sign or verify a plaint is not such a defect as can affect the merits of the case and can be remedied under S. 99, C.P. Code.

A plaint was signed by an agent of the plaintiff who was not authorised to sign plaints. An objection being raised by defendants, the plaintiff gave his agent power to sign the plaint, and ratified the signature already made by him. The plaintiff was exempted from personal attendance in Court.

Held, that the agent's signature by the plaintiff may be accepted as sufficient verification under O. 6, R. 14. AIR (Vol 15) 1928 Pat 51: 104 Ind Cas 747: 8 PLT 820.

——S. 99 — Power through agent — — No fraud, but a formal defect in presenting the case to Court — S. 99 applies.

Where A, authorised by B to file an application in a Court, gave and signed the vakalatnamah in B's name as he himself was incompetent to file the application and B all the while accepted the authority given to the pleader by A,

Held, A could not file the application himself, and the only way to file it was to engage a pleader. Therefore, the power to file the application included power to give and sign vakalatnamah. The rule with regard to entering appearance and filing applications and with regard to the appointment of pleaders for that purpose are no doubt salutary rules and certain formalities have to be performed. The rules are more or less strict and they are made no doubt with a view to prevent fraud. But when it is clearly proved that no fraud has been committed and that what has been done, has been done with full knowledge and acquiescence of the party himself, it was never intended by these rules where some mere formal matter has not been complied with or where there has been some irregularity in presenting the case before the Court

and where such formality or irregularity in no way affects the merits of the case that that should be taken as a matter of vital importance and probably for this very reason S. 99 of the C.P. Code was passed. AIR (Vol 11) 1924 Pat 114: 74 Ind Cas 1033: 2 Pat LR (Civ) 174 (DB).

——S. 99 — The deposition of a handwriting expert signed by him and admitted in evidence does not vitiate the trial though it is not signed by the Judge. AIR (Vol 10) 1923 Nag 7: 68 Ind Cas 664.

——S. 99 — Defect of signature.

Defect of signature does not justify reversal of the decree. The mere fact that pleadings are not duly signed does not invalidate them. AIR (Vol 7) 1920 Pat 636: 1 Pat LT 647: 59 Ind Cas 282 (DB).

3. Joinder of parties.

(a) Mis-joinder.

(b) Non-joinder.

(a) Misjoinder.

——S. 99 — Absence of prejudice — Curability.

Where parties do not appear to have been prejudiced in any manner by an alleged misjoinder of defendants or causes of action, the defect if any is completely cured by S. 99, C.P. Code. (1949) 1949 R.D. 91.

——S. 99 — Original holding split up into two holdings — These holdings in possession of different persons — One suit for rent for different periods in respect of two holdings — Decree.

Held, that the decree cannot be reversed in appeal merely on the ground of misjoinder. AIR (Vol 29) 1942 Pat 243: 8 BR 228: 197 Ind Cas 476.

——S. 99, O. 21, R. 63 — Suit undr O. 21, R. 63 — Correct valuation — Amount of decree or value of property — Attachment — Impleading of judgment-debtor as party, effect of.

Where a claim preferred to a party which has been attached in execution of a decree is rejected and the claimants institute a suit to obtain a declaration that the property, the attachment of which had been objected to, was their own property, and could not be attached and sold in execution of the decree obtained against the judgment-debtor, it is the amount of the decree that determines the value of the suit, where the property involved is of large value than the amount due under the decree. The fact that the judgment-debtor has been made a pro forma party to the suit does not make any difference. AIR (Vol 20) 1933 All 249: 55 All 315: (1933) ALJ 222: 143 Ind Cas 275 (FB).

——S. 99 — Must affect the merits for decree to be reversed.

Under the provisions of S. 99, C. P. Code, it is not competent to the appellate Court to reverse the decree passed by the trial Court on the mere ground of misjoinder of parties and causes of action, more especially when there is no finding by the appellate Court that such misjoinder affected the merits of the case or the jurisdiction of the Court. (1928) 108 Ind Cas 544: 1928 MWN 82 (DB).

——S. 99 — Interpretation.

The words "Misjoinder of parties or causes of action" in S. 99 do apply to a case in which there is a misjoinder both of parties and of causes of action. Rulings under the old Code are inapplicable on this point. AIR (Vol 13) 1926 Lah 145: 89 Ind Cas 333 (DB).

——S. 99 and O. 1, R. 3 — Misjoinder — Joinder of different tenants — Suit for enhancement of rent.

Plaintiff landlord brought one suit for the enhancement of rent in respect of two 'etmans' in a temporarily settled area twenty years after the last proceedings for increasing the rent. In the record of rights the defendants were recorded as settled raiyats:

Held, that the plaintiffs and the defendants being the landlords and tenants of the etmans and having the same interest in each, the misjoinder in bringing one suit was merely technical and did not affect the merits of the case. AIR (Vol 7) 1920 Cal 35: 23 CWN 945: 30 CLJ 140: 54 Ind Cas 850 (DB).

——S. 99 and O. 34, R. 1 — Joinder of unnecessary party.

The joinder of an unnecessary party in a mortgage suit does not involve its dismissal but is a mere irregularity. AIR (Vol 6) 1919 Pat 325: 52 Ind Cas 105.

——S. 99 — Misjoinder of parties and causes of action — Objection — No prejudice.

No objection as to misjoinder of causes of action and parties can be entertained for the first time in appeal, especially where there is no prejudice to the parties. AIR (Vol 5) 1918 Nag 233: 43 Ind Cas 960.

——S. 99 — Misjoinder of parties — No ground for second appeal.

Misjoinder of parties, when it does not affect the merits of the case or the Court's jurisdiction, affords no ground for second appeal. AIR (Vol 4) 1917 Lah 96: 118 PLR 1916: 37 Ind Cas 197.

——S. 99 — An Appellate Court has no power to reverse the decision of the first Court on the ground of misjoinder. AIR (Vol 2) 1915 Mad 859 (1): 26 Ind Cas 51 (DB).

——S. 99 — Receiver — Not formally appointed — Conduct of parties — Estoppel as to Receiver's powers.

When a Commissioner is not formally appointed but the parties conducted themselves in such a manner as to show that they accepted the appointment, neither party in view of S. 99 can go back upon this. AIR (Vol 1) 1914 Lah 339: 72 PLR 1914: 45 PWR 1914: 22 Ind Cas 526 (DB).

——S. 99 — Misjoinder — Objection on appeal.

An objection as to misjoinder cannot be taken for the first time on appeal especially when the suit is decided on the amendments in the first Court. (1912) 17 Ind Cas 97 (Mad) (DB).

——S. 99 — Misjoinder of parties — Objection in appellate Court.

Where an objection on the score of non-joinder of parties is taken for the first time in appeal the proper course for the appellate court is to add the necessary parties and dispose of it, or remit the suit to the first Court of retrial. It should not dismiss the suit. (1911) 1 MWN 321: 9 MLT 503: 10 Ind Cas 392 (DB).

——S. 99 — Misjoinder of parties — Effect of.

An appellate Court should not dismiss a suit for misjoinder of parties where such misjoinder does not affect the merits of the case. (1910) 8 Ind Cas 889 (All) (DB).

——S. 99 — Misjoinder — Non-joinder.

"Misjoinder" in S. 99 includes non-joinder. (1910) 33 Mad 436: 7 MLT 102: 20 MLJ 344: 5 Ind Cas 774 (DB).

——S. 99 — Decree — C.P.C., S. 578 (O.C.)

A defect of misjoinder of causes of action is cured by S. 578, C.P.C., (O.C.) after decree is passed in the suit. (1903) 30 C. 794 (800) (DB).

(b) Non-joinder.

——S. 99 — Suit for ejectment — Necessary parties — Failure to implead necessary party — Pow-

er of Appellate Court to dismiss suit — Municipal Council, when necessary party.

The plaintiff brougnt a suit to eject the defendant from a site and to remove a pial erected by him thereon. The defendant pleaded that the land belonged to the Municipal Council, that he had put up the pial with its permission, and that the Municipal Council was a necessary party to the suit. Both the lower Courts decreed the suit in the plaintiff's favour and the defendant preferred a second appeal contending that the Municipal Council was a necessary party:

Held, (i) that the Municipality was a necessary party to the suit;

(ii) that as it was not made a party in spite of objection taken from the start, the suit should be dismissed. AIR (Vol 20) 1933 Mad 664: 38 MLW 247: 65 MLJ 290: (1933) MWN 1209: 146 Ind Cas 72.

——S. 99 — **Non-joinder of party.**

Ejectment suit — Non-joinder is not fatal. AIR (Vol 13) 1926 Cal 592: 92 Ind Cas 899 (DB).

——S. 99 — Where a receiver was a party in the trial Court and had acquiesced in the order but was not made a party in appeal.

Held, the defect was not fatal where the order in appeal was in favour of the receiver. AIR (Vol 9) 1922 Mad 439: 70 Ind Cas 572: 1922 MWN 717 (DB).

——S. 99 — **Non-representation of minor.**

Non-representation of a minor by a guardian in a suit is not a defect curable by S. 99. AIR (Vol 8) 1921 Cal 534: 62 Ind Cas 464: 25 CWN 325 (DB).

4. Jurisdiction.

——S. 99 — Declaratory decree given by lower Court cannot be refused in appeal unless the lower Court has acted in any arbitrary or perverse manner. AIR (V 22) 1935 All 174 : 1935 AWR 607 : 153 Ind Cas 73.

——S. 99 — **Plea as to paramount title.**

When the parties to a mortgage suit allowed a matter of paramount title to go to trial without objection, a reversal of the judgment of the first Court on the ground that the issue was not properly triable in the action should not be allowed. There cannot be said to be a flaw in the matter of jurisdiction. At the most there is an undue or unnecessary extension of the frame of the litigation and the scope of the enquiry. AIR (V 15) 1928 Nag 306 : 113 Ind Cas 884.

——S. 99 — **Want of jurisdiction.**

Jurisdiction, want of — Appellate Court will interfere although no miscarriage of justice is caused. AIR (V 13) 1926 All 650 : 95 Ind Cas 406.

——S. 99 — **Powers when not exercised.**

Appellant's case extremely weak — Court should not interfere under S. 99 with irregular order. AIR (V 13) 1926 Cal 95 : 90 Ind Cas 121 (DB).

——S. 99 — **"Jurisdiction" meaning.**

In S. 99 by 'jurisdiction of the Court' is meant the jurisdiction of the trial Court. AIR (V 13) 1926 Lah 402 : 93 Ind Cas 938.

——S. 99 — **Jurisdiction — What is.**

The word "jurisdiction" in S. 99 of the C. P. C. judged from the point of view of locality pecuniary value or the subject matter of a suit means competency to try. (1911) 7 NLR 33 : 10 Ind Cas 731.

——S. 99 — **Defect of jurisdiction.**

The section shows that if the defect in an order, goes to the jurisdiction of the Court, an interference by the High Court is justified. (1909) 2 Ind Cas 677 (All).

——S. 99 (S. 578, old Code) — **Jurisdiction — Meaning of — Remand — Finding to be called for — Irregularity.**

The word 'jurisdiction' in S. 578 is used in the sense of local or pecuniary jurisdiction with reference to the subject of the suit; not in the sense of legal authority of a Court to do a particular act. An erroneous order of remand by a Court having jurisdiction to hear the appeal is not liable to be set aside if it has not affected the merits of the case. (1901) 5 CWN 509 : 28 C 324 (330) (DB).

5. Merits of the case.

(a) When affected.
(b) When not.

(a) **When affected.**

——S. 99 — When the merits of the case have been affected by the non-joinder of parties the section can have no application. AIR (Vol 13) 1926 Cal 416: 89 Ind Cas 121 (DB).

——S. 99 — **View of Court as to onus wrong.**

But decision not affected on merits — Appellate Court will not interfere — Appeal. AIR (Vol 10) 1923 Nag 62 : 69 Ind Cas 541.

——S. 99 — Court refusing to summon witnesses or to examine witness produced — Order must be set aside as it affects the merits of the case. AIR (V 10) 1923 Nag 58 : 68 Ind Cas 272 (DB).

——S. 99 — **Additional evidence on appeal.**

The appellate Court cannot set aside the decree of the first Appellate Court on the ground of improper admission of additional evidence unless it is satisfied that the decision on the merits is wrong and that the additional evidence might have resulted in the wrong decision. AIR (Vol 2) 1915 Mad 762 : (1914) MWN 864 : 26 Ind Cas 50 (DB).

——S. 99 — **Late production of document.**

The appellate Court cannot reverse the decision of the first Court only on the ground that leave to produce a document at the late stage of suit, is granted under S. 63 unless it is satisfied that the grant of leave has affected the merits of the case. If the appellate Court reverses the decision, the error amounts to an illegal and irregular act within the meaning of S. 115, C. P. C. (1908). (1909) 13 CWN 797 : 10 CLJ 33 : 2 Ind Cas 946 (DB).

——S. 99, O. 7, Rr. 17, 18 (Ss. 62, 63, 578, old Code) — **Admissibility of document not produced with plaint — Document on which the suit is based — Prejudice by reception of document at late stage.**

When a Court erroneously holds that a suit is based really upon one document, in the present case, a day-book, and not upon another, a ledger, and erroneously holds that the day-book ought to have been produced along with the plaint, it cannot be said that the Court has refused to exercise a jurisdiction vested in the Court by law or has acted in the exercise of its jurisdiction illegally or with material irregularity. An appellate Court cannot, in view of the provisions of S. 578 of the Code, reverse the decision of the Court of first instance on account of any error, defect or irregularity, whether in the decision or in any other order passed in the suit or otherwise, which does not affect the merits of the case or the jurisdiction of the Court.

An appellate Court cannot, in view of the provisions of S. 578 of the Code, reverse the decision of the Court of first instance on the ground that leave ought not to have been granted for the reception of a document at a late stage of the case, which has affected the merits of the case, or has prejudiced the trial, or that, by reason of the delay in the production of the document, there was a well-founded ground for suspicion that the document was not genuine and reliable and that leave ought not to have been granted.

The provisions of S. 62 of the Code, are no doubt of an imperative character and ought to be strictly followed. But regard must be had to the policy which underlies the provisions of Ss. 62 and 63 of the Code, viz., to exclude evidence, as to the existence of which at the date of the suit there may be reasonable doubt, and as to the genuineness of which suspicion might rightly arise because it was produced at a late stage of the proceedings.

The bare circumstance that a document had been produced at a late stage of the case and had been received by the Court of first instance under S. 63 would not by itself constitute a sufficient reason for the exclusion of the document from consideration by the appellate Court. The error of the appellate Court in thus rejecting the document on that ground alone amounts to an illegal and irregular act, and by itself forms a sufficient ground to justify the interference of the High Court. (1909) 10 CLJ 33 (36, 37, 38) (DB).

(b) When not affected.

——S. 99 — Order of substitution by executing Court under S. 50 not affecting merits of the case — No interference with by Appellate Court. AIR (V 28) 1941 Pat 139 : 19 Pat 838 : 7 BR 515 : 22 PLT 439 : 193 Ind Cas 245.

——S. 99 — Refusal of summons under O. 16, R. 1 — Party producing copy of document sought to be produced in Court but neither proving that it was original nor that it was true copy — There was no miscarriage of justice due to refusal. AIR (V 16) 1929 Cal 459 : 49 CLJ 546 (DB).

——S. 99 — In lower Court case treated under Dekkhan Agriculturists' Relief Act — In appeal case not treated under that Act — Amendment of plaint not affecting merits of case — Formality of amendment was dispensed with. AIR (V 15) 1928 Bom 425 : 113 Ind Cas 381 : 30 Bom LR 1099 (DB).

——S. 99 — Oudh Rent Act (1886), S. 108 (Cls. 15 & 16) — Suit for arrears of revenue under Cl. (16) — Question of defendants' liability therefor enquired into — Plaintiff not prejudiced — Enquiry is proper.

Held, that the finding of the lower Court itself concluded the matter in issue and consequently the suit was untenable. AIR (V 14) 1927 Oudh 468 : 106 Ind Cas 569 : 4 OWN 933.

——S. 99 — Decision given without hearing arguments — Merits of case not affected nor the jurisdiction of the Court — Decree cannot be reversed. (1926) 93 Ind Cas 291 : 13 OLJ 473.

——S. 99 — Case not covered by R. 27 — Additional evidence taken — Merits not affected — S. 99 applies. AIR (V 8) 1921 Sind 155 : 16 SLR 17 : 66 Ind Cas 833 (DB).

——S. 99 — Remand under O. 41, R. 23, C. P. C. — Case decided on the merits — Irregularity.

A remand under O. 41, R. 23, C. P. C. when the first Court decided the suit in the merits, is an irregularity within S. 99 not affecting the merits of the case and the High Court would not set it aside. AIR (V 1) 1914 Cal 163 : 41 Cal 108 : 18 CLJ 613 : 20 Ind Cas 39 (DB).

——S. 99 — Set-off — Court-fee not paid — Objection in appeal — Interference.

The error committed by admitting a claim of set-off without Court-fees does not affect the merits of the case or the jurisdiction of the Court and so afforded no ground for reversal or remand under S. 99. (1913) 17 CLJ 365 : 19 Ind Cas 918 (FB).

6. Multifariousness.

——S. 99 — Defect of multifariousness not affecting merits or jurisdiction — Appellate Court cannot interfere. AIR (V 16) 1929 All 148 : 114 Ind Cas 881 : 1929 ALJ 204 (DB).

——S. 99 — Misjoinder of parties and causes of action — Suit in ejectment by landlord against several tenants in possession of separate holdings — Procedure irregular — Waiver objections.

Where a landlord sued to eject several tenants in possession of different parcels of land, making them all defendants in one and the same suit, and the litigation was conducted as though the defendants, were a community with common interests, the procedure though highly irregular, nevertheless prevents the landlord from objecting to the use of evidence given in the case of some tenants as evidence in favour of all the parties. AIR (V 7) 1920 PC 67 : 43 Mad 507 : 47 IA 76 : (1920) MWN 61 : 27 MLT 102 : 11 LW 399 : 38 MLJ 476 : 18 ALJ 707 : 22 Bom LR 578 : 56 Ind Cas 117.

[On appeal from 24 MLJ 571 : (1913) MWN 434 : 13 MLT 450 : 20 Ind Cas 374.]

——S. 99 (S. 578, old Code) — Misjoinder of parties and causes of action — Irregularity.

A single suit by two persons having distinct causes of action against the defendants is bad and the irregularity is not one which could be cured by S. 578, C. P. C. (1901) 3 Bom LR 878 : 26 B 259 (266) : 2 ALJ 91 (DB).

7. Remand.

——S. 99 — Firm, having sole proprietor — Suit in firm's name — No objection till end of trial:

Held, that under S. 99, Civil P. C., the High Court in appeal could order necessary amendment in the plaint, judgment and decree without ordering a remand to the original Court for re-hearing, as such an amendment would mean a change only in form and not in substance. AIR (V 22) 1935 Rang 240 : 159 Ind Cas 138.

——S. 99 — Remand when not proper.

Where the judgment of the lower Court is based on inadmissible evidence, remand would be proper but where apart from the inadmissible evidence the Court is mainly influenced by the absence of evidence on behalf of the defendant and the positive evidence of plaintiff's witnesses it will serve no useful purpose to remand the case for a reconsideration of the evidence. AIR (V 11) 1924 Cal 370 : 71 Ind Cas 30.

——S. 99 — Order of remand when made.

Where the trial Court considered each case or group of cases separately and dealt with the evidence relating to those cases or groups of cases separately, but the lower appellate Court did not deal with each case or group of cases separately,

Held, that the appeals were not properly dealt with by the lower appellate Court. AIR (V 11) 1924 Pat 245 : 78 Ind Cas 593 : 1923 PHCC 339 (DB).

——Ss. 99, 105, O. 9, R. 9 (Ss. 578, 591, 103, old Code) — Order by a Court without jurisdiction — Subsequent proceedings null and void — High Court's power to interfere in second appeal against final decree — Suit for profits in the Revenue Court.

The suit was originally dismissed for default and an application to restore it was also dismissed. The appellate Court restored the case and remanded it for trial on the merits. In second appeal, Aston, J. reversed the decree on the ground that the District Judge had no jurisdiction to hear an appeal from an order dismissing an application to restore a case.

Held, that when a Court did something which by statute it was enacted should not be done the

doing of the thing was 'ultra vires' and illegal. The order of remand passed by the District Judge setting aside an order refusing to rehear an appeal being an order passed without jurisdiction all proceedings subsequent thereto were 'ultra vires' and illegal.

Per Curiam — Section 591, Code of Civil Procedure, deals with orders which the Court had jurisdiction to make but in the making of which the Court had committed an error or irregularity. The section does not refer to orders passed by a Court without jurisdiction. (1910) 7 ALJ 675 (681) (DB).

——S. 99 (Ss. 578, 566, old Code) — Remand — Trial of issues by other than the Original Court. (1907) AWN 209 : 4 ALJ 603 (604).

——S. 99 (Ss. 564, old Code (Omitted in N. C.), 578, old Code) — Improper remand when cured.

Section 578 of the Code cures the defect in an irregular order of remand made by an appellate Court unless the merits of the case are shewn to have been affected in any way by the order. (1907) 5 CLJ 328 (333) (DB).

——S. 99 (S. 564, old Code) — Limit to remand — Estoppel — Suit not decided on preliminary point — Remand — Consent of parties — Illegality — Waiver — Effect of setting aside remand — Per Subramania Aiyar, J. — (1904) 15 MLJ 236: 28 M 437 (440-41-42) (DB).

8. Waiver.

——S. 99 — Merits when affected.

Witnesses must be examined by the Judge himself in open Court — Judge's failure to examine them himself and allow them to be examined by some one else is an irregularity, defect or error but is no good ground for reversing the decision in the case as it does not affect the merits of the case or the jurisdiction of the Court. The fact that no objection was taken by any of the parties to the examination of the witnesses by the other is an additional reason for not setting aside the decision, because it may be presumed that all parties consented to the witnesses being so examined. AIR (V 15) 1928 Pat 438 : 115 Ind Cas 237 : 10 PLT 474 (DB).

——S. 99 — Omission to frame issue.

If there is no issue framed on a question but the parties have adduced evidence and discussed it before the Court, and the Court decides it as if there was an issue about it, the decree need not be set aside in appeal on the ground merely that no such issue was framed. AIR (V 13) 1926 Bom 384: 96 Ind Cas 827: 28 Bom LR 743 (DB).

——S. 99 — Failure of plaintiff to sign pleadings — No power of attorney given to agent — Objection not raised — S. 99 applies. AIR (V 10) 1923 Rang 206 : 74 Ind Cas 100 : 1 Rang 42.

——S. 99 — Valuation — Objection to — Waiver — Case triable by superior Court tried by inferior Court — Prejudice.

Where an inferior Court disposes of a case which should have been heard by a superior Court there is ground for thinking that the parties were prejudiced. A party is not estopped from questioning the jurisdiction of a Court to hear an appeal though he himself presented the appeal in that Court. AIR (V 5) 1918 Lah 369 : 21 PR 1918 : 44 Ind Cas 816

——S. 99 and O. 7 — Pleadings — Particulars in.

The defendant could not object to the frame of the plaint in appeal, where it stated all the facts fully and did not in fact mislead the defendant. AIR (V 3) 1916 Nag 84 : 12 NLR 90 : 34 Ind Cas 704.

——S. 99 — Consent order — Waiver — Invalid order if can be validated.

An illegal order of remand if assuming it can be validated by consent or waiver, the failure of parties to appeal against the order cannot be presumed to be consent or waiver. (1909) 32 Mad 83 : 1 Ind Cas 746 (DB).

9. Scope.

——S. 99 — Appeal — Vakalat on behalf of insane party bearing thumb mark of a person other than insane person — Next friend signing vakalat — Acceptance by vakil — Next friend representing insane person in proceedings — Decree in such appeal, if void.

Where it turns out that a vakalat on behalf of a party to an appeal under a disability (insanity) bore the thumb mark not of the lunatic but of another person, it cannot be said that the whole proceedings are invalid and that the decree passed in the appeal, is void and of no effect, when there was a next friend on behalf of the insane person who also signed the vakalat and represented the insane person in the appeal. At the most it is only an irregularity not affecting the merits. (1948) 53 Mys HC R 111 (DB).

——S. 99 — Irregularity not material — Decision of Court cannot be affected.

Unless there is error, defect or irregularity in any proceedings in the suit which is material, that irregularity does not affect the decision of the Court. The principles so enunciated generally in regard to decrees should ordinarily apply to orders, particularly interlocutory orders such as attachment before judgment. AIR (V 32) 1945 Nag 97 : ILR (1945) Nag 121 : 1945 NLJ 62.

——S. 99 — Principle that a decree made without jurisdiction is reversible on appeal is involved by implication in S. 99. AIR (V 29) 1942 Pat 1 : 21 Pat 1 : 8 CLT 53 : 8 BR 361 : 198 Ind Cas 353 (FB).

——S. 99 — Mortgage by A and B in favour of C — C selling mortgagee rights to D — Suit by D on mortgage impleading A, B and C — Alternative claim against C — Suit dismissed against A and B as premature but decreed against C:

Held, that the suit was not premature against C.

Held, also, that S. 99 protected trial Court's decision even if there was misjoinder of parties or causes of action. AIR (V 28) 1941 Oudh 56 : 1940 OWN 807 : 1940 AWR 366 : 16 Luck 113 : 190 Ind Cas 334.

——S. 99 — No decree is to be reversed or substantially varied on appeal because of any irregularity in the proceedings which does not affect the merits of the case or the jurisdiction of the Court. So even if the commission is issued behind the back of the defendant, the decree cannot be reversed in second appeal if the defendant is in no way prejudiced by this irregularity. AIR (V 25) 1938 Nag 530 : 1938 NLJ 392 : 181 Ind Cas 177.

——S. 99 — Variation — Court passing decree having jurisdiction — Decree, when can be varied.

Where a properly constituted rent suit is decreed by Court having jurisdiction and in execution of that decree, property purchased by a person in execution of a money-decree is brought to sale, in the absence of proof that the rent decree was obtained by fraud, the decree cannot be varied or modified it having been passed by Court having jurisdiction, in a suit for possession by that person on declaring that the decree and the sale were fraudulent and, void, even though in passing the rent decree the Court might have acted illegally in the exercise of jurisdiction. AIR (V 24) 1937 Pat 147: 3 BR 536: 169 Ind Cas 304.

——S. 99 — Section 99, Civil P. C., lays down that a Court of appeal will not disturb a decree on the ground of misjoinder of causes of action. AIR (V 23) 1936 All 200 : 1935 RD 442 : 1936 AWR 416 : 161 Ind Cas 759.

——S. 99 — Section if applies to proceedings under Agra Tenancy Act — S. 99, if consistent with S. 133, Agra Tenancy Act.

Section 99, Civil P. C., applies to proceedings under the Agra Tenancy Act, and there is nothing in it, which is inconsistent with S. 133 of the Agra Ten. Act. AIR (V 23) 1936 All 200 : 1936 AWR 416 : 1935 RD 442 : 161 Ind Cas 759.

——S. 99 —Applicability of S. 99 to insolvency proceedings.

Although S. 99, Civil P. C., is limited in its terms to decrees, it is illustrative of a general principle that S. 99 governs insolvency proceedings as well. AIR (V 22) 1935 Nag 33 : 31 NLR 212 : 157 Ind Cas 242.

——S. 99 — Question of jurisdiction.

The question of jurisdiction is not one contemplated by S. 99, Civil P. C. AIR (V 22) 1935 Pesh 151 : 158 Ind Cas 971.

——S. 99 — Appeal from decree in terms of award —Maintainability — Failure to give 10 days' time to file objections — No prejudice proved — Reversal of decree, legality of.

Where in an appeal from a decree in terms of an award it was contended that the lower Court did not grant ten days' time to file objections to the award of the arbitrators, and in appeal no objection which the party could validly have taken if full ten days time had been given to him, was pointed out:

Held, that the decision of the lower Court should not be reversed in view of the provisions of S. 99, Civil P. C.

Quaere — Whether an appeal is competent in a case where the Court failed to give full ten days' time to the parties to file objections. AIR (V 18) 1931 All 453 : (1931) ALJ 442 : 53 All 669 : 133 Ind Cas 31.

——S. 99 — Signing judgment at home and asking Bench Clerk to communicate to parties, whether ground for reversal of judgment.

Where a Judge wrote and signed a judgment at home when he was unwell and delivered it to the Bench Clerk for communication to the parties and the judgment showed that he had not applied his judicial mind to the merits of the case:

Held, that S. 99, Civil P. C., had no application to the facts of the case and the Appellate Court had power to set aside the decree. AIR (V 18) 1931 Cal 164 : 52 CLJ 566 : 130 Ind Cas 573.

——Section 99 does not prevent the appellate Court from interfering on the ground of misjoinder or non-joinder which affects the jurisdiction of the trial Court. AIR (V 17) 1930 Mad 714 : 58 MLJ 613 : 31 MLW 757 (DB).

——S. 99 — Per Suhrawardy, J. — Question about the constitution of or the right to maintain a suit is not a question which arises in any proceedings in the suit and it is doubtful whether S. 99 applies to such a question. AIR (V 11) 1929 Cal 445 : 49 CLJ 357 (DB).

——Ss. 99 and 105 are not mutually destructive. AIR (V 14) 1927 Rang 150 : 5 Rang 80 : 102 Ind Cas 379 (DB).

——S. 99 — Section when applicable.

Where owing to permission by a Court to sue the defendants jointly, plaintiff lost opportunity of bringing separate suits within time.

Held, that S. 99 should be made applicable. AIR (V 11) 1924 Oudh 337 : 83 Ind Cas 850 : 27 OC 35.

——S. 99 — Order under wrong section.

Where order passed under O. 39, Rr. 5 and 6 should have been passed under O. 21, R. 42 the High Court refused to set it aside as in substance the order was right. AIR (Vol 4) 1917 All 153 : 41 Ind Cas 89 (DB).

——S. 99 — Decree — Order enlarging time amounting to a redemption decree — Applicability of S. 99.

Where the order amounts impliedly to a redemption decree, it may be treated as such under S. 99 of the Code, notwithstanding an irregularity in form. AIR (V 1) 1914 Nag 8 : 10 NLR 150 : 26 Ind Cas 701.

——S. 99 — Misjoinder — Power of Appellate Court.

Section 99, C. P. C. provides that, when a Court of first instance decides a question of misjoinder in favour of plaintiff, the defendant cannot open the question in appeal. (1913) 18 CLJ 260 : 21 Ind Cas 537 (DB).

——S. 99 — Plaint — Improper verification.

The plaintiff contended in second appeal from a suit which had been filed that so far as the minor plaintiffs were concerned, the plaint ought to have been taken off the file as it was not properly verified;

Held, that the proper procedure here was not to frame any issue but to decide the preliminary question, whether the plaint was properly verified, first, for then the plaintiff would have had an opportunity of curing the defect and therefore there was no substance in the plaintiff's contention. The defect if any, was completely cured by S. 578 of the Code of 1882. (1913) 17 CWN 989 : 15 Ind Cas 583 (DB).

——S. 99 — Issues — Form of issue erroneous — No prejudice.

That the form of an issue threw the onus on the wrong party, is not a ground in appeal for setting aside the decree, provided the parties were not misled and the evidence fully gone into. (1915) 17 CLJ 38 : 17 CWN 280 : 18 Ind Cas 625 (DB).

——S. 99 — Scope of — Non-joinder of parties — — Parties — Malabar Law — Karnavan, arrangements by — When can be impeached by successor.

Section 99, C. P. C., applies to the case of non-joinder as well. It is sufficient to implead the Karnavan alone of the Tarwad as defendant, without impleading the other members, to a suit on an agreement executed by a previous Karnavan for maintenance. (1909) 20 MLJ 344 (346) (DB).

——S. 100.

1. **Abandonment.**
2. **Accord and satisfaction.**
3. **Acquiescence.**
4. **Additional evidence.**
5. **Admission.**

See also N. 11.

6. **Admissibility of evidence.**
7. **Adoption.**
8. **Adverse possession.**
9. **Amendment.**
10. **Ancestral property.**
11. **Appreciation of evidence.**
12. **Benami.**
13. **Burden of proof.**
14. **Change of Law.**
15. **Concurrent findings.**
16. **Consideration of evidence.**

See also N. 11.

17. **Construction of document.**
18. **Costs.**
19. **Court-fees.**
20. **Custom.**

21. Damages.
22. Defective judgment.
23. Different inference.
24. Discretion.
25. Easement.
See also N. 57.
26. Error of Law.
27. Estoppel.
See also N. 46 and 60.
28. Existence of things or facts.
29. Forfeiture.
30. Fraud.
31. Genuineness of document.
See also N. 17.
32. Grounds.
33. Inference from facts.
See also N. 57.
34. Inheritance.
35. Interest.
36. Jurisdiction.
37. Legal necessity.
38. Limitation.
39. Malice.
40. Marriage.
41. Misjoinder.
42. Misreading evidence.
43. Mixed question.
44. Nature of tenancy.
45. Negligence.
46. New plea.
47. Notice.
48. Nuisance.
49. Partition.
50. Partnership.
51. Powers and duties of Court.
52. Presumption.
53. Procedure.
54. Public Way.
55-56. Question of Law.
57. Question or finding of fact.
58. Relationship.
59. Religious endowment.
See also N. 57 (z-30).
60. Representation.
61. Scope.
62. Second appeal.
63. State of mind.
64. Status.
65. Sufficiency of evidence.
66. Sustainability.
See also N. 62.
67. Title.
68. Waiver.

1. Abandonment.

——S. 100 — Finding of fact — Question as to abandonment by tenant — Finding on — If conclusive.

The question whether a ryot or a tenant has abandoned his holding or not is not a pure question of fact, but a mixed question of fact and law; and a finding of the lower Court on such a question is not therefore final in second appeal. (1950) 1950 AWR 216.

——S. 100 — Finding not based on evidence on record can be interfered with.

Where a Judge has based his findings on the question of abandonment on evidence which is not upon the record, the finding is not binding in second appeal. AIR (Vol 30) 1943 All 241: (1943) ALJ 14: 1943 AWR (HC) 14: 209 Ind Cas 341.

——S. 100 — Ground of appeal on certain point specifically raised — Court not deciding on such point as unnecessary.

Where the appellant has specifically raised a ground of appeal on a certain point but the Court decides the appeal on another point and does not decide the former as being unnecessary, such point cannot be taken to have been abandoned by the appellant unless it is so stated in the judgment of the Appellate Court. AIR (Vol 30) 1943 Mad 455: (1943) 1 MLJ 169: 1943 MWN 111: 56 MLW 170: 210 Ind Cas 194.

——S. 100 — Question whether in given circumstances the occupier of a house should be deemed to have abandoned it.

The question whether, in given circumstances, the occupier of a house should be deemed to have abandoned it depends upon the inference of the occupier's intention from the proved facts of a particular case and is not necessarily one of fact. AIR (Vol 23) 1936 All 553: (1936) ALJ 569: 1936 RD 248: 1936 AWR 541: 164 Ind Cas 205.

——S. 100 — "Abandonment" under Punjab Ten. Act is not limited to the provision of S. 38 of that Act. The question of abandonment is one of fact and when the Courts below have agreed on the question of abandonment, it cannot be interfered with in second appeal. AIR (Vol 21) 1934 Lah 163 (2): 34 PLR 1066: 146 Ind Cas 1022.

——S. 100 — Plea at late stage.

The question of abandonment of a holding by a tenant is a mixed question of fact and law. Such a question cannot be allowed to be raised at the time of the argument at a subsequent stage of the litigation. AIR (Vol 19) 1932 Cal 405: 35 CWN 648: 137 Ind Cas 668.

——S. 100 — Question whether facts amount to abandonment is one of law. AIR (Vol 17) 1930 Lah 215.

——S. 100 — Abandonment is a question of fact. AIR (Vol 16) 1929 Cal 120 : 114 Ind Cas 153: 48 CLJ 390.

——S. 100 . — Ananthakrishna Aiyar, J. — Though a party might not be bound by admissions made by his counsel on pure questions of law, yet on questions of fact, parties are bound by admissions made by their counsel whether the admissions be made in the course of the trial in the first Court or in the course of the hearing of the appeal before the lower appellate Court. A pleader's general powers in the conduct of an appeal include, in ordinary cases, the abandonment of an issue which in his discretion he thinks inadvisable to press and therefore an issue of fact abandoned by him in the lower appellate Court cannot be challenged in second appeal. AIR (Vol 15) 1928 Mad 900: 109 Ind Cas 178 (DB).

——S. 100 — Inference from facts found as to whether there was abandonment or not is a question of law. AIR (Vol 15) 1928 Cal 891: 144 Ind Cas 842: 32 CWN 1111 (DB).

——S. 100 — The question as to whether there has been an abandonment of the land by the raiyat is primarily a question of fact depending upon a number of circumstances to be proved in each case. AIR (Vol 13) 1926 Cal 751: 91 Ind Cas 493.

——S. 100 — A question of fact which is abandoned before the lower appellate Court cannot be raised in second appeal. AIR (Vol 12) 1925 Oudh 510: 85 Ind Cas 387.

——S. 100 — Question as to abandonment is one of fact. AIR (Vol 12) 1925 Pat 741: 88 Ind Cas 1032: 4 Pat 838: 6 PLT 500: 1925 PHCC 320 (DB).

——S. 100 — Question of abandonment is one of fact. AIR (Vol 11) 1924 Cal 366: 71 Ind Cas 304 (DB).

——S. 100 — The effectiveness of the abandonment in law on the facts found, although not raised in the memorandum of appeal can be allowed to be questioned in second appeal as it involves a pure question of law. AIR (Vol 8) 1921 Lah 229: 66 Ind Cas 935: 3 Lah LJ 26.

——S 100 — Abandonment is question of fact. AIR (Vol 8) 1921 Lah 162: 3 Lah LJ 445.

——S. 100 — New plea — Plea abandoned in Courts below — Not to be raised.

A plea taken in the trial Court but abandoned in the first Appellate Court cannot be entertained in second appeal especially where it depends for its decision upon a question of fact. AIR (Vol 7) 1920 Nag 45: 16 NLR 89: 55 Ind Cas 481.

——S. 100 — Abandonment — Finding of fact.

Finding as to abandonment is a finding of fact. AIR (Vol 3) 1916 Cal 155: 32 Ind Cas 355 (DB).

——S. 100 — Abandonment — Finding of fact.

A finding on abandonment of a holding is a finding of a fact and consequently a second appeal only on matters of legal principle arising out of these facts can be taken up. AIR (Vol 6) 1919 Lah 299. 41 PR 1919: 82 PLR 1919: 51 Ind Cas 396 (DB).

——S. 100 — Abandonment — Finding of fact.

The High Court will not interfere in second appeal with a finding of fact by the lower appellate Court that there was a complete abandonment of a holding by the tenant thereof. (1913) 17 CWN 802: 20 Ind Cas 198 (DB).

2. Accord and satisfaction.

—Ss. 100 — A finding that there is full accord and satisfaction is one of fact and it must be accepted in second appeal. AIR (Vol 21) 1934 Nag 226 (227): 31 NLR 27: 152 Ind Cas 398.

3. Acquiescence.

——S. 100 — Question of law — Suit for pre-emption — Acquiescence of plaintiff in sale — Inference from facts and circumstances.

In a suit for pre-emption, the question of acquiescence of the plaintiff in the sale giving rise to the right of pre-emption is not purely one of fact, if such acquiescence has to be inferred from a combination of the facts and circumstances. It would be so if it could be decided solely on the allegation that the plaintiff positively and in set terms gave consent, but it is a question of law when the point is whether conduct of the party not amounting to direct consent, should be taken as waiver. AIR (Vol 36) 1949 Ajmer 2.

—S. 100 — Suit under S. 92, not for possession of immovable property but to assert certain rights of public — Suit valued according to the value of relief and not value of property:

Held, objection cannot be raised in second appeal. AIR (Vol 29) 1942 Pat 79: 22 PLT 799: 8 BR 38: 196 Ind Cas 554.

——S. 100 — Decree of original Court — No appeal or cross-appeal — Whether can be challenged in second appeal for first time.

It is not open to the appellants to impeach the original Court's decree for the first time in second appeal having failed to prefer an appeal or cross-objection against the decree and they are not entitled to obtain any relief from the High Court in second appeal. The original Court's decree having been acquiesced in, becomes final. (1936) 163 Ind Cas 954: 18 NLJ 220.

—S. 100 — Where the burden of proof has been wrongly thrown upon a particular party and that has been done with the acquiescence of the parties and no objection in respect of it has been taken in the lower Courts, it is too late for that point to be taken in the Court of second appeal. AIR (Vol 20) 1933 Mad 353: 37 MLW 288: (1933) MWN 689: 144 Ind Cas 573.

—S. 100 — The question of waiver, acquiescence or estoppel is a question which can be examined by the High Court in second appeal. AIR (Vol 16) 1929 Cal 437: 116 Ind Cas 733: 56 Cal 201 (DB).

—S. 100 — Acquiescence for long period giving rise to presumption of grant is question of law. AIR (Vol 15) 1928 Nag 87: 107 Ind Cas 522: 23 NLR 192.

——S. 100 — Question of law.

The question whether there has been a representation amounting to acquiescence or not is a question of fact. AIR (Vol 14) 1927 Cal 220: 106 Ind Cas 302: 44 CLJ 434 (DB).

—S. 100 — Acquiescence is not a question of fact but of legal inference from the facts found. AIR (Vol 13) 1926 Nag 416: 95 Ind Cas 636.

—S. 100 — The question as to whether in a case there has been acquiescence is not one of fact but of legal inference from the facts found and therefore it is open to be considered in second appeal. AIR (Vol 12) 1925 Cal 288: 82 Ind Cas 309.

—S. 100 — The findings of the lower Court are final upon the facts from which acquiescence might or might not be inferred. But acquiescence is not itself a question of fact, but of legal inference from the facts so found. AIR (Vol 11) 1924 Nag 56: 71 Ind Cas 942.

—S. 100 — Acquiescence is not a question of fact but of legal inference from the facts found. Hence second appeal will lie on the question. AIR (Vol 8) 1921 Nag 167: 73 Ind Cas 137.

——S. 100 — Question of law.

The question of acquiescence is a matter of legal inference to be drawn from the facts proved in the case and can be taken up in second appeal. AIR (Vol 4) 1917 Lah 439: 69 PR 1917: 103 PWR 1917: 41 Ind Cas 927 (DB).

——S. 100 — Necessity — question of fact.

Acquiescence is sometimes a pure question of fact, but becomes a question of law when the point is whether conduct of a party not amounting to direct consent should be taken as waiver. Necessity may be a question of fact, but becomes a question of law when the Court decides on wrong principles as to the 'quantum' of proof of necessity. AIR (Vol 3) 1916 Lah 370: 107 PR 1916: 36 Ind Cas 700 (DB).

—S. 100 — Onus wrongly placed — Where the misplacement of onus has been acquiesced in by the parties in the first two Courts, the High Court would be reluctant to interfere with the result unless the error has occasioned miscarriage of justice. (1903) 5 Bom LR 177 (178) (DB).

——S. 100 — (S. 584, Old Code) (c) — Second appeal, jurisdiction of High Court — Evidence — Misunderstanding — Evidence, absence of — Question of acquiescence whether a question of law.

A misreading or misconception of evidence is not a ground for interference in second appeal. The remedy in such a case is by an application for review of judgment. If, however, there is no evidence in support of the finding of the subordinate Court, the Court of second appeal would be entitled to interfere.

Per Rampini, J. — The question of acquiescence or waiver is a question of fact and the finding of the lower appellate Court on such a question is final and cannot be interfered with in second appeal. Per Mookerjee J.:— Acquiesence is not a question of fact but of legal inference from facts found and it is open to the appellant in a second appeal to invite the High Court to consider whether the question of acquiescence has been proper-

ly decided by the lower Courts. (1906) 4 CLJ 198 (201, 203, 204) (DB).

——S. 100 (S. 584, old Code) — Acquiescence is question of law.

The question of acquiescence is not a question of fact but of legal inference from facts and is therefore open to second appeal. The judgment of the lower appellate Court is not final. (1901) 5 CWN 858: 28 C 738 (741) also (1906) 4 CLJ 198 (DB).

4. Additional evidence.

—S. 100 — Public documents admitted in appeal as additional evidence without giving reasons for doing so — Opposite party not allowed to produce evidence in rebuttal but such party not insisting on such right:

Held, that the error did not produce defect in decision on merits and the decision could not be challenged in second appeal. AIR (Vol 26) 1939 All 663: (1939) ALJ 903: 1939 AWR 491: 184 Ind Cas 811.

—S. 100 (1) (c) — Suit on document — Documents filed in previous suit between one of parties and third person referred to all along by parties and Court — Court allowing parties to produce them even at end of argument — Documents not produced at that stage but at close of case for judgment — Court refusing to admit them — Appellate Court also refusing to take them as additional evidence:

Held, documents could hardly be new evidence and could be produced in second appeal under S. 100 (1) (c). AIR (Vol 25) 1938 Rang 170: 177 Ind Cas 547.

——S. 100 O. 41, R. 27 — Direction of Appellate Court to decide case with or without additional evidence — Interference in second appeal — Propriety of.

The question as to whether an Appellate Court can decide a case with or without taking additional evidence is a matter of discretion of that Court and the High Court cannot interfere with that discretion in second appeal. AIR (Vol 20) 1933 Lah 1014: 35 PLR 198: 147 Ind Cas 684(1).

——S. 100, O. 41, R. 27 — Refusal to admit additional evidence in appeal — Discretion — No ground for second appeal.

A party to an appeal is not entitled to produce additional evidence in appeal as of right but the Court may, in its discretion, admit additional evidence. Where the Court has exercised this discretion and refused to admit additional evidence, it cannot be said that a substantial error or defect in procedure has taken place which affords a ground for second appeal. AIR (Vol 18) 1931 Lah 506: 131 Ind Cas 228.

—S. 100 — Where an appellate Court admitted certain documents in appeal but did not base its finding upon them, its finding of fact will not be interfered with in second appeal. AIR (Vol 13) 1926 Mad 864: 92 Ind Cas 661.

——S. 100 — Exercise of discretion.

If an appellate Court before whom an application for admitting fresh evidence is made, exercises its discretion and refuses to admit fresh evidence, the propriety of that order would not be a good ground for entertaining a second appeal. If however the lower appellate Court does not apply its mind to the question properly before it at all and feels that it is unable to admit fresh evidence because of some supposed insuperable difficulty in its way which, in fact, does not exist, then it cannot be said that the Court in the exercise of its discretion, has refused to admit fresh evidence and second appeal will lie. AIR (Vol 12) 1925 All 288: 86 Ind Cas 761: 47 All 412: 23 ALJ 193: 6 LRA Civ 85 (DB).

—S. 100 — Taking additional evidence without recording reasons and without calling upon the party to show its necessity, is a substantial error in procedure and such an order of the lower Appellate Court is open to second appeal. AIR (Vol 12) 1925 Cal 98: 81 Ind Cas 999: 39 Cal LJ 261.

——S. 100 — New plea.

Namboodri litigants cannot adduce evidence of special usage varying Hindu Law, for the first time in second appeal. AIR (Vol 12) 1925 Mad 260: 84 Ind Cas 973: 20 MLW 876: 35 MLT 127: 1924 MWN 792 : 47 MLJ 686 (DB).

—S. 100 — Where the first appellate Court issued a commission for the measurement of the plot in dispute and considered the report of the Commissioner along with other evidence on record without stating reasons for admitting the additional evidence and gave a finding.

Held, that the finding cannot be accepted as binding as it is partly based on inadmissible evidence. AIR (Vol 10) 1923 All 413: 79 Ind Cas 408.

—S. 100 — There is no precedent for allowing an appellant to lead evidence which could have been led in the Court below in appeal. AIR (Vol 9) 1922 Bom 147: 77 Ind Cas 515 (DB).

——S. 100 and O. 41, R. 27 — Additional evidence — Appellate Court refusing to admit — Interference in second appeal.

Per Chief Justice and Ayling, J.: (Sadasiva Iyer, Diss.) The High Court cannot in second appeal interfere with an order of the Lower Appellate Court rejecting an appication made to it for the admission of additional evidence under O. 41, R. 27 (1) of the C. P. Code. Per Sadasiva Iyer, J.:— The question whether the Appellate Court exercised the discretion properly is a question of law which the High Court is entitled to consider in second appeal. AIR (Vol 6) 1919 Mad 1166: 42 Mad 737: 37 MLJ 125: 26 MLT 246: (1919) MWN 525: 10 LW 122: 53 Ind Cas 274 (FB).

——S. 100 — Additional evidence — Admission of.

Per Sadasiva Aiyer J.:— The High Court cannot admit fresh evidence as to facts in second appeal. Where a party thinks that any fresh evidence, which is discovered after the decision of the Appellate Court would have been of assistance to him if it had been considered at the original trial or appeal, he should withdraw the appeal and apply for review of Judgment in the Lower Appellate Court. Per Spencer, J. A Bench of the High Court hearing second appeals may when calling for a finding on any issue from the Lower Appellate Court permit the parties to adduce fresh evidence on that issue if a good case is made out for it. AIR (Vol 5) 1918 Mad 1159: (1917) MWN 560: 39 Ind Cas 954 (DB).

——S. 100 — Additional evidence — Findings thereon — Conclusive.

Findings of fact, even if such findings are based on additional evidence taken for the first time by the Court of Appeal below, on remand from the High Court, are binding in second appeal. AIR (Vol 2) 1915 Cal 568: 27 Ind Cas 265 (DB).

——S. 100 — Procedure — Substantial error in.

Refusal by the Appellate Court in the exercise of its discretion to admit additional evidence given under O. XLI, R. 27 is not a substantial defect or error in procedure. (1911) 33 All 379: 8 ALJ 175: 9 Ind Cas 265.

——S. 100 — O. 41, R. 27 (Ss. 584, 568, Old Code) — Admission of additional evidence in appeal — Discretion of Court.

The refusal by an appellate Court to exercise the discretion vested in it by S. 568 with respect to the admission of additional evidence would be

an error or defect in procedure within the meaning of S. 584 of the Code, because S. 568 distinctly implies that discretion must be exercised. But refusal in the exercise of discretion to admit additional evidence is undoubtedly not such an error or defect. (1900) 23 A 121 (122): 1901 AWN 11 (DB).

5. Admission.

See also Note 11.

——S. 100 — Question of fact — Question of free consent is one of fact.

The question whether a person has freely consented to an admission contained in a consent decree is one of fact and cannot be gone into in second appeal. AIR (Vol 33) 1946 Sind 150.

——S. 100 — Lower Court admitting evidence which ought not to have been admitted — High Court, if can come to a conclusion which it thinks to be right.

In a case in which evidence has been admitted which ought not to have been admitted and where, if that evidence had not been admitted, the decision might have been different, the High Court ought not to allow itself to be prevented from coming to the conclusion which it thinks to be the right one. AIR (Vol 27) 1940 All 441: 1940 AWR 372: 190 Ind Cas 604.

——S. 100 — Finding not based purely on legal effect of award but on admissions and other evidence of contemporaneous acts.

Finding based purely upon the legal effect of the awards can be questioned in second appeal. But where it was based upon certain admissions and other evidence of contemporaneous acts suggesting that the awards synchronized with the date of the actual separation, that finding being a finding of fact, must, therefore, be accepted in second appeal. AIR (Vol 27) 1940 Bom 225: 42 Bom LR 399: ILR (1940) Bom 453: 189 Ind Cas 561 (DB).

—S. 100 — When the lower Appellate Court has admitted a document, it will be most expedient for the High Court in second appeal to interfere with the discretion in the matter of the lower Appellate Court which required that evidence in order to enable it to pronounce judgment. AIR (Vol 22) 1935 Pat 470: 16 PLT 702: 2 BR 103: 159 Ind Cas 711.

—S. 100 — A finding arrived at in consequence of improper admission of evidence is not binding in second appeal. AIR (Vol 20) 1933 Nag 383: 15 NLJ 94: 141 Ind Cas 656.

——S. 100 — Cogency of evidence of admission, if a matter of law.

The evidence of admission is, like other evidence in the suit, a matter whose cogency is for the Court of fact to determine and not a matter of law to be agitated in second appeal. AIR (Vol 20) 1933 Pat 698 (700): 148 Ind Cas 193.

——S. 100 — Admission of party.

Where the lower Court omits to give effect to an admission of a party to the suit, the error may be rectified in second appeal. AIR (Vol 20) 1933 Sind 121: 143 Ind Cas 900.

——S. 100 — Admission by Counsel in lower Court of appeal — Mixed question of law, fact and custom — Party, whether can re-agitate.

It is not open to a party in second appeal to go behind the admission of his Counsel in the lower Appellate Court where the admission involves a mixed question of law, custom and fact and to re-agitate the question in the Court of second appeal. AIR (Vol 19) 1932 Lah 343: 13 Lah 185: 33 PLR 421: 138 Ind Cas 185.

—S. 100 — Whether, on certain admitted facts, certain person is agent or not is question of law. AIR (Vol 17) 1930 Cal 815: 52 CLJ 235 (DB).

—S. 100 — The High Court will not in second appeal interfere with the order of the Court rejecting admission of documents when no reason has been shown for their non-production at the time they were rejected. AIR (Vol 13) 1926 Cal 106: 90 Ind Cas 602 (DB).

—S. 100 — When secondary evidence has once been admitted by the lower appellate Court, the High Court sitting in second appeal cannot reject it. AIR (Vol 11) 1924 Oudh 306: 79 Ind Cas 663: 27 OC 26: 11 OLJ 565.

——S. 100 — Admissions — Decision contrary to question of law.

A decision by the lower Appellate Court opposed to the admissions of the parties amounts to a substantial error or defect in procedure. AIR (Vol 4) 1917 Lah 297: 106 PR 1917: 119 PWR 1917: 41 Ind Cas 163 (DB).

——S. 100 — Finding of fact — Admissions.

A finding of fact arrived at on a previous admission by one of the parties is good and valid and cannot be disturbed. (1910) 8 Ind Cas 728 (Oudh).

6. Admissibility of evidence.

——S. 100 — Trial Court admitting secondary evidence — Interference in appeal.

Where the Court admits secondary evidence on the ground that the original has been lost, the discretion cannot be interfered with in appeal. AIR (Vol 33) 1946 Bom 193: 47 Bom LR 962.

——S. 100 — Finding based on admissible evidence.

Where evidence which is admissible is admitted and a finding arrived at by the lower Appellate Court, the finding is one of fact and cannot be questioned in second appeal. AIR (Vol 22) 1935 All 662: 1935 AWR 715: (1935) ALJ 664: 1935 RD 263: 155 Ind Cas 634.

—S. 100 — A finding of fact based upon admissible evidence cannot be challenged in second appeal. AIR (Vol 22) 1935 Oudh 385: 1935 OWN 449: 1935 RD 202: 154 Ind Cas 1029.

——S. 100 — Question as to admissibility of document.

Where documents, though not duly stamped, have been admitted in evidence in the lower Court, the question of their admissibility cannot be raised in second appeal. AIR (Vol 22) 1935 Rang 160: 13 Rang 322: 156 Ind Cas 589.

—S. 100 — A finding of fact based upon admissible evidence is binding in second appeal. AIR (Vol 21) 1934 Oudh 97: 18 RD 66: 11 OWN 674: 148 Ind Cas 1079.

—S. 100 — There is no jurisdiction to entertain a second appeal on the ground of even an erroneous finding of fact, however gross or inexcusable the error may seem to be. No Court of second appeal can entertain an appeal upon any question as to the soundness of findings of fact by the Court of first appeal and if there is evidence to be considered, the decision of that Court, however unsatisfactory it might be, if examined, must stand final. A finding of fact based upon admissible evidence cannot be impugned in second appeal. (1934) 147 Ind Cas 871: 10 OWN 911.

—S. 100 — Findings of fact based upon admissible evidence cannot be impugned in second appeal on the ground that the finding is erroneous. (1927) 100 Ind Cas 792: 13 OLJ 590.

——S. 100 — Secondary evidence.

Evidence Act, S. 65 — Discretion as to admissibility should not be disturbed except in case of

miscarriage. AIR (Vol 11) 1924 Lah 303: 71 Ind Cas 568: 18 PWR 1923 (DB).

—S. 100 — Error as to admissibility of evidence can be attacked in second appeal. AIR (Vol 10) 1923 Cal 261: 74 Ind Cas 383: 36 CLJ 389 (DB).

—S. 100 — A finding of fact based on legally admissible evidence after due consideration thereof cannot be interfered with by the High Court in second appeal. AIR (Vol 10) 1923 Lah 21: 79 Ind Cas 440 (DB).

—S. 100 — Inadmissible evidence which is at least material part of the basis of the finding, though it may not be the main part of it, renders remand necessary. The admission and consideration of improper evidence would not necessitate a remand if that evidence formed no more than a negligible part of the basis of the finding resting on it, because in that case it would be possible to say that the finding would undoubtedly be the same, even if the improper evidence were excluded. AIR (Vol 10) 1923 Nag 107: 77 Ind Cas 911: 18 NLR 182.

—S. 100 — 'Wajib-ul-arz' rejected on erroneous view of law — High Court can interfere in second appeal. AIR (Vol 8) 1921 Oudh 137: 64 Ind Cas 86: 24 OC 237.

——S. 100 — Inadmissible evidence — Judgment based on.

Where the lower Court has based its decision partly on irrelevant evidence, the High Court will not in second appeal decide whether the other evidence in the case is sufficient to support the findings arrived at. S. 167 of the Evidence Act is not a bar to such a case being remanded. AIR (Vol 8) 1921 Pat 61: 5 Pat LJ 410: 57 Ind Cas 561 (DB).

7. Adoption.

——S. 100 — Finding of fact — Finding that person adopted was not son but step-son of widow giving him in adoption — Finality.

A finding that an adopted son was not the son but the step-son of a widow who gave him in adoption is a finding of a fact, and is not open to challenge in second appeal. AIR (Vol 34) 1947 Nag 143: ILR (1946) Nag 978: 1947 NLJ 133: 228 Ind Cas 173 (DB).

——S. 100 — Whether adoption is proved and plaintiff came to know of adoption more than six years, are questions of fact.

The question whether an adoption challenged by the plaintiff is proved or not and whether the plaintiff came to know of the alleged adoption within six years of the suit are questions of fact and, therefore, the second Appellate Court cannot decide whether the finding on those questions ought to stand or should be revised. AIR (Vol 30) 1943 Pat 68: 8 CLT 96: 9 BR 196: 205 Ind Cas 133.

—S. 100 — A finding in respect of an adoption is one of fact and conclusive and it cannot be disturbed in second appeal especially when there is legal evidence to support it. (1935) 157 Ind Cas 865 (1): 37 PLR 379.

—S. 100 — A question of adoption is a finding of fact and cannot be interfered with in second appeal. AIR (Vol 21) 1934 Lah 968: 154 Ind Cas 675.

——S. 100 — Adoption — Evidence considered — Finding of fact.

Where the lower Court after considering the whole evidence adduced by the parties finds an adoption proved the finding cannot be interfered with in second appeal. AIR (Vol 2) 1915 Lah 159: 12 PWR 1915: 62 PLR 1915: 27 Ind Cas 606.

8. Adverse possession.

——S. 100 — Finding as to — Interference.

A finding with regard to a party's adverse possession is a finding on a mixed question of fact and law. It is a question of fact, no doubt, whether such a party has been actually in possession of the property for a certain period, but it is essentially a question of law, as to whether, on the evidence on the record, or, on the facts admitted between the parties, such possession could be regarded to be adverse. AIR (Vol 36) 1949 All 699: 1949 AWR 488.

——S. 100 — Proof — Question as to — If one of law or fact.

The question whether the adverse possession has been proved is a mixed question of law and fact. AIR (Vol 34) 1947 Bom 300: 49 Bom LR 90.

——S. 100 — Finding as to interference in second appeal.

The question of adverse possession is a mixed question of law and fact and not a pure question of fact. The decision as to what are the elements necessary, in view of the special features of a particular case, in order to attribute the character of possession to the claimant's acts of possession is a question of law; and if the Courts of fact have misdirected themselves as to these elements, they must be considered as having committed an error of law, and the High Court can interfere in second appeal. AIR (Vol 34) 1947 Pat 99: 1946 PWN 37: 25 Pat 412: 229 Ind Cas 482: 13 BR 338 (DB).

——S. 100 — Question of adverse possession held, under circumstances, one of fact.

In the absence of any issue, any cross-examination, any inquiry upon the point, and without giving the plaintiff an opportunity to meet the allegation of adverse possession, the question is only one of fact. AIR (Vol 31) 1944 PC 24: ILR (1944) Kar (PC) 170: 57 MLW 235: 48 CWN 304: (1944) ALJ 143: (1944) 1 MLJ 344: 1944 MWN 346: 10 BR 574: 1944 OWN 323: 212 Ind Cas 525.

——S. 100 — Adverse possession — Question of law or fact.

The question of adverse possession is not a pure question of fact. It is a question of inference from the admitted and proved facts of a case. (1944) 1944 ALJ 344: 1944 AWR (HC) 242 (DB).

——S. 100 — Finding held not binding in second appeal.

Where the lower Appellate Judge has found in favour of adverse possession basing himself on evidence which would certainly have justified his conclusion of fact had he been concerned with strangers but has failed to consider that the persons concerned were 'pardanashin' Muhammedan females, his conclusion is not binding on the High Court in second appeal. AIR (Vol 29) 1942 Nag 75: 1942 NLJ 261: ILR (1942) Nag 781: 201 Ind Cas 325.

—S. 100 — A finding of adverse possession to some extent must be a finding of fact, but more particularly in a case where the judgment of the lower Appellate Court is a judgment of reversal, the High Court may enquire into the method adopted by the lower Appellate Court in coming to its conclusion, and enquire whether the adverse possession as found is supported by evidence, and whether the finding, which is said to be based on the proper legal conclusion to be drawn from the settlement and mutation records is justified. AIR (Vol 25) 1938 Cal 117: 66 CLJ 455: 176 Ind Cas 706.

——S. 100 — Mixed question of law and fact.

The question of adverse possession is a mixed question of law and fact and the Court has to draw its inference from the proved facts in the case. AIR (Vol 23) 1936 Lah 741: 166 Ind Cas 607.

—S. 100 — Per Curiam — Adverse possession is a mixed question of law and fact. AIR (Vol 19) 1932 All 393: (1932) ALJ 425: 54 All 628: 140 Ind Cas 653.

—S. 100 — Question of adverse possession is question of law and can be considered in second appeal. AIR (Vol 18) 1931 Lah 489: 32 PLR 467: 134 Ind Cas 294.

—S. 100 — A question of adverse possession is not purely one of fact and therefore may be raised in second appeal. AIR (Vol 18) 1931 Oudh 381: 8 OWN 854: 15 RD 424: 132 Ind Cas 772.

——S. 100 — Mixed question of law and fact.

The question of adverse possession is a mixed question of law and fact and it is always open to the Court of second appeal to examine the facts established in the case and to determine for itself whether they are sufficient to establish in law the adverse possession which is claimed on the basis of those facts. AIR (Vol 16) 1929 Oudh 337: 115 Ind Cas 440: 6 OWN 536.

—S. 100 — Whether adverse possession has been established or not, is a question of law. AIR (Vol 13) 1926 Lah 482: 98 Ind Cas 161: 27 PLR 89.

—S. 100 — The finding of the lower Court on the question of adverse possession is not conclusive in second appeal. AIR (Vol 11) 1924 Oudh 266: 78 Ind Cas 895: 10 OLJ 646: 27 OC 77.

—S. 100 — The question of adverse possession is a mixed question of fact and law. AIR (Vol 9) 1922 Cal 54: 68 Ind Cas 200: 26 CWN 890 (DB).

—S. 100 — The question of adverse possession is a mixed question of fact and law and is open in second appeal so far as it is a question of inference to be drawn from the facts found by the lower Court. (1921) 60 Ind Cas 298: 33 CLJ 344 (DB).

——S. 100 — Finding as to absence of adverse possession is one of fact. AIR (Vol 8) 1921 Lah 264: 4 LLJ 309.

——S. 100 — Adverse possession — Interference.

Abandonment by an occupancy tenant or adverse possession by a landlord are not necessarily questions of fact. When the decision is based on no evidence or is against express prima facie reliable evidence which by law is to be presumed to be correct in the absence of all evidence to the contrary or is based on a misconstruction of the Punjab Tenancy Act. The High Court can interfere in second appeal. AIR (Vol 7) 1920 Lah 293: 170 PR 1919: 54 Ind Cas 873.

——S. 100 — Adverse possession — Question of law.

A question of adverse possession may be a question of law where the facts are not in dispute and where the conclusion depends upon the inferences to be drawn from admitted facts. AIR (Vol 4) 1917 All 42: 40 Ind Cas 420 (DB).

——S. 100 — Adverse possession — Trespass.

The term "trespasser" is a term of law and the High Court in second appeal may examine whether the finding of the Lower Court on the point is correct on the evidence tendered. AIR (Vol 3) 1916 Pat 381: 1 Pat LJ 47: 34 Ind Cas 616.

——S. 100 — Adverse possession — Question of law — Continuity of 'possession' necessary.

The question whether or not a possession is adverse is one of mixed law and fact and the High Court can, in second appeal, interfere and determine whether on facts found a certain possession may legally amount to adverse possession. Continuity of possession is necessary to render it adverse. (1911) 11 Ind Cas 185 (Cal) (DB).

9. Amendment.

——S. 100 and O. 7, R. 11 — Objection that plaint is defective by defendant having knowledge of such defect cannot be raised for first time in second appeal.

If a plaint is objected to be defective by the defendant in that it does not set out all the dealings between the plaintiff and the defendant on the basis of which the claim in suit was based and the defendant had full opportunity of knowing what the dealings between the parties were, the defect should be pointed at an earlier stage to enable the plaintiff to take necessary steps for amendment, if required. It is too late for the defendant to contend in second appeal that the plaint was defective and as such, liable to be rejected. AIR (Vol 33) 1946 Nag 266 (DB).

——S. 100 — An amendment which does not merely change the form of the relief but raises many intricate questions of fact and law cannot be allowed in second appeal. (1940) 42 PLR 479.

——S. 100 — Lower Appellate Court allowing amendment on erroneous view of law.

Where in an appeal, the Court allows a plaint to be amended erroneously thinking the plaint as amended to be in time, being under wrong impression that if the suit when originally brought was in time, then the suit when amended must also be in time, its finding can be challenged in second appeal. Where the Court proceeds on a wrong view of law, it should be deemed to have failed to apply its mind in exercising the discretion whether amendment should be allowed or not.

After the close of the case brought on the basis of a receipt or acknowledgment and when it was reserved for arguments, the plaintiff applied for permission to amend his plaint, so as to base his suit on a prior receipt or acknowledgment:

Held, that the two causes of action were different and, therefore, the amendment should be refused, especially so when the suit on the new cause of action was barred by time on the date of the application for amendment and the opposite party was likely to be taken by surprise. AIR (Vol 25) 1938 Nag 388: 1938 NLJ 198: ILR (1939) Nag 194: 176 Ind Cas 728.

——S. 100 — Amendment — When can be permitted — Principles.

There is nothing to preclude the Court from allowing an amendment necessary to determine the real question in controversy between the parties even in second appeal, but except under exceptional circumstances, it should not be allowed. In exercising discretion whether such an amendment should be allowed or not, the first principle to be observed is that an amendment is not permissible when it would prejudice the right of the opposite party existing on the date of such amendment. It is not a question whether the defendant would be taken by surprise by such an amendment or not, but whether by allowing such amendment, prejudice and injustice would be caused to him. The second principle to be observed is whether the conduct of the party seeking the amendment has been bona fide and he has come to Court with clean hands, and whether by the exercise of due diligence, the relief or amendment could have been sought earlier. AIR (Vol 23) 1936 Mad 545: (1936) MWN 411: 165 Ind Cas 737.

——S. 100 — A point relating to an amendment of decree is not a point which can be urged in second appeal. AIR (Vol 11) 1924 Cal 363: 70 Ind Cas 173 (DB).

——S. 100 — Amendment — Limitation — Second appeal.

Where the amendment was allowed after the expiration of the limitation period, the High Court can take notice of it in second appeal though the point was not pressed in the lower Appellate Court. AIR (Vol 1) 1914 All 80: 36 All 370: 12 ALJ 635: 24 Ind Cas 255 (DB).

10. Ancestral property.

——S. 100 — A finding that certain land has not been proved to be ancestral is one of fact and

cannot be challenged in second appeal where the Court, in coming to that finding, has not contravened any legal principle. The fact that the Court had to construe certain revenue records in coming to that decision is not sufficient to provide a law point for interference in second appeal. AIR (Vol 21) 1934 Lah 406: 35 PLR 406: 151 Ind Cas 789.

——S. 100 — A finding that certain property was not ancestral qua the plaintiffs is a finding of fact and cannot be attacked where there was evidence before the Judge from which he could legitimately draw the conclusion he did, and he did not misdirect himself on any question of law in coming to that finding. AIR (Vol 21) 1934 Lah 351: 35 PLR 378: 15 Lah 791: 150 Ind Cas 46.

——S. 100 — The question of the ancestral character of certain land is a finding of fact which cannot be reopened in second appeal. AIR (Vol 21) 1934 Lah 274: 36 PLR 315: 149 Ind Cas 986.

——S. 100 — A decision by the lower Appellate Court that a certain portion of the land in suit is ancestral is one of fact and cannot be challenged in second appeal. AIR (Vol 20) 1933 Lah 765: 34 PLR 567 (1): 145 Ind Cas 628.

——S. 100 — Inference by trial Court about ancestral nature of land — Same inference drawn by Division Bench of High Court — Finding cannot be said to be arrived at illegally and decision is not contrary to law and usage. AIR (Vol 18) 1931 Lah 704: 32 PLR 559.

——S. 100 — A finding as to the ancestral nature of certain property based upon mere conjectures and presumption is liable to be set aside in second appeal. AIR (Vol 13) 1926 Lah 659: 8 Lah 30: 8 LLJ 485: 27 PLR 721: 97 Ind Cas 241 (DB).

——S. 100 — Self-acquisition — Throwing into common stock.

The question whether the self-acquired property of a member of a joint Hindu family has been thrown into the common stock or not is a question of fact. AIR (Vol 13) 1926 Mad 963: 51 MLJ 167: 1926 MWN 635: 96 Ind Cas 1051.

——S. 100 — Finding of fact — Title to sue — Punjab Courts Act.

Whether the property in dispute is ancestral is a finding of fact. Whether the plaintiffs as the collaterals in the sixth degree are entitled to sue is a finding on custom and cannot be questioned in second appeal without the production of the necessary certificate under the Punjab Courts Act. AIR (Vol 11) 1924 Lah 263: 5 LLJ 449: 76 Ind Cas 147.

——S. 100 — Finding of fact — No evidence.

A decision on the question on ancestral nature of land is one of fact, and ordinarily speaking such a finding cannot be assailed in second appeal. But if the finding has been arrived at on no evidence whatever on purely conjectural grounds such a finding can be gone into and examined by the High Court sitting in second appeal. AIR (Vol 9) 1922 Lah 65: 4 Lah LJ 31: 64 Ind Cas 428 (DB).

——S. 100 — Ancestral property — Finding of fact.

Although on the facts established it might have been possible to hold that there was a sufficiently strong presumption that the land in suit was ancestral qua the plaintiff but the finding that the land was not ancestral being one of fact and the view taken by the lower appellate Court being not opposed to law a second appeal was not competent. 42 PLR 1919 (DB).

11. Appreciation of evidence.

——S. 100 — Power of High Court — Appreciation of evidence.

The High Court will be exceeding its powers under this section if it differs from the view taken by the lower appellate Court upon appreciation of oral evidence. AIR (Vol 37) 1950 PC 28: 1950 ALJ 113: 63 LW 184: 1950 AWR 211: 54 CWN 508: 52 Bom LR 477: 31 PLT 1: (1950) 1 MLJ 294.

——S. 100 — Finding of fact — Interference — Failure of lower Court to appreciate real issues involved.

If there was any failure of the Court below to appreciate the real issues involved, the finding of fact is not conclusive in second appeal. AIR (Vol 36) 1949 Oudh 87.

——S. 100 — Findings drawn for 'argumentative inferences' from oral and documentary testimony.

On a question of credibility of a witness, a great weight ought to be given to the judgment of the Judge who saw and heard the witness.

But in a case where findings as regards facts have been drawn from "argumentative inferences" from the testimony, oral or documentary, produced by a witness and depend upon "the weight of evidence" and "the inherent probabilities of the story" and not on the credibility induced by his "whole demeanour in the witness-box" or the manner in which he answers questions", the trial Court is in no better position than the Court of appeal in discovering the truth. AIR (Vol 32) 1945 PC 35: (1945) 1 MLJ 136: 1945 MWN 322: 12 BR 231: 47 Bom LR 608: ILR (1944) Kar PC 199: 221 Ind Cas 451.

——S. 100 — Appreciation of evidence basis of finding — No interference in second appeal.

The question how far the lower Court was justified in appreciating the evidence in the way in which it did and came to the conclusion is not a matter to be considered by the High Court. If there were materials on which the lower Court could have come to the conclusion it arrived at, it would not be open to the High Court to interfere with it. AIR (Vol 29) 1942 Mad 730: 55 MLW 652: (1942) 2 MLJ 518: 204 Ind Cas 128.

——S. 100 — A finding of fact, whether good or bad, based on discussion of evidence cannot be interfered with. (1939) 41 PLR 491.

——S. 100 — Where a piece of evidence has been duly considered by the lower Appellate Court, its appreciation of this evidence, whether right or wrong, cannot be questioned in second appeal. AIR (Vol 27) 1940 Pat 310: 19 Pat 382: 21 PLT 660: 6 BR 384: 189 Ind Cas 883.

——S. 100 — The Court of second appeal attaches considerable importance to the findings of fact recorded by the lower Appellate Court but such findings should be based upon a proper appreciation of legal evidence on the record. A finding recorded by the lower Appellate Court based wholly upon wrong assumptions would not be binding on the High Court in second appeal. A Judge, whose findings on questions of fact are final, must be wide awake. He should be in full possession of the whole evidence on the record before he can give a decision on a question of fact, knowing full well that great sanctity attaches to his decision when it comes to the High Court in second appeal. AIR (Vol 23) 1936 Lah 1005: 167 Ind Cas 704.

——S. 100 — Trial Judge's estimate — High Court, if can differ from it.

Unless there are strong reasons, the High Court will not differ from the trial Judge on the question of assessing the value of the evidence of witnesses. AIR (Vol 23) 1936 Rang 344: 14 Rang 557: 164 Ind Cas 272.

——S. 100 — Appreciation — Jurisdiction of Court before whom witnesses are examined.

The question as to what witnesses should be believed or what witnesses should be disbelieved is entirely a question of appreciation of evidence within the jurisdiction of the Court before whom the witnesses are examined and by whom they are

seen. AIR (Vol 22) 1935 Bom 371: 37 Bom LR 584: 158 Ind Cas 796.

——S. 100 — It is open to the lower Court to appreciate the evidence in the best manner according to its discretion, and where evidence has been properly admitted on both sides, even if its conclusion on a question of fact is erroneous, it cannot be interfered with in second appeal. AIR (Vol 19) 1932 Mad 173: 136 Ind Cas 783.

——S. 100 — Appreciation of evidence.

Practice — Appellate Court — Finding of fact based on credibility of witnesses and demeanour — Unsuccessful party seeking to reverse decision has heavy burden to discharge — Burden not discharged but finding reversed — Privy Council restored trial Court's findings. AIR (Vol 17) 1930 PC 170: 58 MLJ 629: 1930 MWN 544: 34 CWN 593: 32 Bom LR 887: 123 Ind Cas 557.

—— S. 100 — In second appeal the High Court cannot define the amount of weight to be attached to the evidence. AIR (Vol 13) 1926 Cal 822: 43 CLJ 327: 30 CWN 826: 95 Ind Cas 334 (DB).

——S. 100 — When the High Court is called upon to disturb findings of fact based entirely upon oral evidence, it should feel some hesitation before coming to a different conclusion from that of the Judge who heard and saw the witnesses deposing, especially when that course would involve giving credit to witnesses who have been disbelieved in the Court below, and when it involves accepting a story which, judged merely upon probabilities, sounds hard to accept. AIR (Vol 13) 1926 Mad 173: 22 MLW 786: 93 Ind Cas 670 (DB).

——S. 100 — It is not sufficient for the lower appellate Court when it reverses the findings of the trial Court to merely differ from it as regards appreciation of only the oral evidence. It ought to consider the evidentiary value of the several documents on record filed by the parties. If it does come to any conclusion by misappreciation of evidence such finding is not binding in second appeal. AIR (Vol 13) 1926 Nag 129: 89 Ind Cas 663.

——S. 100 — Finding of fact — Evidence — Doubtful.

Doubtful evidence — High Court will not interfere unless injustice is caused or there is misapprehension of evidence. AIR (Vol 12) 1925 Oudh 658: 87 Ind Cas 208.

——S. 100 — Witnesses — Credibility.

Trial Court disbelieving witnesses with reference to certain statements — Appellate Court believing them as to other statements — No second appeal lies. AIR (Vol 12) 1925 Oudh 537: 85 Ind Cas 407.

——S. 100 — Where the High Court differed from the lower Courts not only in the estimate of the evidence, but also with regard to the inferences derivable from documents produced in the case and other circumstances, their Lordships dealt with the case on its merits. AIR (Vol 9) 1922 PC 272: 45 MLJ 460: 2 Pat 38: 32 MLT 1: 36 CLJ 499: 49 IA 399: 3 PLT 605: 27 CWN 925: 1923 MWN 361: 71 Ind Cas 984.

——S. 100 — Appreciation of evidence — Question of weight to evidence.

The question of weight to be attached to evidence cannot be dealt with in second appeal. AIR (Vol 7) 1920 Pat 726: 2 UPLR (Pat) 49: 1 Pat LT 224 : 55 Ind Cas 922.

——S. 100 — Appreciation of evidence — Error in weighing evidence.

Findings of fact are conclusive in second appeal even though there has been an error on the part of the Court below in weighing the evidence. AIR (Vol 6) 1919 Lah 42: 53 Ind Cas 137.

——S. 100 — Appreciation of evidence — Findings of fact when to be questioned.

The findings of fact cannot be questioned on second appeal unless the appellant shows that the lower Court has committed some error of law in deciding it. The value to be attached to evidence is not a question open in second appeal. (1913) 21 Ind Cas 95 (Oudh).

——S. 100 — Appreciation of evidence — Weighing of evidence.

The precise degree of weight to be attached to the different parts of evidence is not a matter for second appeal. If a finding of fact had been arrived at after a careful consideration of the whole evidence no valid objection in law could be made in second appeal with respect to the finding. (1911) 10 Ind Cas 188 (Oudh).

——S. 100 (S. 580 old Code) — Finding of fact — Erroneous view of cause of action.

Where the lower Court's appreciation of evidence is influenced by an erroneous view of plaintiff's cause of action, it is open to the High Court to interfere in second appeal. (1903) 5 Bom LR 85: 27 B 271 (278) (DB).

——S. 100 (S. 584 old Code) — Questions of fact — Lower Court's failure to appreciate the real points in issue — High Court's power to interfere.

The High Court has generally no jurisdiction to entertain a second appeal on the ground of erroneous findings of facts, however, gross or inexcusable the error would seem to be; but it will interfere in those cases where it is clear that the lower appellate Court has completely failed to appreciate the points which justly weighed with the Court of first instance. (1902) 4 Bom LR 822 (822).

——S. 100 (S. 584 old Code) — Appreciation of Evidence — Sound principles.

The High Court can, in second appeal, interfere with a finding of fact if the lower Court has failed to apply sound principles to the consideration of the evidence in the case. A total discarding of evidence on the sole ground that the witnesses belong 'to the lowest dregs of the populace' is unjustifiable and proceeds upon an erroneous principle of appreciation of evidence; and on second appeal the High Court is not bound by a finding so arrived at. (1901) 3 Bom LR 167: 25 B 574 (581) (DB).

12. Benami.

——S. 100 — Finding of fact — Question of benami — Interference in second appeal.

It is no doubt open to the High Court in second appeal to see how far the Courts below have considered the question whether the ingredients required to be established in a case of benami have been established. But if on the findings of the Court of fact the necessary elements are found to have been established for supporting the benami character of a transaction, the High Court in second appeal will not interfere with the conclusion. AIR (Vol 37) 1950 Pat 541.

——S. 100 — Finding of fact — Benami character of sale-deed — Point fully and carfeully dealt with by trial Court — Appellate Court definitely accepting finding but not giving reasons fully — If vitiate finding — O. 41, R. 31.

The judgment of an appellate Court should contain the grounds on which its decision of the case is based. The parties are entitled to a consideration by the appellate Court of the evidence on the points raised and the decision thereon with the grounds therefor. It is not sufficient for the appellate Court to state in general terms that it agrees with the reasoning of the trial Court; although in a judgment of affirmance, it is not necessary for the appellate Court to repeat all that has been said by the first Court, there must be a sufficient discussion showing that the

appellate Court has applied its own mind to the evidence.

But when the point has been dealt with by the trial Court very fully and carefully, and the appellate Court accepts the finding of the trial Court (on a plea of benami) and definitely accepts the finding of the trial Court that a sale-deed was benami or farzi only, such a finding is binding in second appeal and cannot be interfered with merely because the appellate Court has not fully set out its reasons for its decision on that point. AIR (Vol 37) 1950 Pat 298 (DB).

——S. 100 — Benami nature of document is question of fact.

The question whether a document is taken benami for another is a question of fact and the burden of proving the benami nature is upon the person setting up the benami. AIR (Vol 33) 1946 Mad 122: (1945) 2 MLJ 484: 58 MLW 650: 1945 MWN 735.

——S. 100 — Finding that purchaser was not benamidar is one of fact.

The finding that a purchaser was not a benamidar is a finding of fact and cannot be disturbed in second appeal. AIR (Vol 31) 1944 Nag. 57: 1943 NLJ 546: ILR (1943) Nag 796: 211 Ind Cas 507.

——S. 100 — A finding on the question as to the benami nature of a transaction being purely one of fact cannot be questioned in second appeal. AIR (Vol 30) 1943 Mad 459: 1943-1 MLJ 219: 213 Ind Cas 359.

——S. 100 — Finding in favour of the benami transaction based on some evidence is binding on second appeal. AIR (Vol 22) 1935 All 884: 1935 AWR 707: 158 Ind Cas 639.

——S. 100 — A finding that a certain person is merely a benamidar is one of fact behind which the High Court cannot go in second appeal. (1931) 133 Ind Cas 551: 32 PLR 295.

——S. 100 — Finding as to the benami nature of a transaction given after a consideration of the evidence on record is binding on the High Court in second appeal. (1931) 133 Ind Cas 440: 32 PLR 289.

——S. 100 — The question of benami is purely a finding of fact and cannot be challenged in second appeal. AIR (Vol 16) 1929 Oudh 83: 5 OWN 1122: 115 Ind Cas 99: 4 Luck 265 (DB).

——S. 10 — Benami — Fraud.

A question of benami or fraud is not a question of pure facts; it is a mixed question of fact and law, and if the Court proceeds on a mere suspicion and draws inference from facts proved such as no reasonable man would draw, then the Court committed an error of law, and the High Court may interfere in second appeal. AIR (Vol 5) 1918 Pat 632: 3 Pat LW 339: 43 Ind Cas 49 (DB).

13. Burden of proof.

——S. 100 — Finding of fact — Finding arrived at by throwing burden of proof on wrong party — Finality.

A finding of fact reached by the lower Court by throwing the burden on the wrong party is not conclusive in second appeal, as the finding is the result of an error of law. AIR (Vol 36) 1949 Pat 214: 14 Cut LT 51.

——S. 100 — Finding of fact — Finding arrived at by placing onus on wrong party — Interference by High Court.

A finding of fact arrived at as the result of placing the burden of proof on the wrong side is not conclusive in second appeal, and the High Court is competent to interfere with such a finding in second appeal. AIR (Vol 35) 1948 Pat 247 (DB).

——S. 100 — Finding of fact by lower Court that plaintiffs had not been repaid — Finding challenged by defendants on ground that onus was wrongly placed on them — Question of onus, held did not arise as there was conflicting evidence — Finding was binding in second appeal.

The finding of fact arrived at by the lower Court that the plaintiffs had not been repaid was challenged by the defendants in second appeal and it was contended that the onus of proving this had been wrongly placed on them instead of on the plaintiffs:

Held that as there was conflicting evidence on the point, no question of onus arose, and the Court had come to a conclusion which was binding in second appeal as a finding of fact. AIR (Vol 33) 1946 Pat 440.

——S. 100 — Onus wrongly placed — Judgment is vitiated.

Where, in a suit, the evidence has been viewed in the lower Appellate Court as if the plaintiff lay under the necessity of dispelling a suspicion of fraud which arose out of the dismissal of the infructuous application in the execution proceedings, that is, the burden has been wrongly placed, this is sufficient to vitiate the judgment on point of law. AIR (Vol 25) 1938 Lah 760: 40 PLR 682: 180 Ind Cas 138.

——S. 100 — When the onus is used as the determining factor in the whole case because the tribunal finds the evidence pro and con so evenly balanced or so equally worthless that it can come to no sure conclusion, then the question of onus becomes one of law and not one of fact as it would otherwise be. AIR (Vol 25) 1938 Nag 522: 181 Ind Cas 226.

——S. 100 — In conducting any enquiry, the determining tribunal, be it Judge or jury, will often find that the onus is sometimes on the side of the one contending party, sometimes on the side of the other, or, as it is often expressed, that in certain circumstances, the onus shifts. But onus, as the determining factor of the whole case, can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no sure conclusion. Then the onus will determine the matter. Even when the onus appears to have been wrongly laid, as for instance, in the framing of an issue or even because of the actual words used in the judgment, nevertheless, if the Judge says, in spite of that, that "I hold such and such a fact proved or disapproved as the case may be, because I believe A and disbelieve B' then he has actually given a positive finding based on positive evidence and there can be no interference in second appeal. The actual substance of the finding must be considered in every case, and not the mere form of words the Judge may have employed. AIR (Vol 24) 1937 Nag 230: 171 Ind Cas 860.

——S. 100 — Finding proceeding on wrong basis.

If the lower Appellate Court does nothing more than accept the finding of the first Court which has proceeded upon a wrong basis by throwing the burden of proof on the wrong party, it will have to be reversed by the High Court. AIR (Vol 23) 1936 Nag 130: ILR (1936) Nag 142: 164 Ind Cas 740.

——S. 100 — Mixed question of law and fact.
Finding arrived at by misapplication of law by wrongly placing the burden of proof is not merely a finding of fact but is one of mixed law and fact and can be set aside in second appeal. AIR (Vol 23) 1936 Rang 262: 163 Ind Cas 604

——S. 100 — Where the lower Court wrongly placed the onus of proof on the defendant and came to a finding that the defendants had no occupancy right:
Held, that there was an error of law and the finding was not binding on the High Court in second appeal. AIR (Vol 19) 1932 Cal 351: 53 CLJ 616: 133 Ind Cas 220.

——S. 100 — Question of fact — Finality attaching to question of fact can be disturbed in second appeal if onus is wrongly put on parties — C. P. Code, S. 103. AIR (Vol 17) 1930 Cal 591: 51 CLJ 465 (DB).

——S. 100 — Ignoring rule as to second appeal lies.
Where the lower appellate court ignored the rule as to onus of proof in transactions entered into by pardanashin ladies, held, that the High Court could interfere in second appeal and remand the case for fresh disposal. AIR (Vol 17) 1930 Cal 591: 51 CLJ 465 (DB).

——S. 100 — Burden thrown on wrong party — Finding of fact is not binding — Privy Council gave finding of fact. AIR (Vol 16) 1929 PC 13: 114 Ind Cas 5: 31 Bom LR 264: 56 IA 6: 33 CWN 233: 49 CLJ 98: 29 MLW 86: 52 Mad 83: 1929 MWN 43: 56 MLJ 165.

——S. 100 — Error of principle — Appeal lies.
A decision based on an error of the principle as governing the question of onus will be set aside. AIR (Vol 13) 1926 Lah 653: 96 Ind Cas 820 (DB).

——S. 100 — Onus wrongfully placed.
Where the plaintiff has not been prejudiced in any way owing to the fact that the initial onus was wrongly placed upon him, held, that no reason for interference is made out. AIR (Vol 11) 1924 Lah 335: 69 Ind Cas 521 (DB).

——S. 100 — The question of 'onus' is one of law and so can be taken up in second appeal. AIR (Vol 11) 1924 Lah 195: 73 Ind Cas 216.

——S. 100 — The question upon which party the 'onus' of proving any particular point lies, is undoubtedly a question of law on which a second appeal lies. (1922) 65 Ind Cas 745 (Lah).

——S. 100 — Question as to onus of proof is one of law. AIR (Vol 8) 1921 Lah 199: 4 LLJ 199: 77 Ind Cas 246 (DB).

——S. 100 — Question of 'onus' of proof is one of law. AIR (Vol 8) 1921 Lah 128: 2 Lah 249: 106 PLR 1921: 64 Ind Cas 901 (DB).

——S. 100 — A correct appreciation by an Appellate Court of a direction of the Lower Court as to the burden of proof. and a consequent arriving at a finding of fact must be accepted in second appeal. AIR (Vol 7) 1920 Mad 789: 12 MLW 170: 59 Ind Cas 973 (DB).

——S. 100 — Burden of proof — Question of Law.
The adjustment of the burden of proof in a case is a question of law. AIR (Vol 5) 1918 Oudh 103: 4 OLJ 556: 43 Ind Cas 478.

——S. 100 — Burden of proof — Objection to.
After evidence was given by both sides and the Lower Court has preferred that of one side, the objection as to wrong shifting of burden of proof is groundless in second appeal. AIR (Vol 4) 1917 Pat 703: 1 Pat LW 194: 38 Ind Cas 817.

——S. 100 — Burden of proof — Question of law or fact.
The question of onus is not necessarily and in all cases one of law. How much or what evidence is sufficient to discharge the 'onus' is a question which will depend upon the weight to be attached to the evidence adduced. (1911) 13 Bom LR 1021: 12 Ind Cas 691 (DB).

——S. 100 — Burden of proof — Error as to finding of fact.
A solitary statement seeming to throw onus on the wrong party while the whole evidence was considered does not vitiate the finding of fact. (1911) 9 Ind Cas 4 (Cal).

——S. 100 — Burden of proof — Wrong view.
A finding of fact vitiated by the misapplication of the burden of proof may be interfered with in second appeal. (1909) 8 CLJ 135: 13 CWN 167: 4 Ind Cas 495 (DB).

——S. 100 — Burden of proof — Materiality of.
When both parties adduce evidence in support of their respective cases there is no question of onus in second appeal. (1909) 3 Ind Cas 431 (Cal) (DB).

14. Change of law.

——S. 100 — Passing of new Act after filing of suit — Execution proceeding is governed by old Act.
An appeal being a mere continuance of the original proceeding initiated by the filing of the plaint, the right to continue that proceeding by way of an appeal cannot be affected by a new Act passed subsequent to the filing of the suit unless it expressly so provides. The same rule applies tc execution proceedings following the decree in the suit. AIR (Vol 21) 1934 All 709: 3 AWR 604: 151 Ind Cas 362.

——S. 100 — Question or finding of fact — Change of law.
Where during the pendency of second appeal the Transfer of Property (Amendment) Act (1926) came into force rendering the finding of fact as to attestor's actually seeing the document signed irrelevant,
Held, that the High Court can consider the evidence in view of the altered aspect of the finding as to attestation. AIR (Vol 13) 1926 All 725 (2): 96 Ind Cas 775 (DB).

——S. 100 — A decision of the lower Court which was right according to the view of the law then prevailing can be set aside in second appeal if the subsequent ruling of the Privy Council takes a contrary view. AIR (Vol 13) 1926 Nag 49: 90 Ind Cas 210.

15. Concurrent findings.

——S. 100 — Finding of fact — Question of adoption.
The concurrent finding of both the lower Courts that certain person is not proved to be another person's legally adopted son cannot be assailed in second appeal. AIR (Vol 33) 1946 Bom 193: 47 Bom LR 962.

——S. 100 — Lower Appellate Court agreeing with trial Court, if bound to take every sentence of trial Court judgment and say that it agrees with it.
There is no magic in any special formula of words, nor is the first Appellate Court bound to take every sentence of the trial Court's judgment and say in terms that he agrees with it as though he were a litigant dealing with all his opponent's pleadings. Where the lower Appellate Court, while agreeing with the trial Court's finding of fact, uses in a part of his judgment the phrase "it is not unreasonable to presume" with reference to lower Court's finding of fact, it means no more than that he was satisfied that the trial Court was

right in the conclusion at which he arrived, or at least that he was unwilling to disturb it. Such a finding of fact is binding in second appeal. AIR (Vol 28) 1941 Rang 76: 1940 Rang LR 777: 193 Ind Cas 286.

——**S. 100 — Peshawar Judicial Commissioner's Court.**

It has been an established practice of the Judicial Commissioner's Court not to lightly disturb the concurrent findings of the two Courts below. AIR (Vol 27) 1940 Pesh 52: 1940 Pesh LJ 56: 192 Ind Cas 343.

——**S. 100 — Finding that mortgage by Burmese husband was executed with consent of wife, cannot be canvassed in second appeal.**

On second appeal it is not the concurrent finding of fact which cannot be interfered with; it is the finding of the first Appellate Court; and there is no question of it being within the discretion of the second Appellate Court to interfere; the second Appellate Court cannot interfere, however erroneous it may think this finding of fact to be. The only circumstance under which it can interfere is when the alleged finding of fact is not in reality a finding of fact because it is supported by no evidence whatever.

Consequently, the finding of the first Appellate Court that the mortgage of property belonging to Buddhist Burmese husband and wife was executed by the former with the knowledge and consent of the latter is a finding of fact and cannot be canvassed in second appeal. AIR (Vol 27) 1940 Rang 126: 1940 Rang LR 180: 189 Ind Cas 817.

——**S. 100 — Finding as to whether lands were totally unfit for cultivation.**

The question whether the lands were totally unfit for cultivation for the years in suit is a matter for the Court below and the High Court cannot interfere in second appeal when the lower Appellate Court has accepted the finding of the trial Court that the entire land has been diluviated and no area was cultivable in the years of the suit. AIR (Vol 26) 1939 Pat 386: 6 BR 108: 185 Ind Cas 144.

——S. 100 — Concurrent finding of fact by the lower Courts cannot be disturbed on second appeal by a Judge sitting singly. AIR (Vol 25) 1938 Lah 218: 40 PLR 112: 177 Ind Cas 101.

——S. 100 — A litigant who seeks before a second appellate tribunal to reverse findings of fact which have been arrived at by the trial Judge and have, after consideration, been confirmed on appeal, comes always with a very heavy burden upon his shoulders. And when he is the principal witness in regard to the crucial facts, and has been discredited by the trial Judge, the weight of his burden is so great that few, if any, can survive under it. AIR (Vol 21) 1934 PC 127: 40 MLW 94: 36 PLR 45: 150 Ind Cas 226.

——S. 100 — Interfering with the concurrent findings of fact of the Courts below amounts to exceeding jurisdiction under S. 100. AIR (Vol 21) 1934 Cal 707: 38 CWN 763: 153 Ind Cas 170.

——S. 100 — Where the principal issue is one of fact, and the two lower Courts are in agreement with regard to the decision on that fact, in second appeal whether it is right or wrong, that finding of fact is binding unless the appellant is able to show some error of law or procedure which may have affected the decision of the case. AIR (Vol 20) 1933 Rang 174: 146 Ind Cas 445.

——S. 100 — Where the lower Courts have arrived at a finding of fact and there was no legal impediment or objection to their arriving at that finding, the Court of second appeal should not interfere with a question of fact. AIR (Vol 20) 1933 Mad 353: 37 LW 288: (1933) MWN 689: 144 Ind Cas 573.

——S. 100 — A concurrent finding of fact based on admissible evidence cannot be challenged in second appeal. (1933) 145 Ind Cas 652 (2): 10 OWN 380.

——**S. 100 — Letters Patent appeal.**

The High Court has no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be. Nor can the High Court in second appeal consider the question of the quantum of evidence required to prove a fact.

Therefore, if a Judge of the High Court interferes with a concurrent finding of fact in second appeal, his judgment could be set aside in Letters Patent appeal. AIR (Vol 18) 1931 Lah 144: 31 PLR 381: 132 Ind Cas 379.

——S. 100 — Concurrent findings of fact by the Courts below that certain transfers are not colourable and fictitious, are not open to challenge in second appeal. AIR (Vol 18) 1931 Oudh 400: 8 OWN 878: 136 Ind Cas 247.

——S. 100 — Concurrent findings of the Courts of India that defendants were in possession, through their agents, of lands the proprietary title of which was with the plaintiff at the time of the institution of the suit rendering O. 1, R. 8, inapplicable, when supported by ample evidence will not be disturbed in second appeal. AIR (Vol 17) 1930 P.C. 232: 34 CWN 849.

——S. 100 — Where there exist concurrent findings of fact which support the judgment under appeal and there is evidence upon which these findings could have been reached, and there did not exist in the case any circumstances which would justify reviewing these findings, the appellant's case must be dealt with on the basis of these findings. AIR (Vol 16) 1929 PC 205: 118 Ind Cas 263: 31 Bom LR 1369: 50 CLJ 336: 30 MLW 825: 57 MLJ 594.

——S. 100 — Privy Council — Concurrent finding is no finding if based on error of law. AIR (Vol 16) 1929 PC 38: 116 Ind Cas 593.

——S. 100 — Concurrent findings of two lower Courts preclude High Court from interfering in second appeal. AIR (Vol 16) 1929 Nag 180.

——**S. 100 — Documents — Effect of.**

Lower appellate Court forming its opinion on legal effect of some of the documents — Correctness of its opinion can be challenged in second appeal. AIR (Vol 15) 1928 Nag 153: 11 NLJ 21: 111 Ind Cas 488.

——S. 100 — Concurrent finding cannot be impugned. (1926) 96 Ind Cas 283 (Lah).

——**S. 100 — Perverse findings.**

Ordinarily it is not possible on second appeal to go behind concurrent findings of fact, but where not only the findings are perverse in the sense that they were opposed to the weight of the oral evidence, but that it was due to the fact that the trial Court wholly ignored the entry in certain document, whilst the first Appellate Court entirely failed to realise its probative value, the High Court set aside the concurrent findings of fact. AIR (Vol 10) 1923 Rang 196: 76 Ind Cas 449: 1 Rang 135.

——**S. 100 — Concurrent findings.**

Concurrent finding of fact can only be disturbed in second appeal for cogent reasons. 95 PWR 1911: 169 PLR 1911: 10 Ind Cas 338 (DB).

——**S. 100 — Concurrent findings — What are.**

If the appellate Court does not expressly deal with the question of fact decided by the first, and fails to give independent opinion thereon, the finding is concurrent. 8 PWR 1910: 5 Ind Cas 592 (DB).

——Ss. 100 and 115 — Concurrent findings.
The concurrent findings of both lower Courts on a question of fact can neither be disturbed in second appeal nor in revision. 49 PWR 1909: 4 Ind Cas 889 (DB).

16. Consideration of evidence.

See also Note 11.

——S. 100 — Finding of fact — Finding based on evidence — Interference in second appeal.
Where a finding of fact is based on evidence on the record it cannot be disturbed in second appeal. (1950) 1950 AWR 16.

——S. 100 — Finding of fact — Interference — All available evidence not considered.
It is firmly established that a finding of fact to be binding on a Court of second appeal must be a judicial decision reached on the consideration of the whole of the evidence. Where it appears that all the evidence available is not considered, the High Court will and should interfere in second appeal. AIR (Vol 36) 1949 EP 342: 51 PLR 70 (DB).

——S. 100 — Findings that part of village was included within Municipality and was converted into town and that custom set up by plaintiff did not exist in such part, are findings of fact — Findings are binding in second appeal.
The findings arrived at after consideration of the evidence on record that a part of a village was included within a Municipality and, to all intents and purposes, it was converted into a town and was subject to all incidents thereof and that a custom set up by the plaintiff did not exist in such part any longer or its breach was the rule and observance only an exception, are findings of fact and are binding in second appeal. AIR (Vol 33) 1946 Oudh 188 (DB).

——S. 100 — Finding of fact — Interference — Lower Court not dealing with the entire evidence.
It is not always possible or necessary to refer in the judgment to every document on the record or to the evidence of every witness examined at the trial. Hence, if from a perusal of the judgment of the lower appellate Court, the Chief Court is satisfied that all the relevant material was considered, though specific reference in detail is not made to every piece of evidence on the record it will not be right to interfere with the finding of the lower appellate Court on a question of fact. AIR (Vol 33) 1946 Oudh 72: 21 Luck 279: 223 Ind Cas 524: 1945 OA (CC) 263: 1945 ALW (CC) 366: 1945 OWN 401: 1945 AWR (CC) 263.

——S. 100 — Conclusion on consideration of evidence of both parties.
The proper legal effect of a proved fact is essentially a question of law but the question whether a fact has been proved when evidence for and against has been properly admitted is necessarily a pure question of fact.
Where, therefore, both the parties went into evidence and the Judge, after a consideration of that evidence, came to the conclusion that the transferee's bona fides had not been proved, the finding must be accepted in second appeal. AIR (Vol 32) 1945 All 227: (1945) ALJ 78: 1945 OWN (HC) 74: 1945 AWR (HC) 83: ILR (1945) All 148 (DB).

——S. 100 — Since findings of fact by the lower Appellate Court are to be treated as final, they should at least be clear and specific—not ambiguous or inferential. A general approval given to the views of the trial Court will not necessarily incorporate all its findings in detail, especially if accompanied by language which casts doubt on a particular point. In such a case, the High Court is entitled to decide that question upon the evidence before it. AIR (Vol 30) 1943 PC 24: 47 CWN 489: 9 BR 299: (1943) 1 MLJ 514: ILR (1943) 1 Cal 372: (1943) Kar (PC) 39: 46 Bom LR 192: 70 IA 18: 206 Ind Cas 266.

——S. 100 — Consideration of oral and documentry evidence.
A finding of fact arrived at by the lower Appellate Court on a consideration of the oral and documentary evidence on the record cannot be interfered with in second appeal. (1943) 205 Ind Cas 520: 1942 OWN 744.

——S. 100 — A final Court of fact especially when it reverses the decision of the Court of first instance should consider the entire evidence on the record and its judgment should indicate that the conclusion has been arrived at after consideration of all the materials on the record. (1940) 42 PLR 275.

——S. 100 — Available evidence not considered — Whether binding.
Finding reached by lower Court without considering all available evidence is not binding in second appeal. AIR (Vol 26) 1939 Lah 504: 42 PLR 232: 185 Ind Cas 652.

——S. 100 — Failure to consider document vitiates finding.
A finding of fact of the lower Appellate Court is vitiated by its failure to consider a document pointedly relied upon by the Judge below. AIR (Vol 26) 1939 Lah 188: 41 PLR 120.

——S. 100 — Finding based upon consideration of evidence.
Where there is no error or defect in the procedure, the finding arrived at by the District Judge in first appeal is clearly a finding of fact and if based on consideration of the evidence, cannot be disturbed on further appeal. AIR (Vol 25) 1938 Lah 191: 40 PLR 573: 181 Ind Cas 422 (DB).

——S. 100 — Where the sole question for decision in the appeal is whether the house in suit was purchased by the appellant in a certain year and the finding of the lower Courts is in favour of the plaintiff, finding being arrived at after due consideration of the oral and documentary evidence in the case, the High Court would not be prepared to interfere with this finding. AIR (Vol 25) 1938 Oudh 259: 1938 OWN 1043: 177 Ind Cas 979.

——S. 100 — Where the District Judge has recorded findings of fact, the High Court will not be in a position to re-open the matter merely because some items of evidence may not have been considered. AIR (Vol 25) 1938 Pat 38: 4 BR 228: 173 Ind Cas 237.

——S. 100 — Finding arrived at on fair consideration of evidence.
A finding of fact by the lower Appellate Court is binding upon High Court in second appeal, provided it was arrived at on a fair consideration of the evidence in the case even if the Subordinate Judge erred in his reasoning. AIR (Vol 23) 1936 Pat 270: 17 PLT 195: 2 BR 516: 15 Pat 422: (1936) CWN 267: 162 Ind Cas 849 (DB).

——S. 100 — An appeal is not in the nature of a rehearing. Where the Judge has heard the evidence and come to his own conclusion, that finding should not be disturbed in appeal unless it is manifestly incorrect. AIR (Vol 22) 1935 Pat 74: 15 PLT 787: 1 BR 381: 155 Ind Cas 81.

——S. 100 — The fact that the Court had given weight to evidence to which it was not entitled and has thus been led totally to misconceive the case is not enough to justify interference in second appeal on a finding of fact if the Court had evidence before it proper for its consideration in support of the finding. AIR (Vol 21) 1934 Nag 124: 150 Ind Cas 306.

——S. 100 — Finding of fact is binding only when arrived at after due consideration of all evidence

oral and documentary. AIR (Vol 14) 1927 Oudh 95: 1 Luck 458: 29 OC 330: 3 OWN 352: 95 Ind Cas 925: 13 OLJ 586.

——S. 100 — **Question or finding of fact — Finality — Interference.**

Where a finding of fact arrived at by a trial Court was upheld by the appellate Court in the following words: "After hearing both counsel I am not able to say that the decision is clearly wrong. It is certainly not perverse. Cogent grounds for upsetting it are not forthcoming. It must, therefore, prevail."

Held, that it was not an independent finding on the evidence such as can be treated as a finding of fact closing the door to a second appeal. AIR (Vol 13) 1926 Lah 158: 89 Ind Cas 662 (DB).

——S. 100 — Finding of fact can be set aside when lower Court has not considered whole of evidence or finding is not reasonably deducible from the evidence. AIR (Vol 12) 1925 Lah 87: 79 Ind Cas 107.

——S. 100 — A finding on a question of fact would be binding if based on a proper consideration of all the material evidence otherwise the finding can be reversed. AIR (Vol 12) 1925 Mad 447: 21 MLW 227: 86 Ind Cas 919 (DB).

——S. 100 — Finding without weighing evidence is not binding. AIR (Vol 12) 1925 Oudh 747: 87 Ind Cas 1040.

——S. 100 — Where a finding of fact is arrived at upon no evidence, the finding is liable to be set aside in second appeal. A finding of fact to be binding on a Court of second appeal must be a judicial decision reached on a consideration of the whole of the evidence, and where it appears that all available evidence has not been considered the High Court will interfere and should interfere in second appeal. AIR (Vol 9) 1922 Lah 149: 65 Ind Cas 497 (DB).

——S. 100 — Where there are circumstances showing that the evidence on record has not been assessed at its true value and various important factors to be taken into consideration while appraising that evidence have not been considered the High Court would interfere. AIR (Vol 9) 1922 Nag 226: 68 Ind Cas 332.

——S. 100 — Second appeal — Finding of fact — Whole evidence not considered — Finding is not binding. AIR (Vol 9) 1922 Pat 503: 70 Ind Cas 853. (DB).

——S. 100 (S. 584 old Code) — **Second appeal — Weight of documentary evidence — Misunderstanding of the result of a local investigation.**

A question as to the weight which the lower appellate Court should have given to certain documents or that the lower appellate Court misunderstood the result of the first Court's local investigation is no ground of second appeal. (1909) 13 CWN 105 (107) (DB).

17. Construction of document.

(a) Decree.
(b) Double interpretation.
(c) Finality.
(d) Inference.

See alsc Note 57.

(e) Intention.
(f) Legal effect.
(g) Meaning of Words.
(h) Misconstruction.
(i) Nature of transaction.
(j) Question of fact.
(k) Question of Law.
(l) Sufficiency of evidence.

——S. 100 — **Finding of fact — Finding as to ancestral character of land — Finding based on construction of revenue record.**

A finding as to the ancestral character of land which is based upon the perusal, construction and piecing together of a large number of revenue records, cannot be regarded as a finding of fact. AIR (Vol 38) 1951 Punj 358: 52 PLR 407.

——S. 100 — **Whether execution of certain document is genuine.**

It is true that a document is said to be executed only if it is proved to have been consciously signed or thumb-marked after the alleged executant had become aware of its contents and that the mere presence of a signature or a thumb mark on a document may not, in certain cases, in itself amount to a proof of its execution. But where the Judge has not been impressed by the mere presence of the thumb-marks on the documents in question, but there are certain other attending circumstances which have influenced his mind while formulating his conclusion that the execution of document is genuine, his decision cannot be interfered with in second appeal. AIR (Vol 25) 1938 Lah 357: 180 Ind Cas 555 (DB).

(a) Decree.

——S. 100 — **Construction of decree is question of fact.**

The question of interpretation of decree is a pure question of fact, the decree not being a document of title. AIR (Vol 22) 1935 Lah 115: 36 PLR 481.

——S. 100 — Whether a previous decree can be rectified by subsequent suit is a substantial question of law. AIR (Vol 10) 1923 Cal 387: 71 Ind Cas 371 (DB).

——S. 100 — **Procedure — Technical error.**

If the Court misconceiving the action as based on a mortgage, decrees redemption instead of specific performance, the decree is wrong only technically and should not be interfered with in appeal as the parties are in exactly the same position as if specific performance would have been granted. AIR (Vol 4) 1917 Cal 284: 35 Ind Cas 631 (DB).

——S. 100 — **Procedure — Error — Decision without evidence.**

It is a substantial error or defect in the procedure of a lower Appellate Court if it gives a decree not based on evidence and the High Court can interfere in second appeal. AIR (Vol 1) 1914 Low Bur 198: 7 Bur LT 310: 26 Ind Cas 240.

——S. 100 — **Question of law — Decree fraudulent.**

A finding that a certain decree is not fraudulent is a conclusion of law based on facts found and thus can be reversed in second appeal. (1910) 5 Ind Cas 398 (Cal) (DB).

——S. 100 — Where a declaratory decree has been given by the Court of first instance, it is not open to the lower appellate court nor to the High Court in second appeal, to question the correctness of the decree on the ground that from the plaint itself, apart from the written statement, no hostility of the defendants to the plaintiff's claim was shown. (1905) 2 CLJ 534 (537) (DB).

——S. 100 (S. 584 old Code) — Second appeal — An order dismissing a suit as abated is a decree from which an appeal and a second appeal will lie. (1902) 12 MLJ 389: 26 M 224 (229) (DB).

(b) Double interpretation.

——S. 100 — **The expression "construction" as applied to a document includes two things: first the meaning of the words, and secondly their legal**

effect or the effect which is to be given to them. The meaning of the words is a question of fact in all cases whether dealing with a poem or a legal document. The effect of the words is a question of law. Interpretation placed upon the words in the deed is a clear question of fact which cannot be agitated in second appeal. Even if the document admitted of more than one construction, one of which has been adopted by the lower Appellate Court, the High Court will not be competent to challenge it. AIR (Vol 22) 1935 Lah 378: 158 Ind Cas 71.

——S. 100 — Where there are two possible interpretations of terms or expressions in a deed or document and the Courts below have adopted one of the interpretations, High Court is not justified in refusing to accept that interpretation in second appeal. AIR (Vol 17) 1930 Lah 139: 123 Ind Cas 533.

——S. 100 — Inferences of lower Court from documents cannot be questioned in second appeal though the High Court differs from inferences of the appellate Court. AIR (Vol 12) 1925 Oudh 611: 85 Ind Cas 967.

——S. 100 — Reading of words in deed in one of two possible ways is a point of fact and no second appeal lies. AIR (Vol 9) 1922 Lah 240: 65 Ind Cas 580 (DB).

(c) Finality.

——S. 100 — Error of record — Presumption of correctness of entry in record of rights wrongly raised — Finding based on — Finality — Interference. AIR (Vol 37) 1950 Pat 293.

——S. 100 — Finding that dar mokurari potta and kobala are valid and genuine and land was covered by both.

A finding that the dar mokurari potta and a kobala were valid and genuine documents and that the land in dispute was covered by both the documents cannot be questioned in second appeal. AIR (Vol 29) 1942 Cal 486: 46 CWN 770: 202 Ind Cas 545.

——S. 100 — Fact that document was tampered with, whether finding of fact.

The fact that the document was tampered with is a finding of fact of the Courts below and is binding in second appeal. AIR (Vol 27) 1940 Pat 245: 7 BR 20: 5 CLT 45: 22 PLT 666: 190 Ind Cas 377 (DB).

——S. 100 — Finding of fact based on documents which are instruments of title.

A finding based upon documents which are instruments of title and not merely historical material, even if one of fact, can be challenged in second appeal. AIR (Vol 23) 1936 Oudh 225: 1936 OWN 100: 1936 RD 35: 11 Luck 642: 161 Ind Cas 158.

——S. 100 — Findings based on instruments of title.

A finding based upon documents which are instruments of title and not merely historical materials, can be challenged in second appeal even if it is a finding of fact. (1936) 162 Ind Cas 334: 1936 OWN 375: 1936 RD 172: 12 Luck 155.

——S. 100 — Finding based upon interpretation of title deed.

A finding based upon the interpretation of a title deed can be challenged in second appeal. AIR (Vol 22) 1935 Oudh 304: 1935 OWN 365: 1935 RD 161: 154 Ind Cas 1017.

——S. 100 — Interpretation of document not being document of title is for Court of first appeal, and High Court cannot upset its decision in second appeal. AIR (Vol 17) 1930 Lah 691.

——S. 100 — The findings based upon construction of or inferences drawn from the documentary evidence, cannot be questioned in second appeal. AIR (Vol 15) 1928 Oudh 18: 104 Ind Cas 760.

——S. 100 — Findings based upon the construction of or inferences drawn from documentary evidence cannot be questioned in second appeal. AIR (V 14) 1927 Oudh 541: 4 OWN 165: 100 Ind Cas 631 (DB).

——S. 100 — Where documents which are mere pieces of evidence are considered by the lower appellate Court in determining questions of fact, findings based on construction of, or inferences drawn from, such documentary evidence cannot be questioned in second appeal. (1927) 99 Ind Cas 183: 3 OWN Sup 277 (DB).

——S. 100 — Mixed question of law and fact — Finality of.

Deed — Finding based not on construction of deed alone but on other facts also — Finding cannot be reversed in second appeal. AIR (Vol 12) 1925 Lah 344: 7 LLJ 74: 26 PLR 110: 86 Ind Cas 595.

——S. 100 — Construction of document — Solenamah.

The construction of a solenamah between the same parties in a prior litigation is binding on the parties in a subsequent suit on the basis of the same document. AIR (Vol 6) 1919 Cal 381: 46 Cal 870: 29 CLJ 465: 51 Ind Cas 922 (DB).

——S. 100 — Appreciation of evidence — Weight given to a document which is not one of title, whether a question of law — Halabadi Chittas.

The question that Lower Appellate Court gave undue preference to thak map involves a pure question of fact and as such cannot be raised in second appeal. Halabadi Chittas cannot be called documents of title and, therefore, what effect is to be given to them in evidence is not a question of law which can be raised in second appeal. AIR (Vol 4) 1917 Cal 407: 32 Ind Cas 862 (DB).

(d) Inference.

See also Note 57.

——S. 100 — Question of law — Finding that grant was not of whole village — Not one of fact — Inference drawn from entries in registers is a question of law. AIR (Vol 35) 1948 Mad 195: (1947) 2 MLJ 289.

——S. 100 — Question of law.

Question of relevancy of a document is a question of law and can be raised at any stage but the question of proof is a question of procedure and is capable of being waived.

Whether a presumption under S. 90, Evidence Act, can be raised from a copy of the document is a question of law and can, therefore, be urged at any stage of the litigation. AIR (Vol 33) 1946 Bom 193: 47 Bom LR 962.

——S. 100—Finding that certain assertion in a deed is not true is one of fact.

A finding that an assertion in a deed is not true and is an after-thought, being a finding of fact, must be accepted in second appeal in the absence of any suggestion that there was no evidence to support it. AIR (Vol 33) 1946 Mad 198 : 1945 MWN 725 : (1945) 2 MLJ 508 : 58 MLW 652 (DB).

——S. 100—Whether grant was personal depending on inferences from entries in registers — Question of law.

Where the question whether the grant was a personal one depends upon inferences to be drawn from entries in certain registers, the question is one of law. AIR (Vol 31) 1944 Mad 468 : 57 MLW 366: (1944) 2 MLJ 56: 1944 MWN 513: ILR (1945) Mad 194.

——S. 100 — Finding based on inference from entries in the Record of Rights, that the suit lands are chakran lands constituting a service tenure, is a finding of fact and cannot be assailed in second appeal unless there is any misdirection on a point of law vitiating this finding. AIR (Vol 28) 1941 Cal 506: 73 CLJ 159: 45 CWN 654: 197 Ind Cas 45.

——S. 100 — Wrong inference from wajib-ul-arz — Question can be gone into in second appeal.

Where the Courts below have drawn an inference as to existence of certain custom from the wajib-ul-araiz which cannot be upheld, the High Court can go into the question in second appeal. AIR (Vol 28) 1941 Oudh 468: 1941 OWN 623: 1941 RD 472: 16 Luck 626: 194 Ind Cas 394.

——S. 100 — Question whether documents relied on by party prove title.

The question whether, having regard to what is stated in the documents relied on by a party and whose construction is not open to any controversy, it is proper to infer that title to the land in question passed to him or not, is a question of fact which a Court of second appeal is not competent to disturb. AIR (Vol 27) 1940 Bom 255: 42 Bom LR 462: 189 Ind Cas 545.

——S. 100 — Documents not relied on as instruments of title, construed for purposes of decision, by lower Appellate Court.

A decision of fact by a first Appellate Court does not involve a question of law so as to be open to reconsideration upon second appeal under S. 100 merely because documents which were not relied on as instruments of title or the direct foundations of rights, have to be construed for the purpose of deciding the question. Similarly, the rule that the High Court has no jurisdiction under S. 100 to reverse the findings of fact of a lower Appellate Court unless the findings are vitiated by error of law, applies although the findings .are inferences of fact drawn, wholly or in part, from documents. AIR (Vol 27) 1940 Oudh 217: 1940 OWN 193: 1940 AWR 103: 15 Luck 418: 186 Ind Cas 766.

——S. 100 — Inference from document.

In a matter of legal inference from the documents, it is open to the High Court in second appeal to form its own opinion. AIR (Vol 26) 1939 All 672 : ILR 1939 All 713 : (1930) ALJ 678 : 1939 RD 485 : 1939 AWR 625 : 185 Ind Cas 783.

——100 — Record of Rights.

The question of inference to be drawn from Record of Rights is a question of fact and cannot be interfered with in second appeal. AIR (V 25) 1938 Pat 110: 3 BR 170 (1): 166 Ind Cas 454.

——S. 100 — Inference derived from documentary evidence — Nature of.

A finding based on inferences derived from documentary evidence is as good a finding of fact as that based on oral and documentary evidence and hence is binding in second appeal. AIR (Vol 24) 1937 All 197 (1): 1936 AWR 1287: 167 Ind Cas 851.

——S. 100 — Findings based on inference drawn from documents.

Under S. 100, the High Court has no jurisdiction to reverse the findings of fact arrived at by the lower Appellate Court, however erroneous, unless they are vitiated by some error of law. This rule is applicable to cases in which the findings of the lower Appellate Court are based on inferences drawn from the documents exhibited in evidence. AIR (Vol 24) 1937 Oudh 226: 1937 OWN 330: 167 Ind Cas 870.

——S. 100 — Error in inference.

Question of construction of document is one of law and may be considered in second appeal but where there is no error in the construction of document and it is argued that there is a mistake in drawing an inference from the document, that is not an error of law but an error of fact, and the High Court will not interfere with a finding of fact by the lower Appellate Court merely because it is erroneous. AIR (Vol 24) 1937 Sind 51: 30 SLR 371: 167 Ind Cas 929.

——S. 100 — Conclusion on evidence partly documentary.

The conclusions on evidence, partly documentary, are as much binding in second appeal, as conclusions on oral evidence. AIR (Vol 23) 1936 Cal 22: 61 CLT 369: 39 CWN 1270: 160 Ind Cas 691.

——S. 100 — Unless there has been misconstruction, a mistaken inference from documents is an error, not of law but of fact. AIR (Vol 20) 1933 PC 171: 57 CLJ 519: 65 MLJ 154: 38 MLW 37: 35 Bom LR 816: 29 NLR 210: 60 IA 231: 143 Ind Cas 437.

——S. 100 — Question of law — Question whether land is accretion — Inference from documents.

Whether a certain land is accretion or formation in situ is question of fact. But where the question depends on the construction of certain material documents and the inference to be drawn therefrom the High Court can go into the question in second appeal. AIR (Vol 17) 1930 Cal 764 (DB).

——S. 100 — Oral Evidence.

Where the lower Courts believed the oral evidence produced on behalf of the plaintiff in preference to that of the defendant on the question of possession even though the name of the plaintiff was not entered in the Khasra (revenue papers),

Held, that it could not be said that the Court acted wrongly in believing it in preference to the conclusion to be drawn from the absence of the plaintiff's name from the annual Khasras. AIR (Vol 11) 1924 Oudh 265: 10 OLJ 643: 80 Ind Cas 457.

——S. 100 — Construction of document.

A wrong construction of a document coupled with a wrong inference from certain facts constitute an error of law where there is no other evidence accepted by the Court and furnishes a ground for second appeal. AIR (Vol 7) 1920 All 82: 18 ALJ 195: 55 Ind Cas 366 (DB).

——S. 100 — Adverse possession — Inference from documents.

Where the question of adverse possession is one of inference from documents the concurrent findings of the Indian Courts may be upset by Privy Council as the question was not one of fact. 42 All 152: 46 IA 197: 18 ALJ 235: 11 LW 384: 38 MLJ 259: (1920) MWN 3: 22 Bom LR 451: 2 UP LR 55 : 24 CWN 394: 55 Ind Cas 486: AIR (Vol 6) 1919 PC 60 (PC).

——S. 100 — Appreciation of evidence — Not a question of law.

The weight to be attached to a statement in a rent receipt or any other document is a matter within the cognisance of the Court of first appeal, with which the High Court in second appeal is not entitled to interfere. AIR (Vol 5) 1918 Cal 685 : 47 Ind Cas 780 (DB).

(e) Intention.

——S. 100 — Intention is question of fact — Legal inference as to intention from document of title is, however, question of law.

Per Din Mohammad, J. — It is true that ordinarily the question of intention is a question of fact but when the question in the interpretation of a document of title is at the same time concerned, it is always a question of law to determine what legal inference can be deduced from the contents of the document taken as a whole. AIR (Vol 29) 1942 Lah 42: 43 PLR 689: 199 Ind Cas 677 (DB).

——S. 100 — Question of law or fact.

Whether the interpretation of a particular order is a question of fact, or a question of law, or a question of mixed fact and law, depends on the circumstances of each particular case. The general rule is quite clear. Where intention is to be inferred from the terms of a document, the question is one of law, or mixed question of fact and law; where the intention is to be inferred from the other facts and circumstances tending to show what was

the real intention of the Judge in passing that particular order, then the question may be either a question of pure fact, or again, may be a question of mixed fact and law. AIR (Vol 28) 1941 Lah 62: 193 Ind Cas 334.

——S. 100 — It is not open to a Court in second appeal to re-assess the considerations which led the lower Courts to a particular conclusion as regards the intention of parties to a contract. AIR (Vol 17) 1930 Mad 590.

——S. 100 — Construction of document — What is not.

Where the Courts holds that the document is so worded as to obscure its meaning and prevent the executants from grasping the fact that they were executing a deed of surrender, it is not an interpretation of a document and such finding does not involve a point of law. AIR (Vol 16) 1929 Nag 343: 119 Ind Cas 698.

——S. 100 — Where the words are perfectly plain and the question is to what property they refer to, that cannot be construed as a question of construction of a document and, therefore, cannot be argued in second appeal. (1926) 91 Ind Cas 423 (DB).

——S. 100 — Construction of document — Sale.

Where a sale deed is silent on the point the question whether a pro rata share in the shamilat was intended to be conveyed to the vendee is one of fact which cannot be gone into in second appeal. AIR (Vol 6) 1919 Lah 275: 36 PR 1919: 79 PLR 1919: 51 Ind Cas 380.

(f) Legal effect.

——S. 100 — Misdescription in insurance policy.

Whether a misdescription in insurance policy is material or is not, is partly a question of evidence, and also partly a question of law. AIR (Vol 22) 1935 PC 1 : 1935 OWN 34 : (1935) ALJ 51 : 1 BR 246 : 1935 AWR 80 : 39 CWN 270 : (1935) MWN 13 : 68 MLJ 99 : 41 MLW 160 : 13 Rang 63 : 37 Bom LR 141: 60 CLJ 551 : 37 PLR 217 : 153 Ind Cas 311.

——S. 100 — If a finding of a Court of first appeal is based upon the construction of instruments of title or of contracts, statutes or any other documents which may be direct foundation of rights, the Court's view of the legal effect of such documents is open to question in second appeal. If, however, the lower Appellate Court has simply to consider the history of the case by collecting together and putting in their chronological order, sale-deeds, mortgage-deeds and such other documents and all those are mere pieces of evidence involving no question of construction, then the inference which the Court draws from such documents is a fact which cannot be upset in second appeal. AIR (Vol 18) 1931 Nag 189 : 27 NLR 213 : 134 Ind Cas 673.

——S. 100 — Question whether the terms contained in a correspondence amount to binding contract between the writers is one of law. AIR (Vol 17) 1930 Cal 113 : 123 Ind Cas 250 : 50 CLJ 208 : 57 Cal 170 (DB).

——S. 100 — A question of fact founded upon the effect of a series of documents or of one document quite apart from any difficulties of construction treating the documents as being narratives of events recorded in them cannot be challenged in second appeal. If, however, the question is concerning the construction of the documents which are transfers, and which are tendered to prove legal rights, then the finding of fact can be challenged in second appeal. AIR (Vol 13) 1926 All 542 : 95 Ind Cas 582 : 48 All 588 : 24 ALJ 700 (DB).

——S. 100 — A finding of fact based on the view taken by the Court as to the legal effect of a document is open to question in second appeal. AIR (Vol 13) 1926 All 75 : 89 Ind Cas 617 : 23 ALJ 869 : 6 LRA Civ 399 (DB).

——S. 100 — Deed — Construction — Question was held to be one of law. AIR (Vol 12) 1925 Rang 255 : 88 Ind Cas 314 : 4 Bur LJ 27.

(g) Meaning of words.

——S. 100 — Interpretation of document and giving meaning to it are different things (difference pointed out.) AIR (Vol 27) 1940 Oudh 35 : 1939 OWN 1114 : 15 Luck 191 : 184 Ind Cas 521.

——S. 100 — When it is clear that the Appellate Judge has wrongly interpreted a deed in the same manner as has a trial Judge and that the other facts on which he relied are insufficient to sustain the legal inference, the High Court in second appeal is bound, however, unfortunate it may be for the party, to set aside the judgment and decree. AIR (Vol 27) 1940 Sind 74 : 190 Ind Cas 373.

——S. 100 — Question as to which of two alternative meanings applies — Word occurring in document of title.

Where the question is which of two alternative meanings of a certain word should, in the context, be held applicable, the question is one of interpretation of a document and if the document is one of title, it would be open to second appeal. AIR (Vol 26) 1939 Lah 264 : 41 PLR 326.

——S. 100 — Document.

When the words of a document have been misconstrued, it does not give rise to a question of law. AIR (Vol 23) 1936 Cal 49 : 39 CWN 581 : 61 CLJ 143 : 161 Ind Cas 187.

——S. 100 — Question whether language used in an entry contains promise to pay — Question of fact.

The question whether the langauge used in an entry in an account does or does not contain a promise to pay is purely a question of fact. AIR (Vol 22) 1935 Lah 877 : 37 PLR 126 : 159 Ind Cas 677.

——S. 100 — The meaning of words is always a question of fact. AIR (Vol 22) 1935 Lah 877 : 37 PLR 126 : 159 Ind Cas 677.

——S. 100 — Where the question to be decided is one of fact, it does not involve an issue of law merely because the documents which were not instruments of title or otherwise the direct foundations of rights, but were merely historical materials, have to be construed for the purpose of deciding that question; and a second appeal would not lie because some portion of the evidence might be contained in a document or documents and the first Appellate Court had made a mistake as to its meaning. AIR (Vol 21) 1934 Cal 461 : 61 Cal 45 : 151 Ind Cas 813.

——S. 100 — A second appeal would not lie because some portion of the evidence might be contained in a document or documents and the first Appellate Court had made a mistake as to its meaning. AIR (Vol 20) 1933 Oudh 102 : 9 OWN 1063 : 142 Ind Cas 303.

——S. 100 — Document, whether contains acknowledgment is question of interpretation.

The question as to whether a document does or does not contain an acknowledgment is always a question of interpretation and rules of evidence applicable to such a question must therefore, apply to such a document also. AIR (Vol 20) 1933 Oudh 80 : 9 OWN 1024 : 8 Luck 195 : 141 Ind Cas 298.

——S. 100 — The question as to the effect of the construction of the words in a document which is neither a document of title nor the foundation of the plaintiff's claim is one of fact and not of law. AIR (Vol 18) 1931 Lah 417 : 32 PLR 156 : 136 Ind Cas 727.

——S. 100 — What the Commissioners resolved to do at their meeting and what they meant in their resolution by the expression "assessment", is a question of fact. It cannot be said that the determination of the point depends on the construction of any document. The point depends on the record of the proceedings of the Commissioners. The meaning of the words is a question of fact in all cases. The effect of the words is a question of law. 94 Ind Cas 231 : 53 Cal 453 : 30 CWN 405 : 44 CLJ 275 : AIR (Vol 13) 1926 Cal 607 (DB).

——S. 100 — Construction of document includes two things, namely, meaning of words and its legal effect—The former is a question of fact and the latter one of law. 90 Ind Cas 1047 : 26 PLR 605 : AIR (Vol 13) 1926 Lah 21.

——S. 100 — Meaning of a term in common language is a question of fact, but the effect in a document of the use of the term is one of law and challengeable in second appeal. 93 Ind Cas 927 : 13 OLJ 565 : 3 OWN 213 : AIR (Vol 13) 1926 Oudh 260.

——S. 100 — If extrinsic evidence is necessary and therefore admissible to determine the meaning of the words used in a document the construction of the document is a question of fact, which cannot be re-agitated in second appeal. But if the question is one of construction of the document upon the document itself, then it is a question of law which can be considered in second appeal. 85 Ind Cas 693 : 29 CWN 353 : AIR (Vol 12) 1925 Cal 656 (DB).

——S. 100 — Meaning of words is question of fact and their legal effect is question of law. 78 Ind Cas 36 : AIR (Vol 12) 1925 Lah 150.

——S. 100 — The meaning of words is a question of fact in all cases; the effect of the words is a question of law. 75 Ind Cas 686 : AIR (Vol 10) 1923 All 337.

——S. 100 — A special appeal does not lie because some portion of the evidence may be in writng and the Judge makes a mistake as to the meaning of it. For instance a writing supposed to contain an admission may be put in as part of the evidence but a mistake in its meaning is not a misconstruction of a document upon which the special appeal will lie, if it is connected with other evidence affecting its construction. The misconstruction of a document which is the foundation of the suit, which is in the nature of a contract or a document of title is allowed to be a ground for a second appeal. 72 Ind Cas 55 : 37 CLJ 580 : AIR (Vol 10) 1923 Cal 358 (DB).

——S. 100 — Meaning of words is a question of fact and effect of words is one of law. A second appeal is not admissible merely because some portion of the evidence is in writing of which the meaning has been mistaken by the lower appellate Court. 80 Ind Cas 264 : AIR (Vol 10) 1923 Lah 626 (DB).

——S. 100 — Effect of admission — Misappreciation of.

The misconstruction of a document which is the foundation of a suit, is a question of law, but the misconstruction of a document which is alleged to contain an admission, that is to say, a misappreciation of the meaning and effect of an admission, is not a question of law, which can be raised in second appeal. The High Court cannot look at the evidence to decide if the evidence that remains after the improperly admitted evidence is rejected, is sufficient to uphold the finding of the court below. 68 Ind Cas 1003 : 35 CLJ 182 : AIR (Vol 9) 1922 Cal 185 (DB).

——S. 100 — Question of law — Inference from documents.

The interpretation of a document is a point of law and the legal inference to be drawn from admitted facts is also a question of mixed law and fact with which the High Court can interfere in second appeal. A question whether a vendor's lien was or was not lost is one which is open to consideration in second appeal. 23 MLJ 85 : 7 LW 210 : (1918) MWN 231 : 35 MLJ 304 : 44 Ind Cas 523 : AIR (Vol 5) 1918 Mad 82 (DB).

——S. 100 — The inference to be drawn from the wording of a document may be a question of fact or law each case depending upon the circumstances. 68 PR 1916 : 182 PWR 1916 : 77 PLR 1917 : 36 Ind Cas 199 : AIR (Vol 3) 1916 Lah 85.

——S. 100 — The construction of a deed means first ascertaining the meaning of the words, which is a question of fact and secondly their legal effect which is a question of law. Unless there is a question of legal effect of a deed, a second appeal does not lie. 21 CLJ 45 : 25 Ind Cas 286 : AIR (Vol 1) 1914 Cal 836 (DB).

(h) Misconstruction.

——S. 100 — Misinterpretation of wajib-ul-arz by lower Court.

Where the lower Courts have misinterpreted the wajib-ul-arz and misdirected themselves in the evaluation of the evidence, the High Court can interfere in second appeal. AIR (Vol 29) 1942 Oudh 414 : 1942 OWN 390 : 1942 AWR 109 (2) and 265 : 18 Luck 386 : 201 Ind Cas 303.

——Ss. 100, 101 — Existence of Record of Rights not appreciated and statutory presumption not given effect to by first Appellate Judge — Questions of fact as well as law are open to High Court.

The findings of fact of the first Appellate Judge, though not his conclusions as to their effect in law, would 'prima facie' be conclusive in view of Ss. 100 and 101 of the Civil P. C. But where the existence of the Record of Rights has not been appreciated by him, and he has given no effect whatever to the statutory presumption, the questions of fact as well as of law are open to the High Court and must be considered by the Board. AIR (Vol 27) 1940 PC 192 : 7 BR 110 : 45 CWN 57 : 52 MLW 966 : 43 Bom LR 1 : ILR (1940) Kar (PC) 380 : (1941) 1 MLJ 427 : ILR (1941) Bom 107 : 73 CLJ 612 : 190 Ind Cas 342 (PC).

——S. 100 — Document which is not one of title, misconstrued.

Obiter.— Even if the lower Appellate Court has misconstrued a document which is not a document of title, no second appeal can be based on this misconstruction. AIR (Vol 27) 1940 Lah 278 : 42 PLR 216 : 189 Ind Cas 676.

——S. 100 — Even in a case of splitting up of a holding where the case is put forward on a dakhila granted by the landlord, the question of construction of the dakhila would be a question of fact on the principle that the misconstruction of a piece of documentary evidence does not raise a question of law. AIR (Vol 25) 1938 Cal 690 : 67 CLJ 136 : 177 Ind Cas 996.

——S. 100 — Misconstruction of wajib-ul-arz which is the basis of title can be interfered with in second appeal. (1938) 40 PLR 626.

——S. 100 — Misconstruction of documents which are not documents of title would not be a good ground for second appeal. (1937) PLR 376.

——S. 100 — Pukhtadari Khewat.

The High Court has no jurisdiction to reverse the findings of fact arrived at by the lower Appellate Court, however erroneous, unless they are vitiated by some error of law. An extract from 'pukhtadari khewat' is not an instrument of title.

and even if the construction put upon it by the lower Court is not correct, no second appeal lies. AIR (Vol 23) 1936 Oudh 201: 1935 OWN 1316 : 1935 RD 563.

——S. 100 — Where it appeared upon the 'kabuliyat' that certain tenancies constituted entire holdings but the decisions of the lower Courts proceeded on the basis that they were not so, although the point was not raised in both the lower Courts, it was allowed to be raised in second appeal. AIR (Vol 18) 1931 Cal 565 : 35 CWN 212 : 133 Ind Cas 561.

——S. 100 — Interpretation of settlement record is a question of fact.

The interpretation of an obscure settlement record is a question of fact. "The mere fact that a writing has to be read and understood in order to determine the answer to the question, does not of itself make the question one of law". The High Court has no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may be. (1930) 124 Ind Cas 26 (All) (DB).

——S. 100 — Finding based on misconstruction of document is liable to be set aside. AIR (Vol 17) 1930 Lah 139 : 123 Ind Cas 533.

——S. 100 — Findings of fact not properly arrived at through errors of record and misconstruction of documents are not binding and so case should be remanded. AIR (Vol 16) 1929 Pat 433 (DB).

——S. 100 — In order to maintain a contention of fact in second appeal and even more so in an appeal under the Letters Patent, it would be incumbent on the person raising it to plead and to show from the record, that documentary evidence establishing his contention of fact had either been disregarded by the Court of first appeal or misinterpreted. 65 Ind Cas 371 : 44 All 169 : 19 ALJ 964 : AIR (Vol 9) 1922 All 312 (DB).

——S. 100 — Misconstruction of document.

Misconstruction of certain documents which are neither documents of title nor embody a contract, nor are the foundation of the suit is no ground of law. 5 Pat LJ 251 : 1 Pat LT 126 : 2 UPLR (Pat) 31: 55 Ind Cas 179: AIR (Vol 7) 1920 Pat 646 (DB).

——S. 100 — Misconstruction of document.

A question of the construction of a document if it is a document of title and not merely a piece of evidence in the case is a question of law, and High Court will interfere in second appeal where the lower Appellate Court has misconstrued the document or has made no attempt to construe it. 52 Ind Cas 119 : AIR (Vol 6) 1919 Pat 334.

——S. 100 — Misconstruction of document — Wajib-ul-arz — Finding of fact.

A finding of fact based in a totally unwarranted reading of a passage in the wajib-ul-arz of a village is liable to be set aside in second appeal. 54 PWR 1917 : 41 Ind Cas 755 : AIR (Vol 4) 1917 Lah 368 (DB).

——S. 100 — Misconstruction of document — Whether a ground.

The misconstruction of a document is a ground for second appeal. 1 LW 416: 24 Ind Cas 87: AIR (Vol 1) 1914 Mad 685 (DB).

——S. 100 — Construction of document — Power to reverse finding of lower Appellate Court — C. P. Code (1882), Ss. 584 and 585.

The right construction of documents is a question of law which Judges in second appeal are not precluded from considering by any finding of the Lower Appellate Court based on such documents. Where the lower Appellate Court found in favour of the plaintiff's proprietary title relying on inferences drawn from an incorrect construction of the wajib-ul-arz: Held, that the High Court in second appeal was not bound by the finding. (1912) 34 All 479 : 39 IA 247 : 16 CWN 1033 : 23 MLJ 330 : 12 MLT 413 : (1912) MWN 1065 : 10 ALJ 335 : 14 Bom LR 1090 : 17 CLJ 1 : 16 Ind Cas 67 (PC).

[Affirming (1907) 29 All 203: 4 ALJ 38.]

——S. 100 — Misconstruction of document — Question of law.

The High Court will not interfere in second appeal simply because a document which is merely a piece of evidence and not a document of title is misconstrued by a Lower Court. (1912) 13 Ind Cas 425 (Cal) (DB).

——S. 100 — Misconstruction of document.

Misconstruction of a piece of documentary evidence is not a mistake of law to give room for a second appeal. (1912) 13 Ind Cas 206 (Cal).

——S. 100 — Misconstruction of document — When a question of law.

Though the misconstruction of a document which is the foundation of a suit or which is in the nature of a contract or a document of title, is a ground for second appeal, yet a second appeal does not lie only because some portion of the evidence is in writing and the Court makes mistake in its construction. (1911) 15 CWN 752 : 13 CLJ 418 : 10 Ind Cas 325 (DB).

——S. 100 (S. 584, old Code) — Misconstruction of document — No ground.

The misconstruction of a document is not necessarily a ground for second appeal unless the document is one which is the foundation of the suit, being in the nature of a contract or document of title. The mere fact that some portions of the evidence is in writing and the judge makes a mistake as to the meaning of it, does not afford a ground for second appeal. (1909) 9 CLJ 623 (631) (DB).

——S. 100 — Misconstruction of document — Evidence in writing.

No second appeal lies on the ground that some portions of the evidence are in writing and the Judge makes a mistake as to their meaning. (1909) 10 CLJ 593 : 4 Ind Cas 732 (DB).

——S. 100 (S. 584 old Code) — Misconstruction of document.

Where a document of title, which was the foundation of the whole of the plaintiff's claim in the suit, was misconstrued by the lower appellate Court: Held, that it was open to the High Court in second appeal to interfere with the findings of the lower appellate Court arrived at on misinterpretation of the passages of the document. (1905) 9 CWN 154 (159, 160) (DB).

——S. 100 (S. 584 old Code) — Question of law — Misconstruction of document: — Per Harington J. : — Semble:—

Where the issue of a case depends solely upon the construction of a document, it may be that the construction is a question of law. But if the document is only a piece of evidence to be taken into consideration to arrive at the conclusion of fact, the construction of the document is outside the consideration of Judges in special appeal. Per Mookerjee J.: The misconstruction of a document which is the foundation of the suit, which is in the nature of a contract or a document of title, is allowed to be a ground of special appeal, but a special appeal does not lie because some portion of the evidence may be in writing and the Judge makes a mistake

as to the meaning of it. (1905) 32 C 719 (722, 724) (DB).

(i) Nature of Transaction.

——S. 100 — Document, whether mortgage or sale.

The question of construction of a document, as to whether it is a mortgage or a sale, is not always one of law. AIR (Vol 19) 1932 Bom 230: 34 Bom LR 372: 138 Ind Cas 204.

——S. 100 — Question whether sale-deed is meant to be joint transaction making vendees jointly liable or is really several transactions making each vendee responsible for his share is a question of fact depending upon intention of parties — Contract Act, S. 43. In each case the point has to be determined by a reference to the sale-deed and any evidence of surrounding circumstances as to the intention of the parties. AIR (Vol 17) 1930 Lah 806: 123 Ind Cas 283: 31 PLR 201 (DB).

——S. 100 — A finding that a deed which is ostensibly one of gift is in reality a sale, is a finding of fact and as such cannot be challenged in second appeal. (1929) 120 Ind Cas 557 (DB) (All).

——S. 100 — The question as to whether, having regard to the terms of a promissory-note, any personal liability has been undertaken by the executant is a pure question of law to be decided with reference to the terms of promissory-note. AIR (Vol 15) 1928 Cal 123: 106 Ind Cas 848: 46 CLJ 566: 32 CWN 125 (DB).

——S. 100 — Where the question whether the transaction was a mortgage or sale does not depend merely upon the construction of the terms of the document but also upon the surrounding circumstances, the question is one of fact and not of law and so no second appeal is competent. 45 PR 1895 Not Foll. **AIR (Vol 15) 1928 Lah 667: 110 Ind Cas 428.**

——S. 100 — The question whether any particular stipulation is only by way of compensation or by way of penalty depends upon the construction of the particular document or contract and on the circumstances of each case. AIR (Vol 12) 1925 Mad 177: 85 Ind Cas 261: 21 MLW 54: 47 MLJ 833.

——S. 100 — Whether an entry in the wajib-ul-arz is a record of an alleged custom or of a contract being a question of the construction of a document is a question of law which must be entertained in second appeal. AIR (Vol 12) 1925 Oudh 64: 76 Ind Cas 1021.

——S. 100 — Construction of document — Sale or exchange.

Whether a transaction is a sale or exchange is a question of fact to be decided according to the terms of the document and surrounding circumstances and hence no second appeal lies. AIR (Vol 6) 1919 Lah 246: 50 Ind Cas 288.

——S. 100 — Construction of document — Right of re-purchase — Assignability — Question of law — Second appeal.

The assignability or otherwise of a right of repurchase given in a sale deed depends upon the construction of the sale deed which is a question of law and therefore open to second appeal. AIR (Vol 5) 1918 Bom 158: 42 Bom 344: 20 Bom LR 654: 46 Ind Cas 734 (DB).

——S. 100 — Construction of kabuliyat — C. P. Code (1882), S. 584.

The question of the construction of a kabuliyat is a question of law, on which the High Court can entertain a second appeal. AIR (Vol 3) 1916 PC 126: 43 Cal 1104: 43 IA 172: 20 MLT 235: 20 CWN 1245: (1916) 2 MWN 175: 4 LW 251: 14 ALJ 1009: 18 Bom LR 838: 24 CLJ 296: 31 MLJ 745: 37 Ind Cas 223.

——S. 100 — Construction of document — Exchange or sale.

Whether exchange is in reality a sale is a question of law when the contention is that vendee's payment of prior mortgagees amounts to payment to vendor. 100 PWR 1913: 199 PLR 1913: 19 Ind Cas 301.

(j) Question of fact.

——S. 100 — Whether document contained admission is question of fact.

The construction of the mortgage deed for the purpose of ascertaining whether it contains an admission that no portion of the rent was payable in kind, is a question of fact and cannot be interfered with in second appeal. AIR (Vol 30) 1943 Cal 565: 76 CLJ 251: 209 Ind Cas 292.

——S. 100 — Record of Rights — Features in case from which different conclusion might have been drawn.

The question whether an entry in the Record of Rights is correct, is purely one of fact and the mere circumstance that there are features in the case from which a different conclusion might have been drawn as to the status of the defendant does not entitle the High Court to interfere with the finding of fact arrived at by the Court below. AIR (Vol 26) 1939 Pat 229: 5 BR 248: 179 Ind Cas 593.

——S. 100 — Historical materials.

Where the question to be decided is one of fact, it does not involve an issue of law merely because documents which were not instruments of title or otherwise the direct foundations of rights, but were really historical materials, have to be construed for the purpose of deciding the question. AIR (Vol 24) 1937 Lah 656: 39 PLR 482: 168 Ind Cas 638.

——S. 100 — Instrument of title not involved — Finding, if can be questioned in second appeal — Khatauni and khasras, if instruments of title.

Unless instruments of title are involved, findings of fact arrived at by a Court of first appeal cannot be questioned in second appeal, although documentary evidence has to be considered. Khatauni and khasras cannot be regarded as instruments of title, but are mere items of evidence adduced by parties. Consequently, a finding on this point, namely, that the plot in dispute was jointly owned by the two parties, is a finding of fact which cannot be questioned in second appeal. AIR (Vol 24) 1937 Oudh 370: 1937 OWN 544: 1937 RD 258: 168 Ind Cas 302.

[Reverses (1936) 1936 OWN 375 : 162 Ind Cas 334.]

——S. 100 — Question of genuineness of document — Question of fact — Requiring standard of proof required by law — Error of law.

The question as to genuineness of a document is purely one of fact and cannot be agitated in second appeal. But when the lower Appellate Court requires too high a standard of proof — a standard of proof higher than that laid down by the Evi. Act — it commits an error of law or procedure justifying interference in second appeal. 1937 MWN 188.

——S. 100 — Construction of document — Question of fact — If property is dedicated to public or charitable uses is a question of fact.

The question whether property has been dedicated to public, religious or charitable uses among Hindus is one of fact, pure and simple, and a decision of fact by the first appellate Court does not involve a question of law so as to be open to reconsideration upon second appeal, merely because documents which were not instruments of title or otherwise direct foundation of rights have to be construed for the purpose of deciding the question. AIR (Vol 17) 1930 Lah 1056: 12 LLJ 199.

——S. 100 — The conclusions of Courts that the stipulation as to further security was a condition

precedent to the liability of a particular person are conclusions of fact and cannot be called matters of law as being a legal construction put upon agreed words. AIR (Vol 16) 1929 PC 63: 115 Ind Cas 722: 31 Bom LR 700: 33 CWN 675: 29 MLW 445.

——S. 100 — The question whether a certain sum was paid before a certain date, or then remained unpaid, is in itself a mere question of fact. The question what it was paid for, if it was paid at all, is prima facie a question of fact also. This is equally so whether an oral statement or a written record was made about it or whether an inference has to be drawn from the circumstances of the payment. It is only when the legal obligation as to the date of payment is brought into question that the question becomes one of law at all.

Again, the mere fact that a writing has to be read and understood in order to determine the answer to the question does not of itself make the question one of law. Entries in books of account are in themselves only narratives of monetary transactions, expressed by arranging figures in a particular way for the purpose of showing the result of a series of payments and receipts or other similar transactions. Therefore, the question as to the proper construction to be put upon the entries in a jama wasil baki, though the meaning of some of the entries is found to be a matter of some difficulty, is not a question of law.

The facts stated in the jama wasil bakis are materials from which, when their purport is gathered, the inference of fact is finally to be drawn, namely, whether or not certain & sufficient payments had been made and made in time. Errors in those accounts, and obscurity in the mode of keeping them and of posting the amounts mentioned, are no more than similar errors and obscurities would be in oral testimony, and present the same difficulties in drawing a conclusion, but that conclusion, when once it is arrived at, is one of fact and no question arises of legal problems turning on the construction of legal instruments. AIR (Vol 15) 1928 PC 243: 111 Ind Cas 288: 55 IA 380: 48 CLJ 557: 28 MLW 847: 56 MLJ 1.

——S. 100 — Question of finding of fact — Bona fides.

The finding that a document was genuine, is one of fact. (1928) 108 Ind Cas 412 (Mad) (DB).

——S. 100 — Though it is quite true that the mere interpretation of a document standing by itself is rarely, if ever, a question of fact, it is equally true that where a document leaves part of the subject-matter ambiguous, evidence may be given on both sides to remove the ambiguity and then the interpretation thereof becomes a question of fact. AIR (Vol 14) 1927 All 689: 103 Ind Cas 255 (DB).

——S. 100 — The question of the construction of documentary evidence, apart from the construction of a document of title which is the foundation of a claim, is one of fact and not of law and cannot be agitated in second appeal. AIR (Vol 13) 1926 Lah 21: 90 Ind Cas 1047: 26 PLR 605.

——S. 100 — Recitals in deeds.

The question of weight and sufficiency to be attached to recitals in a deed as pieces of evidence is one of fact. AIR (Vol 12) 1925 Oudh 367: 86 Ind Cas 743: 12 OLJ 134.

——S. 100 — Landlord and tenant — Record-of-rights describing dahiyak as abwab — Court looking into collection papers and holding entry to be wrong — Finding is one of fact.

An entry in the record-of-rights classed the landlord's claim on account of dahiyak as an abwab. The lower appellate Court looked at the zamindari collection papers for many years and came to the conclusion that the presumption attaching to the record-of-rights had been rebutted and that the charge on account of dahiyak was not an illegal cess within the meaning of the Bengal Tenancy Act.

Held, that the finding of the lower appellate Court was one of fact based on evidence and could not be challenged in second appeal. AIR (Vol 12) 1925 Pat 795: 88 Ind Cas 395: 6 PLT 801: 3 Pat LR 109 (DB).

——S. 100 — Maps.

The comparative weight to be attached to a "Thak" map and a Revenue Survey map is only a question of fact on which the decision of the lower appellate Court should not be disturbed. AIR (Vol 11) 1924 Cal 977: 79 Ind Cas 1038 (DB).

——S. 100 — Where admittedly the deed is on its face a lease and the question in dispute is merely whether the real contract between the parties was something different from the contract entered in the deed:

Held, that the finding on this point is clearly a finding of fact. AIR (Vol 11) 1924 Lah 260: 80 Ind Cas 494: 5 Lah LJ 541.

——S. 100 — Documentary evidence.

Weight to be attached to documentary evidence is a question of fact. The question whether a given document refers to the land in dispute is a question of fact. AIR (Vol 10) 1923 All 442: 71 Ind Cas 762.

——S. 100 — Construction of document — Question of law or fact — Second appeal

A question to be decided by lower Appellate Court on the construction of a deed by itself is a question of law in second appeal but one to be decided on the deed together with other circumstances is a question of fact. AIR (Vol 4) 1917 Lah 156: 120 PLR 1916: 115 PWR 1916: 37 Ind Cas 297.

——S. 100 — Adverse Possession — Entry by one co-heir

Whether an entry by one co-heir is on behalf of himself or on behalf of all co-heirs is a matter of fact. 79 PWR 1910: 6 Ind Cas 1009.

(k) Question of Law.

——S. 100 — Question of law — Construction of documents and inference drawn from contents thereof — Interference in second appeal.

Where the lower appellate Court has come to a conclusion on a construction and perusal of the document and the proper inference to be drawn from the contents thereof, it is a question of law, and the High Court, in second appeal, can consider whether the conclusion arrived at by the lower appellate Court is correct. AIR (V 33) 1946 Bom 454: 226 Ind Cas 199: 1946 Bom (Rul) 286: 48 Bom LR 185.

——S. 100 — Draft cowle — Evidence of nature of grant.

Question as to whether the draft cowle upon which both the lower Courts largely based their judgments constituted any evidence of the conditions on which the original grant was made is a matter of law. AIR (Vol 32) 1945 PC 165: (1945) 2 MLJ 352: 1945 MWN 637: 58 MLW 500: 72 IA 211.

——S. 100 — The construction of a document is a question of law. AIR (Vol 31) 1944 Pat 35: 9 CLT 27: 10 BR 601: 213 Ind Cas 394.

——S. 100 — Question whether surrender deed and subsequent lease amounted to sale is question of law.

The question whether a surrender deed relating to an occupancy holding in favour of a landlord and a lease by the landlord in favour of third person read together amount to a sale

in contravention of the Tenancy Act is purely a question of law. AIR (Vol 29) 1942 Nag 103: 1942 NLJ 316: ILR (1942) Nag 349: 202 Ind Cas Ind Cas 9.

——S. 100 — **Lease.**

Interpretation of lease is certainly a question of law. AIR (Vol 28) 1941 Cal 446: 74 CLJ 535: 195 Ind Cas 864.

——S. 100 — **Writing to be read and understood to determine answer to question — That does not make it question of law.**

The mere fact that a writing has to be read and understood in order to determine the answer to a question does not of itself make the question a question of law. AIR (Vol 26) 1939 All 510 (513): 1939 AWR 261.

——S. 100 — **Question of law — Decision as to how much land was subject matter of settlement of touzi, depending on construction of rubkari is question of law.**

A decision as to how much area was the subject-matter of a settlement of a touzi at the time of its settlement, which is arrived at on the construction of a rubkari is a question of law so far as the question of consideration of rubkari is concerned. AIR (Vol 26) 1939 Pat 364: 5 BR 864: 20 PLT 677: 182 Ind Cas 982.

——S. 100 — **Construction of plaint.**

The construction of a plaint is a question of law. AIR (Vol 24) 1937 Pat 572: 18 PLT 640: 16 Pat 527: 4 BR 73: 171 Ind Cas 881.

——S. 100 — Right construction of a document is a question of law which could be considered in second appeal. AIR (Vol 21) 1934 All 103: 17 RD 926: 149 Ind Cas 517.

——S. 100 — Interpretation of a document is undoubtedly a question of law. AIR (Vol 16) 1929 Lah 833: 120 Ind Cas 420 (DB).

——S. 100 — Whether a certain document is a will and not a gift or a family arrangement, depends upon the right construction of a document and involves a question of law. AIR (Vol 15) 1928 Nag 208: 113 Ind Cas 373.

——S. 100 — The question of a right construction of document and of legal inference to be drawn from a document are questions of law and can be considered in second appeal. AIR (Vol 15) 1928 Nag 289: 111 Ind Cas 402.

——S. 100 — If the construction of a document is necessary for deciding a material question, it is a point of law on which a second appeal can lie, so the construction of a document as an instrument of title can be the subject of a second appeal. AIR (Vol 13) 1926 Bom 493: 95 Ind Cas 81: 28 Bom LR 467 (DB).

——S. 100 — Construction of report of Commissioner under O. 26, R. 10, is not a question of law. AIR (Vol 13) 1926 Oudh 151: 90 Ind Cas 911.

——S. 100 — Practice — Fact and law — Interpretation of document is a question of law. AIR (Vol 11) 1924 Nag 422: 79 Ind Cas 621.

——S. 100 — In second appeal generally High Court should not consider whether or not the lower Courts have taken a right view of evidence in coming to findings of fact, but the construction of documents upon which the Courts below mainly base their view that a custom was shown, can certainly be considered by High Court in order to see whether their meaning has been rightly interpreted. AIR (Vol 11) 1924 Pat 147: 73 Ind Cas 629: 1 Pat LR Civ 289 (DB).

——S. 100 — Whether a condition in a deed is penal within S. 74, Contract Act, is question of law. AIR (Vol 8) 1921 Lah 212: 64 Ind Cas 350: 14 PLR 1922.

——S. 100 — The construction of a deposition is what the Court thinks is proved by it and it is wrong to speak of it as a construction so as to make it is a question of law. (1921) 63 Ind Cas 575 (Lah) (DB).

——S. 100 — Construction of documents is a matter of law which a Court in second appeal can properly go into. AIR (Vol 17) 1930 Bom 317: 32 Bom LR 610 (DB).

——S. 100 — The question of construction of documents is a question of law. AIR (Vol 2) 1915 Mad 519: (1914) MWN 595: 25 Ind Cas 123 (DB).

——S. 100 — A question regarding the construction of the document is a question of law justifying a second appeal. AIR (Vol 5) 1918 Lah 362: 161 PWR 1918: 47 Ind Cas 351.

(1) Sufficiency of Evidence.

——S. 100 — **Relaying map — Findings based on surmise and not legal evidence.**

In a case of a dispute regarding land, a Civil Court Commissioner was appointed for the purpose of relaying the settlement map and other maps. The Court of first instance accepted this relaying to be correct. But the lower Appellate Court did not accept it. But the reasons given by the lower Appellate Court in not accepting the Commissioner's relaying of the settlement map were based on pure surmises and not on legal evidence and substituted his own evidence judicially in place of the evidence in record:

Held, that the Appellate Court's findings on the correctness of the settlement map were not good and its judgment and decree were liable to be set aside and case remanded.

Held, also that the evidence of possession had been made to depend upon the correctness of the relaying of the settlement map by the Civil Court Commissioner. Inasmuch as his findings on the correctness of the plotting of the settlement map were not good findings, the finding on the question of limitation arrived at by him lost much of its force. (1936) 164 Ind Cas 80: 39 CWN 1233.

——S. 100 — **Contention that documents were misinterpreted.**

Where the case mainly depended on the documentary evidence and this has been discussed in detail by the Judge of the lower Appellate Court, and it is contended that the documents have been misinterpreted or rejected on insufficient ground, there is no ground for second appeal in the absence of an error of law. AIR (Vol 21) 1934 Lah 291: 36 PLR 261: 151 Ind Cas 311 (1).

——S. 100 — **Interference with a decision based on something which the Record-of-Rights does not contain is justifiable even if the Record-of-Rights is merely a document of evidence.**

If the Record-of-Rights is a document of title obviously it is open to the Court in appeal to construe that document. But it is open to the High Court in second appeal to interfere with a decision based upon the Record-of-Rights if the decision is founded on something which the Record-of-Rights does not contain even if the Record-of-Rights is not a document of title but merely a document of evidence. AIR (Vol 12) 1925 Pat 725: 91 Ind Cas 735 (DB).

——S. 100 — A finding of fact can be challenged in second appeal, where the finding is vitiated by the fact that a document relied upon by the lower Court in support of its conclusion had not been proved according to the Evidence Act. AIR (Vol 11) 1924 Lah 470. 80 Ind Cas 705: 6 LLJ 204 (DB).

——S. 100 — Construction of documents is not a question of fact — Facts insufficient for finding — High Court can interfere. AIR (Vol 9) 1922 Nag 52: 69 Ind Cas 800: 18 NLR 163: 5 NLJ 25.

——**S. 100 — Documents held irrelevant, but examined.**

Where the opinion of the lower appellate Court as regards the relevancy of documentary evidence is erroneous, but it is nevertheless apparent that the evidence was examined and discussed and pronounced to be unreliable and insufficient the High Court will not discuss the value of the evidence in second appeal. AIR (Vol 8) 1921 Oudh 116: 61 Ind Cas 781: 8 OLJ 202.

——**S. 100 — Finding on insufficient grounds.**

A finding of fact that a deed is admissible, arrived at by the Appellate Court without sufficient grounds being shown is subject to second appeal if it has prejudiced the trial of the appeal. AIR (Vol 7) 1920 All 294: 60 Ind Cas 96 (DB).

18. Costs.

——S. 100 — Judgment of lower Appellate Court correct but not happily worded — Parties to bear their own costs in second appeal. (1936) 38 PLR 577.

——**S. 100 — Discretion as to costs.**

Where the Courts below have exercised their discretion and no legal point or matter of principle is involved, the High Court will not interfere in second appeal. AIR (Vol 21) 1934 Lah 739: 35 PLR 656: 155 Ind Cas 558.

——S. 100 — In second appeal, the High Court is very reluctant to interfere with an order of costs unless it is shown that any grave injustice has been done to the party against whom the order has been made. AIR (Vol 20) 1933 Oudh 455: 10 OWN 981: 147 Ind Cas 132.

——S. 100 — If the lower appellate Court has no right to interfere with the order of the trial Court in the matter of awarding costs the decision of the lower appellate Court is contrary to law and is a proper subject for second appeal. But if the order of the trial Court is of such a nature as to be appealable to the lower appellate Court and the lower appellate Court's order is based upon a judicial discretion properly exercised, there can be no second appeal. The question as to whether a second appeal lies or does not lie is largely academic, for it is always necessary to examine the merits before the question is decided. AIR (Vol 15) 1928 Oudh 224: 107 Ind Cas 881: 5 OWN 35 (DB).

——S. 100 — A question of costs cannot be allowed to be litigated in second appeal, where the two Courts below have taken the same view and when no substantial point on the merits arises in the case. AIR (Vol 13) 1926 All 419: 93 Ind Cas 1008.

——S. 100 — Interference with the discretion of the Trial Court by the lower Appellate Court in the matter of costs, is a ground for interference in second appeal under S. 100. (1922) 64 Ind Cas 962: 3 UPLR (All) 55.

——S. 100 — Question of principle involved — Second appeal lies. AIR (Vol 8) 1921 Cal 604: 68 Ind Cas 600: 35 CLJ 156 (DB).

——**S. 100 — Costs — Second appeal.**

A second appeal on a question of costs is maintainable. (1920) 2 Lah LJ 310.

19. Court-fees.

——S. 100 — Where an objection is raised in appeal that the appeal ought to have been valued at a particular figure, but the amount of court-fee is the same even if it is valued at such particular figure, the matter of court-fees is not one arising between the appellant and the Crown and the objection to valuation cannot be maintained. AIR (Vol 26) 1939 Pat 13: 5 BR 286: 20 PLT 367: 179 Ind Cas 790

——**S. 100 — Extension of time for payment of court-fees.**

Lower Court wrongly exercising discretion in matters of granting time to pay the court fee — Party not approaching superior Court — He cannot challenge the lower Court's discretion in appeal. AIR (Vol 24) 1937 Pat 550: 18 PLT 665: 16 Pat 600: 4 BR 105: 172 Ind Cas 138 (SB).

——S. 100 — Plaintiff claimed possession of a house from a tenant holding over and paid court-fee under S. 7 (xi) (cc). The defendants raised the question of title and in consequence of their plea, the question of title had to be gone into. The defendants appealed but did not pay court-fee on the market value of the house. In second appeal defendants raised an objection that as court-fee was paid under S. 7 (xi) (cc) plaintiff should not have been given a decree on the basis of title.

Held, that as the objection had only been raised for the first time in second appeal and as appellants (defendants) in their appeal in the lower appellate Court only paid court-fees at the lower rate themselves, the question should not be reopened, no defect of jurisdiction being involved. AIR (Vol 14) 1927 Nag 321: 103 Ind Cas 337.

——S. 100 — An order in effect dismissing an appeal for deficiency in court-fee should be treated as on the same footing with rejection of a plaint for the purpose of determining whether it amounts to a decree or not and an appeal from such order is competent; and where the dismissal of the appeal raises a question of law, for example, as to the interpretation of the Court Fees Act, a second appeal will lie. AIR (Vol 14) 1927 Nag 100: 98 Ind Cas 663.

——**S. 100 — Costs — Court-fee — Erroneous decision.**

A second appeal lies from an order of Appellate Court rejecting a memo. of appeal for non-payment of deficit Court-fees if there is an error in calculating the amount of Court-fees. AIR (Vol 6) 1919 Pat 527: 51 Ind Cas 114 (DB).

20. Custom.

(a) Mixed question of law and fact.

(b) Question of law.

(c) Sufficiency of Evidence.

——**S. 100 — Custom — Concurrent finding as to existence of — Interference in second appeal.**

Questions of the existence of ancient custom are generally questions of mixed law and fact, the Judge first finding what were the things actually done in alleged pursuance of custom, and then determining whether, those facts so found satisfy the requirements of law. This latter is a question of law — not fact. There can be an interference with concurrent findings of two Courts on such a matter to find out if the evidence is sufficient to prove the custom alleged. To establish custom the finding must be that an ancient custom such as modifies the law existed in the locality. Moreover, where there is no pleading as to alleged custom evidence as to it should not be let in at all. AIR (Vol 34) 1947 Mad 71: 59 LW 469: 1946 MWN 591: 231 Ind Cas 365: (1946) 2 MLJ 173 (DB).

——**S. 100 — Whether prevailing practice amounts to custom is question of law — Lower Appellate Court finding that instances proved do not constitute custom — High Court can examine whether finding is right.**

The question whether a prevailing practice has the essential attributes of a legally binding custom is question of law. Where the lower Appellate Court finds that certain instances have been prov-

ed in which the alleged custom has been followed or recognised, but such instances are not sufficiently numerous or ancient or uniform to constitute a custom modifying the ordinary law, then, in such a case, a question of law arises in second appeal and the High Court is entitled to weigh the whole evidence and come to its own conclusion whether the lower Appeliate Court had rightly decided that the alleged custom had not been proved. AIR (Vol 33) 1946 All 410 (DB).

——S. 100 — Time needed for practice to become custom — Question of law.

A custom is mainly a question of fact but the time needed for a practice to be regarded as custom may be a question of law. AIR (Vol 32) 1945 Lah 17: ILR (1495) Lah 343: 47 PLR 74: 221 Ind Cas 187 (FB).

——S. 100 — Wajib-ul-arz not verified by tenants — Whether custom is unenforceable against tenants can be considered in second appeal.

A single Judge has jurisdiction to interfere in second appeal and to consider whether the non-verification of the wajib-ul-arz by the tenants has the effect of rendering the custom recorded therein as unenforceable against the tenants. AIR (Vol 31) 1944 Oudh 201: 1944 OWN 79: 20 Luck 26: 1944 AWR (CC) 79: 215 Ind Cas 10.

——S. 100 — Existence of.

Where the existence of a custom may be regarded as a question of the proper interpretation of the specific facts proved, it is a question of law which is open in second appeal. AIR (Vol 30) 1943 PC 111: 1943 NLJ 438: (1943) ALJ 360: (1943) 2 MLJ 186: 10 BR 84: 47 CWN 923: ILR (1943) Nag 705: 46 BomLR 312: ILR (1943) Kar (PC) 152: 1943 AWR 69: 208 Ind Cas 560.

——S. 100 — Question as to existence of custom — Evidence of wajib-ul-arz wrongly rejected.

Where the lower Appellate Court, in arriving at a finding on the question of the existence of custom has attached no value to a wajib-ul-arz in which the custom was recorded, upon the erroneous view that it is inadmissable in evidence, its finding can be interfered with in second appeal. AIR (Vol 30) 1943 Oudh 29: 1944 OWN 574: 1942 AWR (CC) 328 (2): 202 Ind Cas 743.

——S. 100 — Wajib-ul-arz, entry in, restricting right of inhabitants of village to transfer houses — Evidence of over thirty sales and mortgages in the course of fifty years — Finding that custom remained dead letter:

Held, that the finding could not be challenged in second appeal in the absence of any error of law and that in each case the question was one of the weight of evidence and if, after considering the entire evidence, the lower Appellate Court recorded a finding without contravening any rule of law, such finding was conclusive in second appeal. AIR (Vol 20) 1933 All 603: (1933) ALJ 439: 17 RD 298: 144 Ind Cas 120.

——S. 100 — A finding as to the existence or non-existence of a custom, in so far as it is a finding that a certain practice does or does not prevail, is a finding of fact though the question whether a prevailing practice has the attributes of a legally binding custom is a question of law. AIR (Vol 20) 1933 All 306: 17 RD 556: 141 Ind Cas 668.

——S. 100 — Custom — Appreciation of evidence.

Value to be attached to evidence for proving customs is entirely within jurisdiction of Court of first appeal and Court of second appeal cannot reverse finding. AIR (Vol 17) 1930 Oudh 330: 123 Ind Cas 51: 7 OWN 333.

——S. 100 — A second appeal lies on a question of custom where the question is whether the lower appellate Court has acted upon illegal evidence or on evidence legally insufficient to establish an alleged custom. (1929) 116 Ind Cas 799 (All).

——S. 100 — Whether on evidence a custom is established is a question of fact but whether evidence is legally sufficient is a question of law. AIR (Vol 14) 1937 All 201: 99 Ind Cas 292.

——S. 100 — Custom — Finality of.

Finding as to particular custom should not be disturbed unless based on insufficient evidence or the necessary requisites are not established. AIR (Vol 13) 1926 Bom 153: 93 Ind Cas 135: 50 Bom 133: 28 Bom LR 49 (DB).

——S. 100 — Objections based on the grounds of insufficient evidence, or improper rejection of evidence or as to the evidence taken as a whole amounting to insufficient proof in law of local custom, may be gone into in second appeal, but whether a specified instance is properly proved or not is a question of fact. AIR (Vol 12) 1925 Bom 380: 88 Ind Cas 891: 27 Bom LR 880 (DB).

——S. 100 — When the lower appellate Court holds that no question of custom is involved in a case and rejects an application for a certificate to enable the applicant to file a second appeal it is open to the second appellate Court to hold that a question of custom is involved and to remand the case to the lower Court to consider whether the certificate can be granted. AIR (Vol 12) 1925 Lah 32: 79 Ind Cas 488 (DB).

——S. 100 — Whether alleged custom is supported by facts found, can be considered. AIR (Vol 12) 1925 Nag 179: 82 Ind Cas 815.

——S. 100 — High Court can only consider whether facts found by lower Court support custom. AIR (Vol 8) 1921 Mad 694: 69 Ind Cas 570: 14 MLW 702: 1921 MWN 754: 41 MLJ 437 (DB).

——S. 100 — Custom — Finding.

A finding of custom cannot be challenged in second appeal on the ground that the evidence is insufficient. AIR (Vol 4) 1917 Cal 231: 35 Ind Cas 630 (DB).

[Contra (1909) 3 Ind Cas 6 (All).]

——S. 100 — Custom — Proof.

A Second Appellate Court is bound by the finding of the lower Courts that certain documents are sufficient proof of the custom. AIR (Vol 3) 1916 Oudh 336: 2 OLJ 607: 32 Ind Cas 748.

——S. 100 — Custom — Question of fact — Question of law.

Whether certain events did or did not happen is a question of fact but whether the facts proved establish a custom is a question of law. A judgment based on evidence not admissible is unsustainable. AIR (Vol 1) 1914 Cal 289: 18 CWN 55: 18 CLJ 559: 20 Ind Cas 810 (DB).

See also AIR (Vol 5) 1918 Cal 979: 45 Cal 285: 25 CLJ 613: 21 CWN 972: 41 Ind Cas 959.

——S. 100 — Custom — Certificate — Punjab — Question of custom.

A question of custom cannot be taken up in a second appeal without the required certificate. AIR (Vol 1) 1914 Lah 422: 94 PWR 1914: 193 PLR 1914: 24 Ind Cas 623.

——S. 100 — Custom — Finding of fact — When can be disputed.

A decision as to the existence of a custom is a question of fact, but an appellant in second appeal is entitled to show that the evidence even if true, does not establish the custom. (1912) 14 Ind Cas 12 (Oudh).

(a) Mixed question of law and fact.

——S. 100 — Custom — Existence or reasonableness of custom.

A question of the existence or reasonableness of a custom is a question of law. (1947) 82 CLJ 167: 51 CWN 179.

——S. 100 — Mixed question of law and fact.

The question whether the custom has been made out or not is a mixed question of law and fact. AIR (Vol 32) 1945 All 439: 1945 OWN (HC) 263: 1945 RD 459: 1945 AWR (HC) 249: 1945 ALJ 419.

——S. 100 — Proof of, depending on interpretation of wajib-ul-arz — Question is mixed one of law and fact.

Where the question of custom depends entirely upon the interpretation of the two documents, wajib-ul-araiz of two villages which must be read together, the question is not a pure question of fact, but is a mixed question of law and fact and an appeal does lie. AIR (Vol 29) 1942 Oudh 213: 1941 OWN 1412: 1942 AWR (CC) 19: 1942 RD 30: 17 Luck 567: 200 Ind Cas 561.

——S. 100 — Custom is a mixed question of law and fact. AIR (Vol 25) 1938 Bom 492: 40 Bom LR 1015: 178 Ind Cas 854; AIR (Vol 20) 1933 Mad 390: 37 MLW 272: 143 Ind Cas 880; 32 Bom LR 1679: AIR (Vol 18) 1931 Bom 167 (DB) (Rule as to concurrent findings does not apply to such a finding); 119 Ind Cas 476: AIR (Vol 16) 1929 Mad 751; 93 Ind Cas 363: AIR (Vol 13) 1926 All 215 (But concurrent finding of lower Court will not generally be upset); 92 Ind Cas 769: AIR (Vol 13) 1926 Lah 251; 81 Ind Cas 1033: AIR (Vol 12) 1925 Oudh 55; 64 Ind Cas 956: 20 ALJR 57: AIR (Vol 9) 1922 All 88 (DB) (Pre-emption): 38 MLJ 275: 27 MLT 111: 55 Ind Cas 380: AIR (Vol 9) 1922 Mad 290 (DB).

——S. 100 —A finding as to the existence or non-existence of a custom, in so far as it is a finding that a certain practice does or does not prevail is a finding of fact. The question whether a prevailing practice has the essential attributes of a legally binding custom is a question of law. AIR (Vol 18) 1931 All 499: (1931) ALJ 757: 54 All 6: 134 Ind Cas 21 (SB).

——S. 100 — Questions of custom are mixed questions of law and fact. There may be findings as to the existence of a custom which are pure findings of fact, but all questions of interpretation involve an element of law.

Where there was no question that the documents relied on to establish custom were silent as to rights of a father to inherit from his son, yet two diametrically opposite interpretations were placed by the parties on this omission.

Held, that this was a fit matter for second appeal. AIR (Vol 15) 1928 Oudh 269: 112 Ind Cas 68: 5 OWN 275 (DB).

——S. 100 — Where a question arises as to the existence or non-existence of a particular custom and where the lower appellate Court has acted upon illegal evidence or on evidence which was legally insufficient to establish an alleged custom the question is one of law. AIR (Vol 14) 1927 All 471: 100 Ind Cas 605: 8 LRA Rev 110.

——S. 100 — The question of custom is one of mixed fact and law and the point whether the facts found in any given instance prove existence of the essential attributes of a custom or usage is a question of law and in second appeal an inquiry can be made whether all the attributes of a local custom had been established or not by evidence accepted by the lower Court. There is no difference between cases where custom is accepted and those in which the existence of the custom is not accepted. AIR (Vol 13) 1926 Oudh 53: 90 Ind Cas 525: 2 OWN 838.

——S. 100 — Question of custom of transferability of house built by tenant on village abadi is one of fact and law and can be taken in second appeal. AIR (Vol 12) 1925 Oudh 239: 82 Ind Cas 810: 11 OLJ 738.

——S. 100 — Custom — Mixed question of law and fact.

Questions as to the existence of an ancient custom are questions of mixed law and fact. The judge must find what were the things actually done in alleged pursuance of the custom and then determine whether these facts so found satisfy the requirements of the law. The latter is a question of law — not fact. AIR (Vol 4) 1917 PC 33: 40 Mad 709: 21 CWN 729: 15 ALJ 485: 1 Pat LW 697: 33 MLJ 1: 19 Bom LR 567: 22 MLT 1: (1917) MWN 507: 26 CLJ 153: 6 LW 222: 44 IA 147: 39 Ind Cas 722.

(b) Question of Law.

——S. 100 — Question of law — Existence of reasonableness of Custom. See (1947) 51 CWN 179: 82 CLJ 167.

——S. 100 — Whether usage has developed into custom is question of law.

The finding that there is a particular usage is a finding of fact, but the question whether the particular usage has developed into a custom and has the force of law is a question of law. AIR (Vol 33) 1946 All 384 (385).

——S. 100 — Question as to continuity of, is one of law.

Whether the alleged custom was continuous or whether its continuity was broken and the custom was not enforced for a long period of time is a question which has to be decided from the proved facts in the case, and is a question of law. AIR (Vol 29) 1942 Oudh 401: 1942 OWN 368: 1942 RD 552: 1442 AWR (Rev) 109 (1) and 255: 18 Luck 205: 200 Ind Cas 622.

——S. 100 — Actual instances showing existence of custom — Whether instances amount to custom is question of law.

Actual instances showing existence of a practice are proved as facts, and the High Court is bound by the findings of the lower Appellate Court as regards the existence of such instances unless its finding is vitiated by an error of law. But the question whether the numerous instantances which show the existence of a practice of transferring houses amount to a custom having the force of law is a matter of inference from the admitted or proved facts and is, therefore, a question of law. AIR (Vol 23) 1936 All 119: 1935 RD 572: 1935 AWR 1427: 160 Ind Cas 1098.

——S. 100 — The questions whether a usual practice prevails or not, and the length of its existence are questions of facts, although the legal inferences which follow from them may be those of law. AIR (Vol 23) 1936 Nag 95: ILR (1936) Nag 13: 164 Ind Cas 825.

——S. 100 — Mercantile usage.

The finding arrived at by the lower Appellate Court on an issue remanded to it as regards mercantile usage can be challenged in second appeal. AIR (Vol 19) 1932 Lah 274 : 13 Lah 31 : 33 PLR 363 : 137 Ind Cas 873.

——S. 100 — Where a question of custom is decided by the lower Appellate Court without reference to any evidence in the case, there is a question of law for purposes of second appeal. AIR (Vol 19) 1932 Lah 61: 32 PLR 617: 134 Ind Cas 826.

——S. 100 — Usage.

Where there is evidence legally sufficient to support a finding as to the existence of a usage, the High Court cannot set aside that finding on the ground that the quantum of evidence is meagre

and scanty. But where the usage has not been pleaded with precision and the evidence adduced is vague and inconsistent, a finding may be over-set by the High Court on the ground that it was not justified by the pleadings and was not supported by evidence of a relevant character. AIR (Vol 18) 1931 All 583: (1931) ALJ 390: 136 Ind Cas 158.

——S. 100 — Where no question of any custom was involved and the decision of the case depended on the proper application of the judicial authorities cited before the Courts, the question was therefore a question of law and not a question of custom and so a second appeal was competent. AIR (Vol 16) 1929 Lah 426: 117 Ind Cas 380: 11 LLJ 110: 10 Lah 868: 31 PLR 93 (DB).

——S. 100 —The question of custom is one of mixed fact and law. Whether the facts found in any given instance prove the existence of the essential attributes of a custom or usage is a question of law and in a second appeal an enquiry must be made whether all the attributes of a local custom have been established or not by evidence which is accepted by the lower Court. AIR (Vol 11) 1924 Oudh 157 : 76 Ind Cas 774 : 26 OC 386.

——S. 100 — Custom — Question of law.

The question whether the facts proved and found to satisfy the requirements of law to establish a custom is a question of law which the High Court must consider in second appeal. AIR (Vol 7) 1920 Mad 277: 55 Ind Cas 770 (DB).

——S. 100 — Custom — Reasonableness of.

The question whether a custom is reasonable or not is a question of law and not of fact. It is wrong to hold that a custom is unreasonable in so far as it permits the appropriation of timber trees on a holding by the tenant. Where there is nothing unfair dishonest or contrary to the public good in a custom, the custom is not unreasonable. AIR (Vol 3) 1916 Cal 67 : 19 CWN 1188 : 29 Ind Cas 312 (DB).

——S. 100 — Custom — Question of law.

The question of existence or non-existence of particular custom is one of law and the High Court is empowered in second appeal to consider whether the finding of the Court below is based on sufficient evidence. (1909) 3 Ind Cas 6 (All) (DB).

——S. 100 — Second Appeal — Usage having the force of Law — Landlord and Tenant — Custom — Tenant occupying house in abadi — Sale of materials.

Whether or not a custom prevails whereby tenants of houses are empowered to sell the materials of their houses so long as the houses are standing is to some extent a question of law. The High Court, in second appeals, has jurisdiction to consider the evidence given in support of a custom and determine whether or not that evidence is sufficient in point of law to establish a custom. (1909) 7 ALJ 36: 32 A 125 (128) (DB).

——S. 100 (a) (S. 584 old Code) — Second appeal — Custom — Question of.

Where a question arises as to the existence or non-existence of a custom and the Court below acts upon illegal or legally insufficient evidence, the question is one of law and the High Court can interfere in second appeal and examine the evidence. (1909) 6 ALJ 719 (721) (DB).

——S. 100 (S. 584, old Code) — "Usage having the force of law" — Custom — Finding in favour of existence of custom based upon insufficient evidence — Second appeal — Practice.

Where a question arises as to the existence of a particular custom, and the lower appellate Court has acted upon illegal evidence or on evidence legally insufficient to establish an alleged custom the question is one of law, and the High Court is entitled in second appeal to consider whether the finding is based upon sufficient evidence. Held also, that the evidence produced in the case to establish an alleged custom that the tenant has got not only the right to sell the materials of his house in the abadi but also the landlord's land was not sufficient to support it, unreasonable as the alleged custom was. (1908) AWN 112: 5 ALJ 456: 30 A 311 (313, 314) (FB).

——S. 100 (S. 584 (a) of old Code) — Question of law — Usage having the force of law — Custom — Finding by lower Court regarding existence of alleged custom — Second appeal.

Where the lower appellate Court has acted upon illegal evidence or disregarded legal evidence or acted on evidence which is legally insufficient to establish an alleged custom, the question is one of law : but the High Court in second appeal is not bound to examine and consider the evidence in all cases where the existence or non-existence of an alleged custom is the sole question at issue. (1906) 1906 AWN 187: 3 ALJ 467 (468).

——S. 100 (S. 584, Cl. (a) of old Code) — 'Usage having the force of law' — Custom — Jurisdiction of High Court to go behind finding of lower Courts as to the existence of custom.

Though S. 584, C. P. C., disallows a second appeal with reference to findings of fact, yet the evidence of non-existence of a usage having the force of law is unaffected by such disallowances and consequently it is the duty of a second appellate Court when it has to pronounce upon a question of usage or custom to examine the evidence bearing upon it, not only as to the sufficiency thereof to establish all the requisities of a custom, valid and lawful, but also as to the credibility of the evidence relied on and the weight due to it. In India, unlike England, custom is transcendantal law and is matter for the Judge and not for the Jury. (1904) 16 MLJ 8: 29 M 24 (28) (DB).

(c) Sufficiency of evidence.

——S. 100 — Whether from facts found, essential attributes of legal custom are established or not — If question of law or fact.

Whether a particular custom is proved to exist or not, is undoubtedly a question of fact and a mere question of sufficiency of the evidence adduced to establish a custom is not a ground of second appeal.

But the question whether on the facts found, the essential attributes of a legal custom are or are not established is certainly a question of law which can be discussed in second appeal. AIR (Vol 29) 1942 Cal 26: ILR (1941) 2 Cal 258: 73 CLJ 544: 45 CWN 809: 198 Ind Cas 837.

——S. 100 — Finding based on evidence.

If the finding of the Court below that the custom has not been proved was in accordance with the weight of evidence, it is quite impossible for the High Court in second appeal to reverse such a finding. AIR (Vol 26) 1939 All 500: 1939 RD 234: (1939) ALJ 617: 1939 AWR 318: 183 Ind Cas 471.

——S. 100 — The question whether the facts found in any particular case prove the existence of the essential attributes of a custom or usage is a question of law which may be discussed in second appeal. AIR (Vol 24) 1937 Pat 458: 18 PLT 477: 3 BR 762: 171 Ind Cas 754.

——S. 100 — Finding of lower Appellate Court that parties are governed by Hindu law of succession — Whether one of fact — High Court, if will interfere when evidence is legally insufficient to prove custom.

Where the lower Appellate Court has taken into account both oral and documentary evidence and has recorded a clear finding that the family

of the parties is governed by the Hindu law of succession, this finding should be accepted as a finding of fact when it is not vitiated by an error of law. But the High Court will interfere if the evidence is legally insufficient to establish a family custom. AIR (Vol 23) 1936 All 443: (1936) ALJ 493: 1936 AWR 449: 58 A 889: 163 Ind Cas 650.

——S. 100 — **Facts found, whether establish custom, if question of law.**

The question of the sufficiency or insufficiency of evidence is not a question which can be gone into by a Court in second appeal. The weight or value to be attached to particular evidence and the question whether the quantum of evidence before the Court is or is not sufficient to establish a custom, are matters entirely within the province of a Court of first appeal. This, of course, is quite different from the question whether the facts found in any given instance prove the existence of the essential attributes of a custom or usage which is a question of law and can be properly considered in second appeal. AIR (Vol 22) 1935 Oudh 459: 1935 OWN 928: 1935 RD 426: 11 Luck 397: 157 Ind Cas 654.

——S. 100 — When the lower Appellate Court finds that no instances are proved in which the alleged custom has been exercised or recognised, then that is a finding of fact which is ordinarily binding upon the High Court in second appeal, if not vitiated by any error of law, and in such a case, no further question of law can arise.

Where the lower Appellate Court has held that certain instances had been proved in which the alleged custom had been followed or recognized but such instances were not sufficiently numerous or ancient or uniform to constitute a custom following the ordinary law, a question of law arises in second appeal and the Court of second appeal will be perfectly right in weighing the whole evidence and coming to its own conclusion whether the lower Appellate Court had rightly decided that the alleged custom had not been proved. AIR (Vol 21) 1934 All 890: (1934) ALJ 879: 18 RD 407: 4 AW R 188: 150 Ind Cas 758.

——S. 100 — A second appeal will be maintainable on a question of custom where a question is whether the lower appellate Court has acted upon illegal evidence or on evidence legally insufficient to establish an alleged custom. (1929) 116 Ind Cas 799 (All).

——S. 100 — Second appellate Court can consider sufficiency of evidence in law to establish a custom. AIR (Vol 14) 1927 All 605: 102 Ind Cas 596.

——S. 100 — Where a lower appellate Court has refused to accept oral evidence as sufficient to establish the existence of a custom its refusal cannot be reversed in second appeal but when it comes to the question of determining the legal point as to which of two wajib-ul-arzs should be held to govern a case it is permissible to find that a custom exists where the lower Appellate Court found that no custom exists. AIR (Vol 13) 1926 All 153: 89 Ind Cas 89.

——S. 100 — High Court can examine whether evidence in the case establishes a custom. AIR (V 13) 1926 All 43: 48 All 77: 23 ALJ 932: 88 Ind Cas 752 (DB).

——S. 100 — **Sufficiency of evidence as to — Proof of elements of custom.**

A High Court cannot in second appeal be asked to go into the evidence produced in a case in order to see whether the evidence produced is sufficient to establish an alleged custom, when the lower appellate Court has reviewed the entire evidence and come to the conclusion that the evidence produced is insufficient to establish the custom. A custom, in order to be a valid and binding custom must be proved to be ancient and invariable, and it can always be argued in second appeal whether the evidence produced in the case fulfils these requirements and so far the question can be considered to be a question of law.

It is one thing to say that the evidence produced in a case was not legally sufficient to prove a custom and quite the other thing to say that the evidence produced in the case which had been held by the lower appellate Court to be insufficient to prove the custom should be held in second appeal to be sufficient to prove the same. 40 Mad 709, Dist.; 29 Mad 24, Diss. from. AIR (Vol 13) 1926 Oudh 460: 3 OWN Sup 10: 94 Ind Cas 987.

——S. 100 — The question whether by custom a tenant is entitled to transfer the site of his house in the village abadi is a mixed question of law and fact and in the second appeal the question of sufficiency or insufficiency of the evidence in support of such a custom may be gone into. AIR (Vol 12) 1925 All 718: 87 Ind Cas 749.

——S. 100 — It is always open to the High Court in second appeal to see whether an opinion on custom which has been pronounced was based or not on sufficient evidence. AIR (Vol 11) 1924 All 477: 5 LRA Rev 115: 79 Ind Cas 134.

——S. 100 — In second appeal the Court should not only consider whether the evidence that is brought forward to prove custom is legally admissible evidence but whether the sum total of that evidence regarded from the point of quantum is of sufficient weight to justify the Court's coming to a conclusion that the custom has been proved. AIR (Vol 10) 1923 All 341: 75 Ind Cas 657 (DB).

——S. 100 — It is open in second appeal to go into the question of law as to whether the evidence which the lower appellate Court found sufficient to establish a custom was adequate for the purpose. But where a lower appellate Court found that the evidence was insufficient to establish a custom no point of law arose in second appeal that it was in fact sufficient. AIR (Vol 9) 1922 All 241: 66 Ind Cas 613.

——S. 100 (1) (a) — **Custom — Power of Court in second appeal to consider evidence.**

Under S. 100 of the C. P. Code, in a case where a custom differing from the general law is set up, the High Court in second appeal should consider whether the evidence adduced suffices to establish all the elements of antiquity and certainty necessary to constitute a valid custom. AIR (Vol 4) 1917 Nag 147: 48 Ind Cas 236.

——S. 100 — **Custom — Proof of.**

An appellant even in second appeal can impeach the validity of a proof of custom, on the evidence which he can show as unreliable and not amounting to proof in law though it is considered sufficient. (1912) 15 Ind Cas 247 (Oudh).

——S. 109 — **Custom — Evidence — Sufficiency.**

When there is legally insufficient evidence to prove a custom, a finding of the existence of custom may be questioned in second appeal but when the insufficiency depends on the weighing of the evidence, it cannot be contested in second appeal. (1911) 9 Ind Cas 839 (Cal).

——S. 100 — **Custom — Evidence.**

The High Court has jurisdiction, in second appeal to consider the evidence given in support of a custom, and determine whether or not that evidence is sufficient in point of law to establish it. Whether a custom has been satisfactorily proved or not is a question of law. A custom ought to be established by clear and cogent evidence. (1910) 32 All 125: 7 ALJ 36: 4 Ind Cas 304 (DB).

But see (1909) 2 Ind Cas 558 (All).

——S. 100 — Custom — Question of law.

If the Lower Appellate Court acts upon legally insufficient evidence to establish an alleged custom, it is a question of law and High Court can in second appeal inquire whether there is sufficient evidence for the finding. (1909) 6 ALJ 719: 6 MLT 178: 2 Ind Cas 490 (DB).

21. Damages.

——S. 100 — Damages — Quantum of —— Interference in second appal.

The High Court in second appeal will not lightly interfere with a mere question as to amount of damages in an action for tort but where the amount awarded by the trial Court is substantially reduced by the first appellate Court on a wrong view of law, the error must be set right by the High Court in second appeal. AIR (Vol 33) 1946 Mad 147: (1945) 2 MLJ 461: 1945 MWN 720: 58 MLW 613.

——S. 100 — Damages — Principle on which to be assessed is question of law — Quantum of damages is a question of fact.

The principle on which damages are to be assessed is a matter of law though the quantum to be awarded once the principle is determined is one of fact. AIR (Vol 33) 1946 Nag 392: 225 Ind Cas 235: 1946 NLJ 684.

——S. 100 — Quantum — Findings of trial Court.

The rule that the Appellate Court should not be inclined to reverse the finding of the trial Court as to the quantum of damages does not apply in India. AIR (Vol 32) 1945 PC 168: 47 Bom LR 959: 58 MLW 571: 1945 MWN 661: (1945) ALJ 518: 49 CWN 788: (1945) 2 MLJ 257: 72 IA 206: ILR (1945) Mad 73.

——S. 100 — Mixed question of law and fact.

Question whether amount paid by Improvement Trust in land acquisition proceedings was by way of interest or damages is a mixed question of law and fact. It is certainly not a substantial question of law. AIR (Vol 29) 1942 All 258: (1942) ALJ 332: 1942 AWR 176: ILR (1942) All 753: 202 Ind Cas 164.

——S. 100 — Quantum of damages, question of.

Where the amount of loss suffered by a party has been assessed by both the lower Courts at a particular amount, the quantum of damages is not open to argument in second appeal. AIR (Vol 28) 1941 Mad 259: (1940) 2 MLJ 103: ILR (1941) Mad 406: 52 MLW 910: 1941 MWN 46: 195 Ind Cas 301.

——S. 100 — Question, if can be re-opened.

Questions about the adequacy of damages are ordinarily questions of fact which cannot be entertained in second appeal. AIR (Vol 23) 1936 Nag 70: 161 Ind Cas 593.

——S. 100 — Compensation for malicious prosecution.

In second appeals arising from suits for compensation for malicious prosecution, all preliminary questions of fact, on which the ultimate decision depends are determinable by the District Judge. He must ascertain as to what the facts of the case were as known to, or believed by, the defendant, and the High Court on second appeal is bound to accept these findings as final. But it is entitled to examine whether the inference drawn therefrom is legitimate, i.e., whether the facts found did, or did not, amount to absence of reasonable and probable cause. AIR (Vol. 22) 1935 Lah 765: 17 Lah 190: 38 PLR 440: 160 Ind Cas 779.

——S. 100 — Normally the question of damages is not one which is considered in second appeal. But the High Court can review the matter in order that substantial justice between the parties may be done. AIR (Vol 21) 1934 All 392: 154 Ind Cas 820 (1).

——S. 100 — Finding of fact — Amount of damages — Question as to, is one of fact. But when the amount is fixed arbitrarily, it cannot be taken as an amount arrived at on a finding which is binding on the High Court. AIR (Vol 10) 1923 All 199: 80 Ind Cas 297.

——S. 100 — Damages — Measure of.

On second appeal the Court may go into the question of quantum of damages. AIR (Vol 1) 1914 Lah 531: 1 PR 1915: 14 PLR 1916: 28 Ind Cas 273.

——S. 100 — Damage — Question of fact.

The amount of damages is a question of fact. (1911) 9 Ind Cas 984 (All) (DB).

——S. 100 — Damages — Malicious prosecution — Question of fact.

The question of the amount of damages for malicious prosecution is a question of fact and the High Court cannot interfere in second appeal. (1909) 31 All 333: 6 ALJ 381: 1 Ind Cas 760 (DB).

22. Defective judgment.

——S. 100 — Findings of lower Court confused and involving mistakes of facts — They can be re-opened in second appeal.

Where the judgment of the lower Court dealing with points of fact is very confused containing several mistakes of fact, some portions being wholly unintelligible, & material evidence bearing on the disputed matters not appearing to have been considered, findings on these points are not conclusive and binding in second appeal and these matters can be re-opened at the stage of the second appeal. AIR (Vol 28) 1941 Lah 10: 43 PLR 450: ILR (1941) Lah 568: 195 Ind Cas 786.

——S. 100 — Mere fact that judgment of lower Appellate Court is in few lines, whether justifies interference.

Per Chatterji, J. — When the facts of the case are quite simple and the evidence is very short and there is absolutely no reason to suppose that the lower Appellate Judge did not properly apply his mind to the same and also there is no error of law or defect in procedure, the mere fact that the judgment of the lower Appellate Court has been written in a few lines does not make the finding of fact anytheless binding in second appeal. AIR (Vol 26) 1939 Pat 267: 5 BR 295: 179 Ind Cas 803

——S. 100 — Appellate Court improperly admitting evidence overlooking O. 41, R. 27 — Important aspect not considered and wrong conclusion arrived at — Second appeal.

Where in an appeal, an entirely new case is raised for the first time and the Appellate Court admits evidence improperly, overlooking the provisions of O. 41, R. 27, in support of such a case and bases its judgment on such a new case and the evidence admitted and it is clear that the new case has coloured and influenced its consideration of the facts and its decision on another aspect of the case, which though it treated to be as minor aspect turns out finally to be its most important aspect and it also appears that the Appellate Court has not adequately considered that aspect of the case and consequently, has come to a wrong conclusion, the judgment cannot be upheld in second appeal and the second Appellate Court will not take into consideration the new case raised and the evidence improperly admitted. AIR (Vol 25) 1938 Sind 198: ILR (1939) Kar 111: 178 Ind Cas 690.

——S. 100 — Documents filed not documents of title — Decision of lower Court with regard to such document — Whether one of law or fact.

Where none of the documents filed concerns title nor any question or any decision of the Judge with regard to these documents is a decision on a

question of law, it is erroneous to describe an error (assuming there be an error in the judgment of the Court below) as an error of record. It is an erroneous decision on a question of fact and nothing more and is binding in second appeal. AIR (Vol 23) 1936 Pat 129 : 2 BR 227 : 161 Ind Cas 465 (DB).

——S. 100 — Where a Court not competent to entertain and decide an appeal does so, the decision of that Court is clearly contrary to law and a second appeal lies from the decree of that Court. AIR (Vol 17) 1930 Lah 1065 : 121 Ind Cas 722.

——S. 100 — Where an appeal is decided ex parte by a District Judge against unserved respondents, High Court has jurisdiction in second appeal to reverse the appellate Court's decree on the ground that he was wrong in proceeding to decide the appeal ex parte. (1929) 117 Ind Cas 229 (DB) (Lah).

——S 100 — Rejection of admissible evidence.

Exclusion from consideration of a piece of documentary evidence on the erroneous ground that the document was inadmissible in evidence for want of registration vitiates the finding of fact and a second appeal lies. (1928) 108 Ind Cas 191 : 29 Bom LR 287.

——S. 100 — Irrelevant decision.

Where, in a rent suit, although the tenancy and rental dues were admitted and no plea of payment thereof was taken, but the Court dismissed the suit on the ground that the lands described in the plaint were not comprised in tenancy.

Held, that it was not necessary for the Court to decide the question as to what lands were comprised in the tenancy and hence this irrelevancy of the decision made the judgment appealable. AIR (Vol 14) 1927 Cal 410 : 100 Ind Cas 525.

——S. 100 — Wrong assumptions.

Where the lower appellate Court has proceeded on wrong assumptions and it is doubtful what weight the lower appellate Court would have attached to the rest of the evidence if it had avoided these erroneous assumptions, the decree can be set aside in second appeal. AIR (V 14) 1927 Lah 614 : 103 Ind Cas 235.

——S. 100 — Inadmissible evidence.

Finding of fact based partly on inadmissible evidence. AIR (Vol 14) 1927 Lah 448 : 103 Ind Cas 889 : 8 Lah 651: 29 PLR 74 (DB).

——S. 100 — Real points ignored — Bald pleas of parties recorded but parties not examined on the points — Real points in dispute ignored — Trial is vitiated and can be set aside in second appeal.

Where only the bare or bald pleas of the parties are on record but there is no attempt to focus their contention by proper examination of parties by the Court with advertence to the law bearing on the point and the real points are missed, the trial is vitiated and decision is liable to be ignored even in second appeal. AIR (Vol 14) 1927 Nag 180 : 100 Ind Cas 855.

——S. 100 — Question of fact decided on precedent.

Where the lower appellate Court decided a question of fact not upon the evidence before it, but holding that it was precluded from so doing by a previous finding of Court of superior jurisdiction upon similar facts in a case between different parties.

Held, that the Court committed a substantial error or defect in procedure which may possibly have produced error or defect in the decision of the case upon the merits and therefore a second appeal lay. AIR (Vol 14) 1927 Pat 209 : 105 Ind Cas 633 : 6 Pat 698 : 9 PLT 72. (FB).

——S. 100 — Scope of enquiry extended.

The High Court is reluctant to interfere in cases where two Courts have held that fraud has been established. But where in determining whether there has or has not been any fraud, the lower Courts have gone outside the proper foundation for determination of such a question, the High Court should interfere in second appeal. AIR (Vol 13) 1926 Bom 33 : 91 Ind Cas 426: 27 Bom LR 1318 (DB).

——S. 100 — Wrong conception of law.

Finding as to uniform rate of rent for 20 years based on wrong conception of law — High Court can interfere. AIR (Vol 13) 1926 Cal 1169 : 95 Ind Cas 525 : 30 CWN 520(DB).

——S. 100 — A second appeal would not lie merely on the ground that the lower appellate Court in reversing the Trial Court's judgment, failed to consider all the circumstances on which the judgment of that Court was founded. AIR (Vol 12) 1925 Oudh 313 : 84 Ind Cas 470.

——S. 100 — Misreading of judgment.

A finding can be contested in second appeal, if it is based on misreading of the first Court's judgment. AIR (Vol 10) 1923 Lah 502 : 77 Ind Cas 475 (DB).

——S. 100 — Finding of fact based only on local investigation cannot be sustained — Practice — Judgment. AIR (Vol 10) 1923 Lah 208 : 79 Ind Cas 808.

——S. 100 — Judgment of reversal must show that the evidence and reasons of trial Court are considered. AIR (Vol 10) 1923 Pat 275 : 75 Ind Cas 780 : 2 Pat LR (Civ.) 32.

——S. 100 — C. P. Code, S. 100 — Finding of fact not based on evidence but surmise, is defective. AIR (Vol 8) 1921 Pat 59 : 60 Ind Cas 308 : 2 PLT 225: 1921 PHCC 93 (DB).

——S. 100 — Appreciation of evidence — Misapprehension.

The error of the Judge in criticising the evidence of one of the witnesses on the wrong idea that the other two had not examined vitiates his finding. AIR (Vol 5) 1918 Cal 544 : 41 Ind Cas 456 (DB).

——S. 100 — Finding of fact — Evidence not dealt with — Proper judgment.

Where the lower Appellate Court made no effort whatever to refer to or deal with the evidence in the case and a finding was come to, held it cannot be accepted, as correct in second appeal, and that the judgment was not a proper one. AIR (Vol 4) 1917 Lah 267 : 100 PLR 1917 : 39 PWR 1917 : 42 Ind Cas 282.

——S. 100 — Finding of fact — Unsatisfactory and vague findings.

Unsatisfactory and vague findings were interfered with in a second appeal. AIR (Vol 4) 1917 Lah 254 : 40 Ind Cas 496 (DB).

——S. 100 — Finding of fact — Unsatisfactory.

The law requires that the proof of limitation should be clearly established & a finding that "on a consideration of all the circumstances of the case" that the suit is barred by limitation is defective & unsatisfactory. AIR (Vol 4) 1917 Pat 443 : 2 Pat LW 12 : 41 Ind Cas 385 (DB).

——S. 100 — Defective judgment — Meaning uncertain — Setting aside.

A judgment can be set aside on the ground of the uncertainty of the meaning thereof. AIR (Vol 1) 1914 Cal 784 : 19 CLJ 545 : 25 Ind Cas 576 (DB).

23. Different inference.

——S. 100 — Where as to the facts there is no difference between the two lower Courts but they have differed on the legal interpretation to be placed on the admitted facts, a second appeal lies. (1937) 170 Ind Cas 831 : 39 PLR 125.

——S. 100 — Evidence not carefully considered by Court below.

In first appeals, the High Court is generally very reluctant to interfere with the findings of the Court below on a question of fact. The findings of fact arrived at by the Court below are entitled to very great respect and weight, but at the same time the High Court is justified in insisting that the judgment of the Court below should show that the evidence was carefully weighed and considered. When there is no such indication, the High Court should examine the evidence themselves and come to a decision in the case. AIR (Vol 23) 1936 All 537 : (1936) ALJ 594 : 1936 AWR 231 : 163 Ind Cas 984 (2).

——S. 100 — In a case in which there is a simple question of fact involved, the High Court cannot differ from the view taken by the trial Judge who heard and saw the witnesses unless there is something to show that he has not weighed the evidence fairly and properly. AIR (Vol 23) 1936 All 124 : 1935 RD 567 : 1935 AWR 1422 : 159 Ind Cas 903.

——S. 100 — Question of finding of fact — Different inference.

Finding of fact cannot be reversed in second appeal. 118 Ind Cas 715 : 1930 ALJ 340 : AIR (Vol 16) 1929 All 685 (DB).

——S. 100 — The fact that upon the evidence, High Court would have come to a different conclusion is no ground for second appeal. 90 Ind Cas 209 : AIR (Vol 13) 1926 Nag 192.

——S. 100 — Expert evidence.

Where it was possible that the expert evidence given on both sides was true.

Held, that the finding of the lower appellate Court could be considered afresh in second appeal. 47 All 243 : 22 ALJ 1045 : 6 LRA Civ 55 : 83 Ind Cas 27 : AIR (Vol 12) 1925 All 24 (DB).

24. Discretion.

——S. 100 — The High Court does not interfere ordinarily with the discretion of the Court below when that discretion has been exercised judicially on a full consideration of the evidence in the case. Where, however, the Court below has not directed its mind to the evidence in the case at all, but has disposed of the suit on a preliminary objection, the High Court would not be deviating from the ordinary rule when it does not accept the decision of the Court below in a case where the discretion has not been exercised judicially. AIR (Vol 27) 1940 Pat 502 : 6 BR 433 : 187 Ind Cas 207.

——S. 100 — Exercise of discretion by trial and Appellate Courts — High Court can see which is proper.

The discretion given to the trying Court is not one to be exercised arbitrarily but with due regard to the facts of the case and general principles of justice. The High Court in second appeal has also power to see which of two Courts exercised discretion properly in accordance with the judicial principles. AIR (Vol 26) 1939 Nag 110 : 1939 NLJ 157 : ILR (1939) Nag 452 : 182 Ind Cas 52.

——S. 100 — Wrong exerise of discretion by Subordinate Courts.

The Superior Court has power to interfere with a wrong exercise of discretion by the subordinate Courts, both in its revisional and appellate jurisdiction. AIR (Vol 25) 1938 Pat 413 : 19 PLT 309 : 17 Pat 507 : 4 BR 841 : 177 Ind Cas 564.

——S. 100 — Adjournment refused — Second appeal.

On an application for adjournment being made, the Appellate Court has undoubttedly the discretion to refuse the adjournment prayed for. Its exercise of discretion one way or the other is not a matter which can be the subject of second appeal. AIR (Vol 24) 1937 All 284 : (1937) ALJ 174 : 1937 AWR 122 : 168 Ind Cas 1001.

——S. 100 — Question of law — Registration Act, S. 77.

Suit for compulsory registration decreed — Appellate Court concluding that the plaintiff was not entitled to compulsory registration but was entitled to return of the consideration:

Held, that the finding of the trial Court that the agreement was valid was not set aside. If the plaintiff was entitled to the return of his money, the decision was merely a decision on a question of law whether the Judge had exercised what he considered to be his discretion in favour of or against the plaintiff as the case might be under S. 77, Registration Act and the High Court in second appeal could not set aside that order. (1936) 164 Ind Cas 315 : 2 BR 786 (2).

——S. 100 — Question whether successor Judge is competent to go behind finding of predecessor, if can be raised in second appeal.

Whether the Judge was competent to go behind the finding of his predecessor after he had clearly expressed the opinion that the document did not require registration is a matter entirely at the discretion of the Judge and cannot be raised in second appeal. AIR (Vol 23) 1936 Lah 708: 38 PLR 567: 161 Ind Cas 3.

——S. 100 — Issue of commission — New plea.

The issue of commission for local inspection is a matter in the discretion of the Court, and if the discretion was wrongly exercised, the question ought to be raised before the lower Court of appeal and it cannot be raised in second appeal. AIR (Vol 20) 1933 Pat 542 : 147 Ind Cas 789.

——S. 100 — Relief for declaration — No interference in second appeal. AIR (Vol 17) 1930 All 620 (DB).

——S. 100 — An appellate Court is always reluctant to interfere with the decision in a matter of discretion. AIR (Vol 16) 1929 Rang 221 : 121 Ind Cas 815: 7 Rang 561 (DB).

..—S. 100 — New plea.

Where the lower appellate Court has in his discretion refused to allow a point, which had not been raised in the memorandum of appeal to his Court to be taken at the hearing no second appeal lies against that exercise of discretion unless the discretion has been improperly or unjudicially exercised. AIR (Vol 15) 1928 Lah 536 : 107 Ind Cas 283 (DB).

——S. 100 — Genuine document.

Court rejecting an unsuspicious document on the ground of its late production — Discretion can be interfered with in second appeal. AIR (Vol 15) 1928 Pat 537 : 110 Ind Cas 821 (DB).

——S. 100 — Harsh but legal exercise of.

Summonses duly served — Witnesses not appearing — Plaintiff offering to bring them — Court insisting on warrants to be issued is not legally wrong although it is harsh — High Court declined to interfere under S. 100. AIR (Vol 14) 1927 Lah 424 : 101 Ind Cas 257.

——S. 100 — Jurisdiction.

Interference on the question of jurisdiction is discretionary with the High Court. AIR (Vol 14) 1927 Nag 164 : 100 Ind Cas 37.

——S. 100 — How to be exercised.

The question as to the exercise of discretion is ordinarily one of fact. But such discretion must not be exercised arbitrarily but upon sound legal principles which govern the exercise of such discretion. AIR (Vol 13) 1926 Cal 677 : 92 Ind Cas 1031.

——S. 100 — Proper exercise — No interference in second appeal.

The discretion under S. 5, is a judicial one and when it is not exercised after appreciation and consideration of such facts as are relevant and after application of the right principles to those facts, the High Court can interfere in second appeal. AIR (Vol 13) 1926 Lah 445 : 94 Ind Cas 396 (DB).

——S. 100 — Justifiability of dismissal of servant — High Court cannot interfere if question is merely one of degree and not of principles. But when the lower appellate Court has not proceeded on the right principles in coming to conclusion the High Court can interfere. AIR (Vol 13) 1926 Mad 57: 91 Ind Cas 525: 1925 MWN 603: 49 MLJ 516.

—S. 100 — Instalment decree.

High Court will not interfere with discretion of lower Court in fixing the amount in instalments decree. AIR (Vol 9) 1922 Lah 355: 66 Ind Cas 147 : 27 PWR 1922 : 5 LLJ 135 (DB).

——S. 100 — Discretion — Interference by High Court.

Where two Courts fully acquainted with the case and before whom the evidence could be, but was not given, exercise a discretion the High Court will not interfere with the exercise of such discretion. AIR (Vol 7) 1920 Cal 24 : 54 Ind Cas 731 (DB).

——S. 100 — Discretion.

Where it is found that the conclusions of fact at which a Court arrived, and which formed the basis of its decision were not such as could possibly support that decision, then the Court's discretion as to extend the limitation for an appeal, under S. 5, Lim. Act has not been exercised in a legal manner and the High Court is entitled to reverse the decision arrived at. AIR (Vol 6) 1919 Pat 503 : 4 Pat LJ 381 : 52 Ind Cas 225 (DB).

——S. 100 — Discretion — Adjournment — Value of affidavit.

Where the lower Court takes up a big suit at 5-30 P.M. and finding that defendent's vakil was not prepared to cross-examine the plff's witness, gives a decree for the plff., the High Court would not interfere in second appeal if no affidavit explaining the facts and showing how he was prejudiced, is filed by the deft. before the Lower Appellate Court. AIR (Vol 4) 1917 Mad 408: 3 LW 368: 34 Ind Cas 547 (DB).

——S. 100 — Discretion — Interference.

Where the Lower Court exercised their discretion in granting the plff. a declaration somewhat different from that asked for in the plaint without formal amendment to that effect of the plaint, the Court of second appeal should not interfere with the discretion of the Lower Courts in the absence of good reasons. (1912) 17 Ind Cas 315 (Oudh).

——S. 100 — Discretion — Misapprehension of fact by Lower Court.

An appellant can urge in second appeal that the Lower Appellate Court has improperly held that no sufficient cause existed for delay in filing the appeal when it is found that it had misapprehended the facts. (1912) 9 ALJ 15 : 13 Ind Cas 943 (DB).

——S. 100 — Discretion — Order for instalments.

Whether in directing the payment of the decretal amount by instalments the Court below has exercised a judicial discretion or not is a question which cannot be raised in second appeal. (1911) 15 CWN 1083 : 11 Ind Cas 736 (DB).

——S. 100 (S. 584 old Code) — Second appeal — Discretion, wrong exercise of — Limitation Act, S. 5.

Where a Court has exercised a judicial discretion in a sound and reasonable way as where it refuses to excuse delay in presenting an appeal, the appellate Court has no power to interfere under the provisions of S. 584, C. P. C. (1902) AWN 203: 25 A. 71(72).

See also (1904) AWN 23: 26 A. 327 (DB)).

25. Easement.

See also Note 57.

——S. 100 — Lower Court not appreciating what easement of necessity is.

Where the lower Court did not fully appreciate what an easement of necessity is, its finding on the question is not binding in second appeal and so the Court can find in second appeal whether such an easement exists. AIR (Vol 28) 1941 Oudh 585: 1941 AWR (Rev) 529: 1941 OWN 1410: 194 Ind Cas 859.

——S. 100 — New plea.

A party cannot be allowed to set up a new plea of easement in second appeal. AIR (Vol 20) 1933 Oudh 462: 10 OWN 1011: 146 Ind Cas 987.

——S. 100 — Question of law.

A finding that the enjoyment of an easement was not as of right, peaceful and without interruption is not one of fact and can be challenged in second appeal. AIR (Vol 18) 1931 Lah 395 (396): 33 PLR 139: Ind Rul (1932) Lah 35: 12 Lah 741: 135 IC 51 (DB).

——S. 100 — Question of fact.

Finding as to acquisition of right to easement is finding of fact. AIR (Vol 17) 1930 Lah 177.

——S. 100 — Question of law.

The finding whether a right of easement has been acquired is finding of law and can be challenged in second appeal. AIR (Vol 16) 1929 All 862: 118 Ind Cas 225.

——S. 100 — Easements Act, S. 13 — Question whether an easement is one of necessity is one of fact. AIR (Vol 14) 1927 Mad 963: 103 Ind Cas 862.

——S. 100 — Custom — Reasonableness.

Per Ramesam, J. — A question whether a custom relating to a pathway is reasonable or unreasonable should be considered with reference to its extent relatively to the total extent of lands held by the owners of the servient tenements, and where the lower Court takes that fact into consideration in considering the question whether the custom is reasonable or unreasonable, it is not open to the Court sitting in second appeal to say that the finding of the lower Court is vitiated on account of such considerations.

Per Odgers,, J. — One of the most important questions, if not the most important in considering whether or not a customary right is reasonable or not, is to see what effect it will have or what will be the extent of the burden on the servient tenement; for an easement or a right which when exercised obliterates so to say the servient tenement entirely, is clearly, unreasonable. AIR (Vol 14) 1927 Mad 653: 103 Ind Cas 331: 25 MLW 773: 38 MLT 395: 52 MLJ 674 (DB).

——S. 100 — Whether a tenant is entitled to occupy land appurtenant to his house is not a pure question of law. AIR (Vol 14) 1927 Oudh 37: 3 OWN 937: 98 Ind Cas 1044: 8 LR Rev. 20.

26. Error of law.

——S. 100 — Error of law — Lower Court wrongly entertaining appeal which does not lie — Second appeal.

Obiter: Where a subordinate Court wrongly entertains an appeal when it has no jurisdiction to do so, a second appeal lies against that Court's order. AIR (Vol 37) 1950 Pat 90.

——S. 100 — Finding of lower Appellate Court based on entries in Deara Survey Records, oral evi-

dence adduced by other party not being sufficient to outweigh entries — No error of law.

Where the lower Appellate Court based its finding that the under-'rayat' had acquired an occupancy right on the entries in the record of rights prepared for Deara purposes, not being satisfied that the oral evidence adduced by the other party was sufficient to outweigh the entries, there is no error of law that vitiates the finding and it cannot be interfered with in second appeal. AIR (Vol 33) 1946 Cal 326.

——S. 100 — Error of law — Conclusion reached on mistaken assumption that there is no evidence, is an error of law.

If a negative conclusion is reached by the lower Court on the mistaken assumption that there is no evidence and the conclusion is based solely on that fact, it is as much an error of law as where a finding is reached with no evidence to support it.

Where the lower Court held that a certain person was a member of a Municipal Committee on the date of the meeting because, according to it, there was no evidence of the resignation by the member or of its acceptance by the President, when there was evidence to prove the resignation and its acceptance:

Held, that the lower Court had committed an error of law which vitiated what would have been a conclusive finding of fact. AIR (Vol 33) 1946 Nag 152: ILR (1946) Nag 73: 1946 NLJ 227.

——S. 100 — "Contrary to law" — Failure to appreciate and determine question of fact to be tried is error of law.

There is no difference in principle between a failure to appreciate and determine the real question of fact to be tried and a failure to appreciate and determine a question of fact which vitally affects the issue stated in the case. In either case the failure is a failure in the duty imposed by law upon the Court and the question whether there has been such a failure must be a question of law. AIR (Vol 30) 1943 PC 208: (1943) ALJ 569: 1943 OWN 531: (1943) 2 MLJ 606: 56 MLW 762: 48 CWN 109: 10 BR 348: 1944 MWN 81: 70 IA 225: 78 CLJ 7: 1943 AWR 88: ILR (1944) Kar (PC) 22: 210 Ind Cas 507.

——S. 100 — Where the error of law into which the Subordinate Judge had fallen did not affect the decision of the case or lead to a different result from that which would have been arrived at had he had in mind a correct view of the law applicable, the case was not a fit one for interference or for remand and the appeal must be dismissed. (1942) 196 Ind Cas 380: 3 BR 18.

——S. 100 — Disregarding evidence of witness on ground that he has made statement which, in fact, is not made, is mistake of law.

To disregard the evidence of a witness on the ground that he has made a statement which he has, in fact, not made, is a mistake of law. AIR (Vol 27) 1940 Oudh 35: 15 Luck 191: 1939 OWN 1114: 184 Ind Cas 521.

——S. 100 — To find against party because he has not produced some material exhibits not in his power to produce is error of law.

To find against a party because he has not produced before the Court some material exhibits which were not within his power to produce, and which would prove nothing, is obviously an error of law. AIR (Vol 27) 1940 Oudh 35: 1939 OWN 1114: 15 Luck 191: 184 Ind Cas 521.

——S. 100 — Finding of fact — Can be reversed when vitiated by error of law — Interpretation of document and giving meaning to it, difference.

A finding of fact can be reversed in second appeal when it is vitiated by some error of law. It is not possible to show exactly in theory where the line is to be drawn. A mistake of law is not confined to a decision based on inadmissible evidence. A finding of fact, in order to be binding and conclusive on a Court of second appeal must be one based on evidence legally sufficient to support it. The decision of the lower Appellate Court one way or the other on a point of fact must be proper and judicial. For instance, it must consider all the important evidence; it must correctly state what witnesses said and what the documents contain. There is a difference between interpretation of a document, and giving a meaning to it which cannot possibly be given in view of the contents of the document, for the interpretation must be a meaning which the document can bear although of course it need not be the meaning which the Court of second appeal would give to it. The Court of second appeal must examine the evidence of fact arrived at by the lower Court and if it finds that the decision arrived at by the Court below, although on a point of fact, is vitiated by some error of law, it is at liberty to reverse that finding. AIR (Vol 27) 1940 Oudh 35: 1939 OWN 1114: 15 Luck 191: 184 Ind Cas 521.

——S. 100 — Error in law in arriving at conclusion upon facts.

Where the lower Appellate Court has erred in law in holding that on the facts the descent has not been from preceptor to disciple, the finding can be interfered with in second appeal. AIR (Vol 25) 1938 Lah 182: 178 Ind Cas 58.

——S. 100 — Lower Appellate Court's finding based on misconception of real nature of issue in case.

There is an error of law when a Court's finding proceeds upon a misconception of the real nature of the issue in the case, when several facts admitted or proved are not considered in their relation to each other and weighed as a whole, when a certain legal consequence which naturally flows from admitted and proved facts is overlooked, or when a material part of admissible evidence which vitally bears on the point at issue is disregarded. A case which involves such an error of law falls within the ambit of S. 100.

Where, therefore, the lower Appellate Court's finding is not in conformity to law, it cannot claim any finality and the second Appellate Court can hear the whole case on facts. AIR (Vol 25) 1938 Nag 470: ILR (1938) Nag 535: 179 Ind Cas 285.

——S. 100 — The fact that the Court does not accept Commissioner's evidence on his report does not make it incumbent upon him to call for further Commissioner's report: and the failure to do so is not an error of law when both parties had given evidence on the point. AIR (Vol 25) 1938 Pat 569: 17 Pat 358: 19 PLT 731: 5 BR 241: 179 Ind Cas 566.

——S. 100 — Difference between powers of High Court and Privy Council in the matter.

Whereas the Judicial Committee of the Privy Council are not bound by findings of fact and are not confined to considering questions of law, the High Court, in dealing with second appeals under S. 100, Civil P. C., is confined strictly to questions of law and is bound to accept the lower Court's findings of fact. The finding of the facts has been entrusted to the subordinate Courts and the High Court in second appeal has no power to interfere with those findings, however erroneous, unless they are vitiated by some error of law. AIR (Vol 25) 1938 Pat 278: 19 PLT 281: 4 BR 656: (1938) PWN 250: 17 Pat 430: 175 Ind Cas 783 (DB).

——S. 100 — A finding of fact is not binding in second appeal if it is marked by error of law. AIR (Vol 23) 1936 Pat 185: 2 BR 367: 17 PLT 405: 161 Ind Cas 709.

——**S. 100 — Decision of fact — No error of law — Interference.**

The High Court cannot interfere in second appeal with a decision of fact in the absence of an error of law. AIR (Vol 22) 1935 Pat 152: 1 BR 836: 158 Ind Cas 51.

——**S. 100 — Jurisdiction.**

Where the previous suits which were of a Small cause nature were wrongly decided, it was not thought proper to interfere with the later decision dismissing the later suit where the same question was again agitated. AIR (Vol 21) 1934 Mad 563: (1934) MWN 1322: 40 MLW 656: 154 Ind Cas 541.

——S. 100 — The refusal of the lower appellate Court to act under O. 41, R. 33 which is not peremptory but discretionary is not an error of law with which the second appellate Court is bound to interfere. AIR (Vol 17) 1930 Mad 707: 123 Ind Cas 39.

——S. 100 — Error of law vitiating conclusions of facts should be interfered with. AIR (Vol 11) 1924 Oudh 154: 10 OLJ 412: 75 Ind Cas 227.

——**S. 100 — Question of law — Presumption — Ignoring of.**

Where the lower Appellate Court comes to a conclusion without taking into account the presumption arising from the habits of the people, it commits an error in law and a second appeal is competent. AIR (Vol 7) 1920 Lah 354: 1 Lah 206: 113 PLR 1920: 56 Ind Cas 728.

——**S. 100 — Appreciation of evidence — Error of law affecting weight to be attached to evidence — Remand.**

The Lower Appellate Court can attach such value as it thinks proper to each piece of documentary evidence and the High Court in second appeal could not go into the weight to be attached to each. AIR (Vol 3) 1916 Cal 691: 19 CWN 1015: 31 Ind Cas 695 (DB).

——**S. 100 — Appreciation of evidence — Witnesses — Credibility — Second appeal.**

Where evidence is disbelieved simply because the witness is a 'patwari' or a relative of the party producing him and such other general reasons, it is an error in law and a second appeal will lie. (1914) 1 OLJ 383: 25 Ind Cas 660.

——**S. 100 (S. 584 old Code) — Exclusion of evidence — An error of law.**

Held, that the Court on second appeal can set aside the finding when the Court of first appeal wrongly excluded the settlement proceedings from its consideration and disregarded the evidence of road-cess returns filled by the tenants, and thereby committed errors of law. (1907) 11 CWN 1028 (1030) (DB).

——**S. 100 (S. 584 old Code) — Inference from evidence — Evidence, disregard of.**

Where in a second appeal the question was whether certain lands appertained to plaintiff's tenure — Held, that a finding of the lower appellate Court thereon which amounted merely to an expression of opinion could not be accepted as a finding of the first Court, and further, that the lower appellate Court had erred in law in disregarding certain evidence without giving sufficient reasons for rejecting it. (1907) 11 CWN 380 (389) (DB).

——**S. 100 (S. 584 old Code) — Error of law — Refusal to issue fresh process to the witness — Discretion.**

Where a Court, in the exercise of its discretion refuses to issue fresh process to a witness, such failure is not an error of law in which a second appellate Court will interfere. (1903) 7 CWN 514: 30 C 947 (949) (DB).

——S. 100 (S. 584 old Code) — 'Refusing to allow local investigation' is not such error of law as to justify interference — (1903) 30 C 536 (537) (DB).

——**S. 100 (S. 584 old Code) — Second appeal — Erroneous view of evidence, involving an error of law — Failure to consider an important portion of the evidence — Appealability.**

An erroneous view of the evidence, which involves an error of law, such as failure to consider an important portion of the evidence bearing on a party's title is a ground for second appeal. (1902) 30 C 207 (210) (DB).

27. Estoppel.

See Notes 46 and 60.

28. Existence of things or facts.

——**S. 100 — Finding that buildings erected on portion of holding were not consistent with agricultural purpose is one of fact.**

The finding that the buildings erected on a portion of a holding were not erected for convenient or profitable use or occupation of the holding and were not consistent with the purpose for which it was let is a finding of fact and cannot be challenged in second appeal. AIR (Vol 33) 1946 Nag 131: ILR (1945) Nag 709: 1945 NLJ 516 (DB).

——S. 100 — A finding as to the period during which a 'ghari' (cattle shed) has been in existence is one of fact and does in no way depend upon the entries in the 'patwari's' papers. AIR (Vol 24) 1937 Oudh 370: 1937 OWN 544: 1937 RD 258: 168 Ind Cas 302 (DB).

——**S. 100 — Disruption of joint family.**

A finding that there has or has not been a disruption of a joint Hindu family is not a finding of fact and can be questioned in second appeal. AIR (Vol 21) 1934 Nag 13: 144 Ind Cas 919.

29. Forfeiture.

——**S. 100 — Interference — Grounds — Discretion exercised by lower Court in the matter of relief against forfeiture of tenancy — Principles.**

Relief against forfeiture incurred by a tenant is an equitable relief in the discretion of the Court; where both the lower Courts have exercised the discretion against the tenant, the High Court will not in second appeal ordinarily interfere with the exercise of such discretion unless it is satisfied that the discretion was not judicially exercised or was exercised without proper materials. AIR (Vol 37) 1950 Bom 123: ILR (1949) Bom 883: 51 Bom LR 987 (DB).

——**S. 100 — Discretionary relief — Interference — Relief against forfeiture under lease — Grant of — Interference in second appeal.**

It is admittedly a matter of discretion whether the lower Court will or will not grant relief to a lessee against forfeiture under S. 114, T. P. Act; and provided the principles on which it acts are not wrong, no Court of second appeal will interfere with the exercise of discretion. AIR (Vol 34) 1947 Bom 86: 48 Bom LR 608: 230 Ind Cas 67 (DB).

——**S. 100 — Power of lower Court to grant relief to lessee against forefeiture — Interference in second appeal.**

To grant or not relief to a lessee against forefeiture, is a matter of discretion with the lower Court; and, provided the principles on which it acts, are not wrong, no Court of second appeal

will interfere with the exercise of the discretion. (1946) 48 Bom LR 608 (610) (DB).

——S. 100 — **Question whether document amounts to denial of title.**

Whether a certain document amounts to a denial of the title of the landlord so as to entail forfeiture is a pure question of law not involving any further investigation and can be allowed to be raised in second appeal. AIR (Vol 33) 1946 Mad 57: 58 MLW 566: (1945) 2 MLJ 416: 1945 MWN 683.

——S. 100 — **Question of forfeiture — Must be raised early.**

It is not proper to allow a party to raise in second appeal, for the first time, the point that an 'anubhavam' tenure has been forfeited by alienation, in view of the conflict of decisions on the point and the possibility that it may have to be decided as one of custom and not of law. AIR (Vol 22) 1935 Mad 682: (1935) MWN 866: 42 MLW 596: 158 Ind Cas 228.

30. Fraud.

——S. 100 — **Finding, how far binding on High Court, explained.**

Though the High Court is bound by the findings of the first Appellate Court on the facts upon which the allegations of fraud are based, the question whether facts so found justify the inference of fraud is a question of law and the High Court is entitled to draw an inference of its own. (The Court held justified in drawing an inference of fraud and collusion). AIR (Vol 31) 1944 Mad 465: 57 MLW 370: (1944) 2 MLJ 8.

——S. 100 — **Partition, whether fraudulent is question of fact — Intention to divide is question of fact.**

Whether the partition effected by the suit was fraudulent and collusive or not is a question of fact; whether the parties to a partition did or did not intend to effect a diversion in status is a question of fact. AIR (Vol 30) 1943 Mad 369: (1943) 1 MLJ 39: 56 MLW 130: 209 Ind Cas 290.

——S. 100 — **Finding that person was guilty of fraud supported by evidence is conclusive.**

A finding that a person was guilty of fraud when supported by evidence, is conclusive in second appeal. AIR (Vol 29) 1942 Mad 632: (1942) 2 MLJ 213: 55 MLW 422: 1942 MWN 640: ILR (1943) Mad 47: 202 Ind Cas 732.

——S. 100 — **Objection that execution application is fraudulent cannot be raised in second appeal for first time — Similarly objection that execution application was defective as not mentioning previous application cannot be raised for first time in second appeal.**

An objection raised in the High Court which was not raised in either of the Courts below to the effect that the present application is fraudulent in that the decree-holder has suppressed certain particulars with the intention of misleading the Court must be disallowed.

Similarly an objection which was not taken in the Courts below, namely, that the present application for execution is defective in that it does not refer to the previous application and also does not mention the results of the previous application to which it refers must be disallowed. AIR (Vol 28) 1941 Nag 152: 1940 NLJ 319: 194 Ind Cas 641.

——S. 100 — **Finding as to, is one of fact.**

The finding of the lower Appellate Court on the question of fraud is a clear finding of fact which cannot be challenged in second appeal. AIR (Vol 28) 1941 Oudh 341: 1941 OWN 643: 13 RD 563: 194 Ind Cas 195.

——S. 100 — The concurrent finding of the Courts below that the sale in the certificate proceedings was not vitiated by fraud is a finding of fact and binds the High Court in second appeal. AIR (Vol 28) 1941 Pat 529: 7 BR 782: 23 PLT 195: 194 Ind Cas 479.

——S. 100 — **New plea.**

If the question of fraud, misrepresentation or gross negligence is neither suggested, nor put in issue in the lower Court, it cannot be raised in second appeal. AIR (Vol 22) 1935 Lah 10: 8 RL 465: 150 Ind Cas 1085.

——S. 100 — **Fraud not set up in pleadings — Appellate Court if can entertain plea.**

Where no case of fraud is set up in the pleadings, nor is an amendment asked for at any stage the Appellate Court has no jurisdiction to entertain the plea. AIR (Vol 21) 1934 Nag 226: 31 NLR 27: 152 Ind Cas 398.

——S. 100 — Adjustment of firm debt towards private debt of partner does not necessarily amount to fraud in the absence of proof of fraud. The Court would be erring in law if it holds that such a mere act of adjustment is prejudicial to the firm. It is open to the High Court to interfere in second appeal. AIR (Vol 18) 1931 Lah 136: 12 Lah 270: 32 PLR 583: 136 Ind Cas 260.

——S. 100 — Whether a transaction is fraudulent is question of fact. AIR (Vol 13) 1926 Oudh 501: 94 Ind Cas 927.

31. Genuineness of document.

See Note 17.

32. Grounds.

——S. 100 — Where the essential allegation of the plaintiff was that his father K and M were brothers and the lower Court came to the finding of fact on the evidence adduced, that K and M were brothers but the name of their father was S and not A as alleged by the plaintiff, the High Court will not, in second appeal, interfere with the finding on the ground that it was contrary to pleadings of the plaintiff and that the lower Court should not have believed the evidence adduced. AIR (Vol 30) 1943 All 183: 1943 AWR 52: (1943) ALJ 93: 206 Ind Cas 415 (DB).

——S. 100 — Civil P. C., O. 2, R. 6 is an enabling rule and the fact that Court has not chosen to avail of it is not a ground for interference in second appeal. AIR (Vol 28) 1941 Oudh 56: 1940 OWN 862: 1940 AWR (CC) 366: 1940 OLR 568: 16 Luck 153: 190 Ind Cas 334.

——Ss. 100, and 101 — **S. 101 restricts power of second appeal — Respondent in appeal under S. 100, if can challenge findings of fact.**

Per Mya Bu, J. — Section 100, Civil P. C., is an enabling section. It enables a party aggrieved by a decree passed in appeal by a Court subordinate to the High Court. Section 101 restricts the grounds of such appeal only to the grounds mentioned in S. 100. The restriction is imposed on the party appealing against a decree passed in appeal by a Court subordinate to the High Court. There is thus nothing in the language of these two sections which gives countenance to the view that a respondent in an appeal under S. 100 is debarred from challenging the correctness of the findings of fact of the First Appellate Court which, in spite of such findings, dismissed the appeal. AIR (Vol 26) 1939 Rang 59: 179 Ind Cas 946.

——S. 100 — **Erroneous finding of fact.**

There is no jurisdiction to entertain a second appeal on the ground of erroneous findings of fact, however gross the error may seem to be. The proper legal effect of a proved fact is essentially a question of law, but the question

whether a fact has been proved when evidence for and against has been properly admitted is necessarily a pure question of fact. AIR (Vol 25) 1938 Lah 357: 180 Ind Cas 555.

——S. 100 — The grounds of fact relied on in the lower Courts cannot be gone into in second appeal. AIR (Vol 24) 1937 Rang 249: 171 Ind Cas 14.

——S. 100 — Shifting of onus of proof by lower Appellate Court no ground for second appeal when decision not effected on merits. (1936) 38 PLR 577.

——S. 100 — Extremely strong grounds are necessary for interfering with the finding of the trial Judge who heard the witnesses that they were unworthy of belief. AIR (Vol 16) 1929 Nag 117: 116 Ind Cas 432.

——S. 100 — The finding of the lower appellate Court cannot be set aside merely on the ground that undue weight was laid on certain facts which it was proper to consider. AIR (Vol 16) 1929 Nag 270: 119 Ind Cas 674.

——S. 100 — Misconception of law, pleadings and effect of evidence are grounds for interference. AIR (Vol 13) 1926 Nag 416: 95 Ind Cas 636.

——S. 100 — Plea of law not raised in the grounds of second appeal — Court can allow the plea to be raised. AIR (Vol 12) 1925 All 783: 88 Ind Cas 1013: 47 All 932: 23 ALJ 856: 6 LRA (Vov.) 483 (DB).

——S. 100 — Want of evidence or erroneous view of the law are the only grounds for interference. AIR (Vol 12) 1925 Cal 169: 80 Ind Cas 290 (DB).

——S. 100 — Refusal to admit document produced late is ground for second appeal. AIR (Vol 11) 1924 Pat 208: 72 Ind Cas 397.

——S. 100 — New ground of appeal on facts showing 'prima facie' good claim can be allowed. AIR (Vol 10) 1923 All 176: 80 Ind Cas 1041: 45 All 59. (DB).

——S. 100 — Plea of res judicata not raised in memorandum was allowed.

A plea of 'res judicata' was entertained in the second appeal though not taken in the memorandum of appeal. AIR (Vol 10) 1923 Lah 560: 74 Ind Cas 577: 5 LLJ 163.

——S. 100 — An objection not taken in either of the lower Courts cannot be entertained as a ground of second appeal, the more so if the respondents have had no notice, in the memo of appeal that it would be urged. AIR (Vol 9) 1922 Mad 519: 69 Ind Cas 363: 16 MLW 620: 31 MLT 454: 44 MLJ 596 (DB).

——S. 100 — Finding on insufficient grounds.

A finding of fact that a deed is admissible, arrived at by the Appellate Court without sufficient grounds being shown, is subject to second appeal, if it has prejudiced the trial of the appeal. AIR (Vol 7) 1920 All 294: 60 Ind Cas 96 (DB).

——S. 100 — New plea — Notice to quit.

The High Court in second appeal is not bound to consider a ground of defence not raised in the Courts below. AIR (Vol 6) 1919 Mad 130: 10 LW 137: (1919) MWN 548: 52 Ind Cas 517 (DB).

——S. 100 — Custom — "Usage having the force law" — When a ground of second appeal.

The words "usage having the force of law" in S. 100 (a) of the Code do not give the Court any larger powers of interference with findings as to custom in so far as they are findings of fact than any other finding of fact. While the reliability of evidence let in is for the Lower Appellate Court, the value attached to the evidence if it is accepted as true and the relevancy of the evidence are questions to be considered by the High Court also. If in spite of uncontradicted instances ranging over a long period and recognized judicially in several cases, the Lower Appellate Court finds against the existence of a custom on the ground that in its opinion the instances are not sufficient in number, the High Court can hold on the facts found that the custom is legally established. 41 Mad 374: 34 MLJ 104: 23 MLT 44: (1918) MWN 350: 7 LW 243: 44 Ind Cas 699: AIR (Vol 5) 1918 Mad 1 (FB).

——S. 100 — Finding of fact — No evidence.

An allegation of absence of evidence to support a specific finding of fact is a ground of law. (1917) 4 OLJ 140: 40 Ind Cas 139.

——S. 100 — Appreciation of evidence.

Failure of the Lower Appellate Court to appreciate a document put in evidence is not a ground for second appeal. AIR (Vol 3) 1916 Pat 59: 38 Ind Cas 158 (DB).

——S. 100 — Finding of fact — Presumption.

Questions of fact cannot be raised in second appeal on the assumption that every piece of evidence legally admissible either raises a presumption or shifts the burden of proof. AIR (Vol 2) 1915 Mad 680: 1 LW 197: 22 Ind Cas 369 (DB).

——S. 100 — Finding of fact — Unsatisfactory consideration of.

An unsatisfactory discussion of evidence, is not, like absence of evidence or disregard of it a ground for interference in second appeal. AIR (Vol 2) 1915 Mad 463: (1914) MWN 833: 1 LW 772: 16 MLT 300: 25 Ind Cas 700 (DB)

——S. 100 — Grounds — Reference to the Original Court's decision.

On a second appeal the decision of the Lower Appellate Court is the only one to be referred in the grounds of appeal and not the decision of the Original Court. (1913) 6 Bur LT 180: 7 LBR 39: 21 Ind Cas 232 (DB).

——S. 100 — Exclusion of evidence — Objection to in second appeal.

Where evidence is excluded by an original Court and such exclusion is not objected to in the first Appellate Court such objection cannot be raised in second appeal. (1912) 16 Ind Cas 213 (Cal) (DB).

——S. 100 — Appreciation of evidence.

It is not a sufficient ground for second appeal that the Lower Appellate Court has misunderstood the result of the first Court's local investigation or that it has erred in the importance attached to certain documents which were admissible in evidence. (1909) 13 CWN 105: 4 Ind Cas 329 (DB).

——S. 100 (S. 584 old Code) — "Specified".

Per Mookerjee J.:— The ruling in 20 C. 93 by the Privy Council did not lay down that under S. 584, C. P. C., a Court of second appeal cannot deal with a question not specified in the memorandum of appeal. (1907) 34 C 941 (951): 6 CLJ 327: 11 CWN 959 (969) (DB).

33. Inference from facts.

See also Note 57.

(a) Concurrent Inferences.
(b) Finality.
(c) Fraud.
(d) Intention.

See also Note 57.

(e) Nature of Right.
(f) Question of fact.
(g) Question of law.
(h) Soundness.
(i) Status.

——S. 100 — **Question of law — Inference from facts.**

An erroneous inference drawn from a proved fact justifies interference in second appeal. AIR (V 37) 1950 Assam 216: ILR (1950) 2 Assam 137.

——S. 100 — **Mixed question of fact and law — Existence of custom — Jurisdiction of second appellate Court.**

Mixed questions of law and fact are open to reconsideration in second appeal by a third Court, and the soundness of the conclusion in law from proved facts can also be examined. Whenever the existence of a custom is in dispute the resulting decision is partly one of fact and partly one of law. Whether a particular piece of evidence is reliable or not is a matter essentially for the Court determining facts. A law-point arises when, taking all the facts together, a legal custom has to be inferred. Whether the custom satisfies the test of reasonableness and the question whether it is exercised as of right are questions of law. Also the general question whether from the proved facts in the case a valid legal custom can be inferred is a question of law. AIR (Vol 37) 1950 Nag 54: ILR (1950) Nag 128: 1950 NLJ 636.

——S. 100 — **Question of law — Sufficient cause — Limitation Act, S. 5.**

The inference drawn by a Court as to whether certain facts found by it to have been established amount to "sufficient cause" or not under S. 5 of the Limitation Act, is one of law and not one of fact, and can, therefore, be assailed in second appeal. AIR (Vol 34) 1947 Lah 76: 48 PLR 325: 225 Ind Cas 291.

——S. 100 — A question of law does not arise every time an inference is made from a set of proved facts. It can only arise if the ultimate inference is itself a question of law and not one of fact. AIR (Vol 25) 1938 Nag 522 (525): 11 RN 448: 181 Ind Cas 226.

——S. 100 — **Double inference.**

Two inferences possible from facts found — One drawn by lower Courts — No question of law arises. AIR (Vol 17) 1930 Nag 200: 122 Ind Cas 379 (DB).

——S. 100 — **Erroneous.**

Survey Record-of-Rights is a piece of evidence and if the Court draws such inference from that evidence as it thinks proper, the High Court will not interfere in second appeal merely because it is urged that the construction put on the evidence is wrong. AIR (Vol 17) 1930 Pat 319.

——S. 100 — Where legal conclusions have been erroneously deduced from ascertained facts there is an error of law which can be challenged in second appeal. AIR (Vol 16) 1929 All 767.

——S. 100 — **Propriety of.**

Finding as to occupation by a common ancestor based not on any direct evidence but on inferences drawn from other pieces of evidence — Question whether inferences are properly drawn can be raised in second appeal. AIR (Vol 16) 1929 Lah 198: 10 LLJ 455: 116 Ind Cas 325.

——S. 100 — Inference of law from admitted facts — High Court can interfere if inference is wrong. AIR (Vol 12) 1925 All 796: 87 Ind Cas 64.

——S. 100 — Where two inferences from facts are possible & one is drawn by lower Court, Court of second appeal will not interfere. It is only when only one legal inference is possible and that has not been drawn that the second appellate Court might interfere. AIR (Vol 11) 1924 Nag 160: 78 Ind Cas 112.

——S. 100 — Finding of fact — Two inferences from fact possible — High Court is bound by lower Court's inference. AIR (Vol 10) 1923 Lah 239: 79 Ind Cas 814.

——S. 100 — A finding that a possession is adverse is not a question of fact but a matter of legal inference drawn from the facts found. AIR (Vol 10) 1923 Nag 65: 6 NLJ 70: 74 Ind Cas 51.

——S. 100 — Where the sole question in a case is one of fact and the inference is to be drawn from facts, a second appeal is not competent. AIR (Vol 6) 1919 Lah 221: 54 PWR 1919: 51 Ind Cas 620.

——S. 100 — **Question of law — Deductions from facts found.**

In second appeal, the High Court can make deductions from the facts found without disturbing the findings of the Lower Appellate Court. AIR (Vol 4) 1917 Cal 674: 19 CWN 1330: 32 Ind Cas 119 (DB).

——S. 100 — **Finding of fact — Wrong inference from facts whether binding in second appeal.**

Where a wrong inference is drawn from facts, the Chief Court will not be bound by the finding in second appeal. AIR (Vol 4) 1917 Lah 350: 8 PWR 1917: 39 Ind Cas 717.

——S. 100 — **Finding of fact — Interference by High Court.**

In second appeal the Chief Court will not interfere with finding of facts, where they are based on a consideration of all the material facts and evidence. AIR (Vol 4) 1917 Lah 30: 112 PR 1916: 38 Ind Cas 62.

——S. 100 — **Consent of reversioner — Implied — Question of law.**

The question whether reversioner's consent to an alienation can be inferred from the established facts is a point of law. AIR (Vol 3) 1916 Mad 901: 18 MLT 521: (1916) MWN 123: 31 Ind Cas 487 (DB).

——S. 100 — **Finding of fact — Inference by lower Courts.**

When the High Court is satisfied that the conclusions drawn by the lower Courts from the facts are legally deducible, it will not enquire in second appeal as to whether those conclusions are correct or not. (1913) 7 SLR 11: 20 Ind Cas 523 (DB).

——S. 100 — **Question of law — Inference from facts.**

Although an erroneous finding of fact cannot be challenged in second appeal unless it is shown that there is an error of procedure or that there is no evidence in support of the finding, yet inferences drawn from facts found might be questioned in second appeal. (1912) 15 Ind Cas 509 (Oudh).

——S. 100 — **Question of law — Inference from facts.**

When rents are received in the name of a tenant from his transferee, the question of correct inference from the fact is one of law and not of fact. (1910) 14 CWN 68: 2 Ind Cas 148 (DB).

——S. 100 (S. 584 old Code) — **Question of law — Totally erroneous inference of law drawn from undisputed facts.**

The High Court is competent to interfere with a decision based entirely upon totally erroneous inferences of law drawn from facts and evidence about which there is no dispute. (1906) 4 ALJ 38: 29 A 203 (205): 1906 AWN 307 (DB).

——S. 100 (S. 584 old Code) — **Finding of fact — Inference.**

When the lower Courts attach erroneous legal inferences to findings of pure facts, they are open to correction in second appeal. (1903) 5 Bom LR 225 (228) (DB).

——S. 100 (S. 584 old Code) — **Facts admitted — Legal inference.**

A widow having died after granting an izara voidable by the successor, the lessee continued in possession after her death and paid two instalments of revenue out of the rents as directed by the lease. The successor made no attempt to pay

the revenue herself, but had given two notices in which she referred to the leases as expired and to her intention to collect rents directly from the tenants, but did not say that she elected to determine the izara. Held, that the legitimate inference was that by allowing rents to be paid in the shape of payments of revenue, the izara had not been determined by the widow's successor. (1901) 28 C 532 (540): 5 CWN 279 (DB).

(a) Concurrent Inferences.

——S. 100 — Ancestral nature of land.

Where the trial Court draws an inference from the revenue records that certain land is ancestral, and the inference drawn by the Court is one which has been drawn by a Division Bench of the High Court in another case, the correctness of which judgment has not been impugned by any subsequent decision of authority, the finding of the trial Court cannot be said to be arrived at illegally or improperly and its decision is not contrary to law or usage or vitiated by one of the defects mentioned in S. 100. AIR (Vol 18) 1931 Lah 704: 32 PLR 559.

(b) Finality.

——S. 100 — Finding of fact — Finding based on surmise and inference not warranted by evidence on record — Finality.

A Court of justice is not entitled to draw inferences which are not warranted by the evidence on record. If it draws such inference and bases its conclusions on surmises, it acts illegally and its findings even on facts, cannot be conclusive in second appeal. AIR (Vol 35) 1948 Pat 247 (DB).

——S. 100 — Finding of first Appellate Court being inference from facts — Facts not considered — Finding can be interfered with in second appeal.

When the judgment of the first Appellate Court is one of reversal and the finding which he has arrived at is in the nature of an inference from the facts and circumstances of the case, its failure to take into consideration the very facts and circumstances upon which the findings of the trial Court were based amounts to such an error as would justify the High Court in interfering with the decision of the first Appellate Court. AIR (Vol 30) 1943 Pat 177: 9 BR 330: 22 Pat 154: 206 Ind Cas 525 (DB).

——S. 100 — The High Court is not justified in setting aside inferences of fact in second appeal particularly when they are not shown to have been based on an incorrect application of any principle of law. AIR (Vol 29) 1942 Cal 261: 74 CLJ 95: 205 Ind Cas 22.

——S. 100 — So far as the facts are concerned, the finding of the lower Appellate Court cannot be questioned in second appeal. AIR (Vol 28) 1941 Mad 379: (1941) 1 MLJ 161: 53 MLW 230: 1941 MWN 87.

——S. 100 — Finding of fact, even if it may not be very satisfactory, cannot be challenged in second appeal. AIR (Vol 26) 1939 Lah 284: 41 PLR 149.

——S. 100 — When the Court only considers various documents as mere pieces of evidence involving no question of construction, its inference of fact is not open to challenge in second appeal. AIR (Vol 26) 1939 Nag 197: (1939) NLJ 297: ILR (1939) Nag 580: 186 Ind Cas 155.

——S. 100 — Where a finding of the lower Appellate Court regarding inferential delivery of property rests on evidence, it is an inference of fact and such findings of fact are binding in second appeal unless it is shown that the inference is impossible in law. AIR (Vol 26) 1939 Pat 218: 5 BR 244: 179 Ind Cas 583.

——S. 100 — Interpretation of facts by lower Court — If can be dealt with in second appeal.

Where the facts are clear and what is in dispute is interpretation of the facts by the lower Appellate Court, its findings are not the findings of fact & they can be dealt with in second appeal. AIR (Vol 25) 1938 Lah 180: 40 PLR 506: 178 Ind Cas 81.

——S. 100 — An inference of fact from the facts found cannot be interfered with in second appeal on the ground that the Court did not give due weight to the evidence. AIR (V 24) 1937 Cal 371 : 65 CLJ 325 : 173 Ind Cas 358.

——S. 100 — Where the finding of adverse posession or the contrary is an inference from facts found by the lower appellate Court, that inference is open to be dealt with by the Court in second appeal. AIR (Vol 21) 1934 All 288: 17 RD 1085: 149 Ind Cas 807.

——S. 100 — Issue simple.

Where the issue is a simple one, the High Court will not lightly interfere with the findings of fact of the trial Court which had no opportunity of watching the demeanour of witnesses. AIR (Vol 21) 1934 Cal 520: 38 CWN 438: 152 Ind Cas 1073 (DB).

——S. 100 — Where the finding is based, not on direct evidence but on inferences, it can be challenged in second appeal. AIR (Vol 20) 1933 Lah 458: 34 PLR 297: 144 Ind Cas 741.

——S. 100 — From the fact that lambardari dues were never paid, the decision that they were not due is not a finding of fact but an inference which can be interfered with in second appeal. (1929) 10 LRA (Rev) 155: 113 Ind Cas 746.

——S. 100 — Inferences from facts or circumstances can be set aside only if they are wrong. AIR (Vol 13) 1926 Mad 511: 50 MLJ 251: 1926 MWN 344: 94 Ind Cas 458.

——S. 100 — View of law based on facts incorrect — View of facts is not binding in second appeal. AIR (Vol 13) 1926 Nag 197: 90 Ind Cas 196.

——S. 100 — Decision of lower appellate Court drawing one out of two possible inferences cannot be challenged in second appeal. AIR (Vol 13) 1926 Nag 192: 90 Ind Cas 209.

——S. 100 — Inferences of fact that entries were unreliable cannot be interfered with as they are inferences of fact. AIR (Vol 11) 1924 Lah 719: 6 LLJ 311: 85 Ind Cas 89.

——S. 100 — Where the lower Court has dealt with all the essential points in deciding the case and has also analysed the evidence and the main findings which determine the suit are warranted by the evidence on record, the Court of second appeal will not disturb his findings though they may be wrong. AIR (Vol 11) 1924 Nag 240: 78 Ind Cas 887.

——S. 100 — In second appeal it is not the business of the High Court to assess the value of evidence relied upon by the lower Appellate Court. A wrong inference from facts does not entitle the High Court to interfere. A finding of the lower Appellate Court as to a gift being incomplete for want of acceptance, at the time of its revocation, is one of fact and binding on the High Court. AIR (Vol 11) 1924 Oudh 164 : 74 Ind Cas 818.

——S. 100 — Interference not allowed when findings not wrong in law or without evidence. AIR (V 11) 1924 Pat 591 : 75 Ind Cas 846 (DB).

——S. 100 — Mistake of law or want of evidence only will entitle setting aside. AIR (Vol 11) 1924 Pat 336 : 1923 PHCC 332: 75 Ind Cas 946 (DB).

——S. 100 — The High Court cannot in second appeal question the correctness of the inferences from the facts of a case that the consideration for a bond sued on was the withdrawal of a non-compoundable case. AIR (Vol 11) 1924 Pat 305: 74 Ind Cas 843 (DB).

——S. 100 — Question of fact — High Court cannot interfere unless finding is wholly unreasonable.

AIR (Vol 8) 1921 Sind 20: 15 SLR 84: 62 Ind Cas 1002 (DB).

——**S. 100 — Finding of fact — No evidence.**

The High Court has authority to interfere in second appeal if the findings are not reasonably deducible from the evidence. AIR (Vol 5) 1918 Nag 215: 48 Ind Cas 742.

——**S. 100 — Finding of fact — Inference from facts.**

The High Court will not interfere in second appeal with one of two possible inferences drawn by the lower Court. (1918) 46 Ind Cas 794 (Nag).

(c) Fraud.

——S. 100 — Where there is no direct evidence of alleged fraud and only an inference is drawn from circumstantial evidence, then the finding involves the legal question as to whether the circumstances are such that the necessary inference can legally be derived. AIR (Vol 27) 1940 Pat 201: 6 BR 262: 20 PLT 957: 185 Ind Cas 816.

——**S. 100 — Fraud — Findings as to, is a matter of proof and not surmise.**

It would be doing a grave and lamentable injustice in making against a party an imputation of fraud as to which no issue was fixed, to which no one has ventured to testify, and which seemed to rest solely upon an allegation in the written statement which contained no mention of fraud and which was not supported by any evidence. The finding of the High Court that the appellant (before the Privy Council) perceived (i.e., knew) that the respondents executed the deed of sale under a mistake of law, was a matter of proof, not surmise, and since no evidence either of the fact or of his knowledge of it was given, the finding could not be sustained. AIR (Vol 26) 1939 PC 219: 5 BR 889: 1939 OWN 694: 20 PLT 641: 1939 AWR 152: 50 MLW 394: (1939) MWN 991: 44 CWN 1: (1939) ALJ 844: 182 Ind Cas 892.

——**S. 100 — Question whether inference from facts is legally justified — Evidence directed to prove fraud.**

Where certain facts are found and an inference is drawn from the facts so found, it is open to the Court in second appeal to consider whether as a matter of law such inference is justified by the facts found. Whether the evidence is directed to prove fraud or conspiracy, the principle will equally apply because that principle applies to all circumstantial evidence and amounts simply to this, that the inference drawn from such evidence must be one which necessarily flows from it. AIR (Vol 25) 1938 Pat 147: 19 PLT 398: 4 BR 429: 174 Ind Cas 388.

——**S. 100 — Fraudulent transfer.**

Transfer of Property Act, S. 53 — To hold a transanction fraudulent, the creditor need not have filed a suit — High Court will interfere if the inference from proved facts is that the transaction is fraudulent. AIR (Vol 13) 1926 Nag 494: 96 Ind Cas 356.

——S. 100 — Where certain facts are found and an inference of fraud is drawn, based upon the facts so found, it is open to the Court in second appeal to consider whether, as a matter of law, such an inference is justified by the facts found. If, however, the first appellate Court, which is the ultimate judge of fact refuses to draw an inference of fraud upon the facts so found by it, that decision cannot be questioned in second appeal, unless the facts found necessarily amount to fraud; even if, upon a consideration of all the circumstances, High Court might have drawn a different inference and come to a different conclusion, unless that inference necessarily followed from the facts proved, the High Court would not be entitled to disturb the findings of the first appellate Court. AIR (Vol 9) 1922 Pat 507: 3 Pat LT 501: 77 Ind Cas 957: 1922 PHCC 269: 2 Pat 65: 1 Pat LR 18 (DB).

——**S. 100 — Fraud — Question of law — Evidence.**

The second appellate Court's duty is to see whether the facts found by the Court of first instance justify the inference of fraud, just as the Courts in England have got to do cases tried by them with a Jury. (1913) 17 CLJ 209: 16 Ind Cas 811 (DB).

(d) Intention.

See also Note 57.

——**S. 100 — Tenant executing kabuliyat — Rent never realized at kabuliyat rate — Inference that kabuliyat was never meant to be acted upon, whether inference of fact — Bengal Tenancy Act (VIII of 1885), S. 3.**

It cannot be said as a matter of law that no inference can be drawn from the fact that rent was never realised at the kabuliyat rate but at a lower rate and that the parties never meant to act upon the kabuliyat from the beginning. The inference drawn by the Court is an inference of fact based on admissible evidence and is not open to challenge in a second appeal. (1936) 164 Ind Cas 437: 39 CWN 885.

——S. 100 — A finding that a transfer was genuine and was not made with intent to defeat or delay other creditors is a finding of fact and not a matter of legal inference from proved facts. AIR (Vol 18) 1931 Nag 67: 27 NLR 8: 131 Ind Cas 662.

——S. 100 — Where two alternative conclusions as to intention are possible and Court arrives at one of such conclusions, its conclusion is a finding of fact. AIR (Vol 17) 1930 Lah 936.

——S. 100 — Where the question involved (e.g. whether a certain transaction amounts to a sale or a mortgage) is not, simply of the proper construction of a document but of inference to be drawn from the deed and from other evidence as to the intention of the parties to the transfer, it is one of fact and cannot be challenged in second appeal. AIR (Vol 15) 1928 Lah 930: 110 Ind Cas 762.

——S. 100 — The question as to whether a landlord recognised a certain person's tenancy is a question of inference as to a state of mind on the part of the landlord and it is open to the High Court in second appeal to enquire as to whether the facts would go to prove recognition. AIR (Vol 12) 1925 Cal 761: 85 Ind Cas 636.

——S. 100 — A finding that the facts as found did not indicate an unequivocal declaration of intention on the part of any of the joint holders to hold his share separately is not a finding of fact but an inference of the legal effects of facts found and can be set aside in second appeal. AIR (Vol 11) 1924 Nag 410: 21 NLR 12: 79 Ind Cas 884.

——**S. 100 (S. 584 old Code) — Finding of fact — Erroneous inference.**

Where an appellate Court draws a conclusion from certain facts found, and if such conclusion is an erroneous conclusion, the error committed is in a matter of law, which the High Court in second appeal has the power to interfere with and an inference drawn by the lower appellate Court against an intention to keep alive a prior mortgage from the mere fact that the defendants had no knowledge of the prior mortgage at the time of the defendant's mortgage was set aside as erroneous. (1904) 8 CWN 690 (695).

(e) Nature of Right.

——S. 100 — The inference to be drawn from the proved facts is not a question of fact but, on the contrary, is a question of law. Hence an inference as to the nature of a tenancy from proved facts is a question of law. AIR (Vol 26) 1939 Pat 448: 20 PLT 579: 18 Pat 571: 6 BR 45: 184 Ind Cas 363 (DB).

——**S. 100 — Inference as to nature of tenancy from facts found is question of law.**

The question of the nature of the tenancy is a mixed question of fact and law. The inference as to the nature of the tenancy from the facts found is a question of law which can be gone into in second appeal. AIR (Vol 25) 1938 Pat 333: 4 BR 736: 19 PLT 555: 11 RP 93: 176 Ind Cas 562.

——**S. 100 — Question of customary right.**

The question whether customary right is to be inferred from evidence is one of law. (1936) 160 Ind Cas 990: 18 NLJ 172.

——**S. 100 — Mixed question of law and fact — Transferability — Right to offerings.**

The question whether or not the right to collect the offerings made to the deity installed in a temple is transferable is not a pure question of law. The answer to the question must in every case depend on a variety of circumstances which can only be proved by evidence. AIR (Vol 15) 1928 All 721: 113 Ind Cas 242: 50 All 394: 26 ALJ 185 (DB).

——**S. 100 — Mixed question of law and fact — Extent of interest.**

The question whether the purchaser purchased in the auction sale, held in execution of a decree, the individual interest of the judgment-debtor, or the entire interest of the judgment-debtor and his undivided sons in respect of the properties specified in the sale proclamation and sale certificate, is doubtless a mixed question of law and fact. Case-law considered. AIR (Vol 14) 1927 Mad 311: 99 Ind Cas 838: 52 MLJ 68 (DB).

——S. 100 — Whether what the purchaser got at the Court sale was the entire family properties or only the father's share in a certain joint Hindu family, is a mixed question of law and fact. 17 Cal 584 (PC) and 22 Mad 110 (PC) treated as overruled by later rulings. AIR (Vol 13) 1926 Mad 851: 23 MLW 349: 94 Ind Cas 68.

——S. 100 — The question whether possession is adverse or permissive may often be one of legal inference from documents. AIR (Vol 13) 1926 Nag 129: Ind Cas 663.

——S. 100 — Where from an open user continued without interruption for a period of over 20 years and not shown to be attributable to permission or sufferance on the owner's part, the final Judge of fact i.e., the first Appellate Court draws an inference or presumption that it is as of right, the High Court cannot interfere with the finding. AIR (Vol 12) 1925 Nag 168: 7 NLJ 232: 85 Ind Cas 84.

——S. 100 — Second appeal lies from decision that appellant who had agreed to sell land and had taken advance but had not conveyed registered title, had sold the land. AIR (Vol 12) 1925 Rang 68: 86 Ind Cas 205: 2 Rang 59.

(f) Question of fact.

——**S. 100 — Question of fact dealt with as one of law — Decree resulting is bad and must be set aside.**

Plaintiffs instituted a suit against the defendants for opening up of the closed drain and for an injunction restraining the defendants from causing any obstruction to the flow of water from the plaintiffs' house and for damages caused to plaintiffs' wall by logging water. A point was taken for the first time in appeal as to whether by fixing of pipe on the plaintiffs' well, the burden of easement would increase or not. The question was decided, not on evidence in the case, but on inference drawn from the mere existence of pipe that the burden of easement would necessarily increase:

Held, that the question was one of fact but since it was decided as a question of law, the decree resulting from such decision was bad and ought to be set aside in second appeal. AIR (Vol 28) 1941 All 289: (1941) ALJ 282: 1941 RD 366: 1941 AWR (Rev) 171: 195 Ind Cas 364.

——**S. 100 — Finding of fact based on inferences from conduct.**

Section 100 is equally applicable to cases in which the findings are based on inference.

A question of fact is nonetheless a question of fact for the purposes of S. 100, even though part of the proof depends upon inferences drawn from the conduct of the parties. AIR (Vol 22) 1935 Mad 70: 40 MLW 755: 154 Ind Cas 614.

——S. 100 — Case of presumed contract — Finding of legal origin is one of fact. AIR (Vol 17) 1930 Mad 339: 120 Ind Cas 743.

——S. 100 — Transfer of Property Act, S. 136 — "Traffic in" connotes something more than a mere sale — Whether mere sale amounts to "trafficking in" is a question of fact. AIR (Vol 14) 1927 Pat 2: 97 Ind Cas 373: 8 PLT 201 (DB).

——S. 100 — The finding that certain payments made by the mortgagors must be considered as payments made towards interest as such is a question of fact. AIR (Vol 13) 1926 Nag 245: 91 Ind Cas 200 (DB).

——S. 100 — An inference of fact from admitted entries in documents cannot be disturbed in second appeal unless the inference is perverse or illegitimate. AIR (Vol 12) 1925 All 353: 85 Ind Cas 584: 6 LRA Civ 139.

——S. 100 — Question of inferences from documents other than documents of title is one of fact. AIR (Vol 12) 1925 All 39: 78 Ind Cas 1016.

——S. 100 — A finding based on inferences to be derived from documentary evidence is a finding of fact. AIR (Vol 11) 1924 Oudh 185: 74 Ind Cas 811.

——**S. 100 — Lost grant — Question of fact.**

When from a certain set of facts, a Court infers a lost grant the decision is on a question of fact and not of law and cannot be challenged in second appeal. AIR (Vol 7) 1920 Cal 361: 31 CLJ 501: 57 Ind Cas 350 (DB).

——**S. 100 (S. 584, old Code) — Suit for malicious prosecution — Question of fact.**

In a suit for malicious prosecution, absence of probable and reasonable cause is a question of fact. (1901) 28 C 591 (593) (DB).

(g) Question of law.

——**S. 100 — Conclusion of law arising from facts.**

The proper inferences to be drawn from the findings of the lower Appellate Court is a question of law and can be considered in a second appeal. AIR (V 33) 1946 All 118 : 221 Ind Cas 607.

——**S. 100 — Question of law.**

The proper inference to be drawn from the contents of documents is a question of law and the High Court can consider whether the conclusion arrived at, by the lower Court is correct. AIR (V 33) 1946 Bom 454 (DB).

——**S. 100 — Whether structure is of permanent character is partly inference of law.**

Whether a structure is of a permanent character or not is not a pure inference of fact but is partly an inference of law. AIR (V 30) 1943 Nag 77 : 1942 NLJ 145 : ILR (1943) Nag 226 : 203 Ind Cas 540.

——**S. 100 — Legal effect of proved fact and inference from proved fact — Distinction.**

The proper legal effect of a proved fact is essentially a question of law. But this does not mean that it is a question of law whether a certain inference should be drawn from proved facts. It only means that the legal effect of a finding of fact is a question of law. AIR (V 29) 1942 Oudh

19 : 1941 OWN 1027 : 1941 AWR (Rev.) 778 : 17 Luck 158 : 196 Ind Cas 175.

——S. 100 — **Inference drawn from circumstances — Finding involves legal question.**

Though a Court of second appeal is not competent to question the soundness of a finding of fact by the Court below, and the decision of the lower Court as to the effect of the evidence must stand final as to the fact, yet the soundness of the conclusions derived from the findings of fact may involve a matter of law and may, therefore, be questioned by a Court second appeal. AIR (V 27) 1940 Pat 201 : 6 BR 262 : 20 PLT 957 : 185 Ind Cas 816.

——S. 100 — **Conclusions of law arising from facts.**

Whether legal inferences arise from certain facts, whether conclusions in law arising from certain facts are or are not correct, are questions of law which can be considered in second appeal. AIR (V 26) 1939 Sind 97 (98) : ILR (1939) Kar 269 : 181 Ind Cas 888.

——S. 100 — **Proper inference to be drawn from proved facts.**

The question what is the proper legal inference to be drawn from the proved facts of the case is a point of law and can be raised in second appeal. AIR (V 25) 1938 Bom 492 : 40 Bom LR 1015 : 178 Ind Cas 854.

——S. 100 — **Whether right legal inferences have been drawn from facts.**

While a Court in second appeal will not interfere with findings of fact of the lower Appellate Court, whether right legal inferences have been drawn from those facts, whether, for instance, the possession is adverse or not, whether a transfer is made with intent to defeat or delay within the meaning of S. 53, T. P. Act, are questions of law, which can be dealt with in second appeal. AIR (V 25) 1938 Sind 215 : ILR (939) Kar 136 : 178 Ind Cas 469.

——S. 100 — **Questions as to whether lower Courts drew correct inference from circumstantial evidence.**

The proper legal effect of a proved fact is essentially a question of law; so also is the question of admissibility of evidence, and the question of whether any evidence has been offered on one side or the other; but the question whether the fact has been proved, when evidence for and against has been properly admitted, is necessarily a pure question of fact. The question as to whether the lower Courts drew the correct inference or not from the circumstantial evidence on the question as to whether a party had constructive notice or not of certain maintenance allowances is, therefore, a pure question of law and the finding on it can be challenged in second appeal. AIR (V 24) 1937 Oudh 301 : 1937 OWN 438 : 167 Ind Cas 962.

——S. 100 — **Question whether misconduct can be inferred from facts, whether one of law.**

The question whether misconduct can be inferred from a set of facts is a question of law. AIR (V 24) 1937 Pat 289 : 3 BR 554 : 169 Ind Cas 354.

——S. 100 — **Inference from facts when question of law and when question of fact stated.**

An inference from facts admitted or proved may, under certain circumstances, be a question of law, but is not necessarily a question of law and where the conclusion arrived at by the court below is one which hinges upon a balance of evidence produced in the case, the said conclusion is one of fact and not of law. AIR (V 17) 1930 All 218 (DB).

——S. 100 — Punjab Pre-emption Act, S. 22 (4) — Plaintiff who was ordered to deposit purchase money filing security bond instead — Acceptance of the security bond does not imply that order for cash deposit is varied — Finding based on mere inference from acceptance of security bond is not one of fact. AIR (V 17) 1930 Lah 567 : 31 PLR 327 (DB).

——S. 100 — Question as to what is the legal inference from admitted facts is a question of law. AIR (V 17) 1930 Mad 449 : 58 MLJ 581 (SB).

——S. 100 — Findings on questions of facts are undoubtedly binding on appellate court in second appeal. But inference from proved facts is always a question of law and therefore any inference drawn by lower appellate court from proved facts is not binding on appellate court if in arriving at that inference the lower appellate court has misdirected itself on any matter of law. AIR (V 16) 1929 All 875 : 119 Ind Cas 111.

——S. 100 — An inference from admitted or proved facts is a question of law. AIR (V 15) 1928 All 381 : 116 Ind Cas 91 : 26 ALJ 887 (DB).

——S. 100 — Correctness of conclusions drawn from a finding of fact is question of law. AIR (V 15) 1928 Lah 722 : 111 Ind Cas 645 (DB).

——S. 100 — The question whether the lower court was justified in its inference from findings of fact must be regarded as one which is still open to consideration on second appeal. (1928) 112 Ind Cas 847 (Lah).

——S. 100 — The existence of legal necessity is a matter of inferences from facts found and the question whether the inferences are legal or not is a question of law. AIR (V 13) 1926 Nag 332 : 9 NLJ 70 : 95 Ind Cas 553.

——S. 100 — Delay is a question of fact, but the finding that it disentitles the plaintiff from certain relief is one of law and can be examined in second appeal. AIR (V 12) 1925 Nag 58 : 82 Ind Cas 105.

——S. 100 — Where the facts are not in dispute the inference which the Court below draws from these facts and the legal standard of reasonable care set up by it are questions of law and the High Court can see whether the Court below was right in holding e.g., that the defendant in despatching baled jute in a boat with 20 or 30 leaks, 1 or 1-1/2 inches in length, through which water entered into the boat, the jute being left in the hold of the boat for 30 hours, complied with the requirements of S. 151, of the Contract Act merely because there was continuous pumping out of the water which had only the effect of saving the boat. AIR (V 11) 1924 Cal 92 : 80 Ind Cas 279 : 27 CWN 1017 (DB).

——S. 100 — The question whether a particular section of an Act does or does not apply to the facts as found is a question of law. AIR (V 10) 1923 All 583 : 74 Ind Cas 307 : 45 All 520 : 21 ALJ 424 : 4 LRA Civ 234 (DB).

——S. 100 — Inference from fact is a question of law. AIR (V 10) 1923 Mad 54 : 43 MLJ 556 : 71 Ind Cas 330 : 16 MLW 473 : 1922 MWN 639 (DB).

——S. 100 — Inference from given set of facts is question of law. AIR (V 8) 1921 Bom 385 : 45 Bom 1186 : 23 Bom LR 514 : 63 Ind Cas 248 (DB).

——S. 100 — **Ouster — Exclusion from joint Hindu family.**

It is not always an easy matter to separate a finding of fact from a question of law. It may often be open to argument that the materials which have been accepted by one Court as establishing a certain conclusion were not in them-

selves sufficient for its support, if their legal weight had been properly measured and ascertained. A question of what constitutes exclusion from a joint estate may well in many cases be a question of law. AIR (V 4) 1917 PC 77 : 21 CWN 1142: (1917) MWN 642: 42 Ind Cas 258.

(h) Soundness.

——S. 100 — Whether facts found justify conclusion drawn, can be considered.

The Court can, in second appeal consider whether the facts found justify the conclusion drawn by the lower Courts. AIR (V 25) 1938 Sind 206 : ILR (1939) Kar 140 : 178 Ind Cas 801 (DB).

——S. 100 — Legal inference from finding of fact — Second appeal.

Although a second Appellate Court cannot entertain an appeal upon any question as to the soundness of findings of fact by a second Court, it can nevertheless adjudicate as matter of law upon the soundness of the conclusions which have been derived from those findings. AIR (V 24) 1937 Oudh 47 : 1936 OWN 1057 : 1936 RD 504 : 166 Ind Cas 232 (DB).

——S. 100 — No Court of second appeal can entertain an appeal upon any question as to the soundness of the finding of fact by the Court of first appeal, and if, however, unsatisfactory it might be if examined, there is evidence to be considered, the decision of that Court must stand final and when the decision given is legal and not perverse or contrary to reason that cannot be challenged. AIR (V 17) 1930 Oudh 176 : 115 Ind Cas 448 : 4 Luck 665 : 6 OWN 206 (DB).

——S. 100 — Soundness of conclusions drawn from facts is matter of law. AIR (V 16) 1929 Nag 270 : 119 Ind Cas 674.

——S. 100 — Mixed question of law and fact.

The question of adverse possession is a mixed question of law and fact, and in dealing with this question the appellate Court has to consider the findings of fact arrived at by the lower appellate Court and then to see whether the inference which that Court has drawn from these facts was proper or not. AIR (V 13) 1926 Cal 881 : 94 Ind Cas 38 (DB).

——S. 100 — Conclusion from finding of fact can be attacked. AIR (V 10) 1923 Lah 497 : 77 Ind Cas 473 (DB).

——S. 100 — The High Court is entitled in Second Appeal to consider the validity of the Lower Appellate Court's inferences from the facts found proved and to appreciate their weight for itself. AIR (V 8) 1921 Mad 661 : 40 MLJ 301 : 62 Ind Cas 534 : 13 MLW 218 : 1921 MWN 233 (DB).

——S. 100 — Adverse possession — Mixed question of fact and law.

The question of adverse possession is a mixed question of fact and law. The soundness of the conclusions from the facts found is a matter of law and can be questioned by the High Court in second appeal. (1920) 24 CWN 1057 (DB).

(i) Status.

——S. 100 — Finding of fact — Record of Rights — Construction — Inference of status of tenant from entry in Record — If one of fact or law — Finality in second appeal.

An inference as to the status of a tenant drawn from the entries in the Record of Rights is an inference of fact, and, even if there be an error in the interpretation of a portion of the record, there is no error of law which vitiates the finding so as to make it assailable in second appeal. AIR (V 37) 1950 Pat 252.

——S. 100 — Question of law — Inference from proved facts — Partition among members of family — Documentary evidence consistent with partition — Finding of lower Court — Interference in second appeal.

Two brothers who were at one time joint settled down in different villages and they were each of them enjoying in his village the potter service inam lands and rendering service pertaining to that office. It was shown that taxes were paid separately by each branch in respect of the properties in the respective village and one did not pay taxes for the lands in the other's village. There was, further, separate cultivation of the property and separate enjoyment. Water applications were made by the defendant in his own name and orders were issued to him. Similarly, land encroachment notices were served upon the defendant in his own name. The defendant also dealt with the properties as belonging to him individually by mortgaging it on several occasions.

Held, that the cumulative effect of the documents and the evidence was that the parties had become divided and that the property in the hands of the defendant was his separate property and not joint family property in which the plaintiff who belonged to the other branch could claim a share.

When the question of drawing a legal inference from an appraisement of the facts arises, the case involves a question of law on which the High Court in second appeal can finally decide. AIR (V 34) 1947 Mad 426: (1947) 1 MLJ 79: 60 LW 88 : 1947 MWN 95.

——S. 100 — Question of law — Inference from findings.

The proper inference to be drawn from the findings arrived at by the lower appellate Court in respect of the disruption of the joint status of a family, is a question of law and can be considered in a second appeal. AIR (V 33) 1946 All 118: 221 Ind Cas 607 : 1946 AWR (HC) 158 (2).

——S. 100 — Tenancy is permanent.

The proper effect of a proved fact is a question of law and the question whether a tenancy is permanent or precarious is a legal inference from facts and not in itself a question of fact. Hence the finding that the tenants had the status of permanent tenants is not binding on the Judge of the Court in second appeal. AIR (V 28) 1941 Pat 228: 20 Pat 115: 7 BR 946: 22 PLT 721: 195 Ind Cas 583 (DB).

——S. 100 — Partition.

While the High Court will not interfere with findings of facts in the lower Court, what is the legal inference to be drawn from these facts is a question of law and it can, therefore, consider and decide questions of partition. For instance, the Appellate Judge finding that the sons are necessarily separate from their father when the father separates from his brother is clearly a finding of law and clearly wrong. AIR (V 27) 1940 Sind 138 : 190 Ind Cas 271 (DB).

——S. 100 — Inference that a woman is public prostitute drawn from findings of fact that certain women are "kept" women earning livelihood by selling their bodies, is one of law. AIR (V 17) 1930 Lah 824: 123 Ind Cas 536: 31 PLR 547 (DB).

——S. 100 — Second Appellate Court can interfere with a finding as to the legal status of a party. AIR (V 14) 1927 Nag 200: 101 Ind Cas 252.

——S. 100 — Status as public prostitutes is a question of law. AIR (V 13) 1926 Lah 461 : 93 Ind Cas 827.

——S. 100 — Inferences as to jointness or disruption of joint Hindu family are findings of fact.

The inferences drawn from facts admitted or proved as to the jointness or disruption of a joint Hindu family are themselves findings of fact; and as such whatever may have been omitted or disregarded or misunderstood or misappreciated, provided always the findings be based on evidence, those findings are conclusive so far as the High Court is concerned. AIR (V 13) 1926 Lah 443 : 27 PLR 223 : 97 Ind Cas 817 (DB).

——S. 100 — The question of status of the tenant is a matter of inference as to whether certain legal conditions had been made out or not. AIR (V 12) 1925 Cal 1238 : 85 Ind Cas 757.

——S. 100 — The finding of the lower Appellate Court that there was a partnership as defined in the Contract Act is not a finding of fact by which the High Court is bound. The findings that are final are those on the facts from which the existence of the legal relationship of partners might or might not be inferred provided of course, they are not otherwise unsound. A servant whose remuneration varies with profits may be a partner in the popular sense but not in the legal sense. AIR (V 9) 1922 Nag 96 : 69 Ind Cas 781.

——S. 100 — Status of tenant.

Whether the grantee is a tenant under the grantor is a question of law from findings of fact and is open to revision on second appeal. (1911) 38 Cal 273 : 15 CWN 266 : 9 Ind Cas 394 (DB).

34. Inheritance.

——S. 100 — Question whether a Hindu can inherit to a Muhammadan is not a pure question of law. AIR (V 18) 1931 Sind 170 : 25 SLR 493 : 134 Ind Cas 1171 (DB).

35. Interest.

——S. 100 — Finding of fact — Whether person is interested in tenure — Finding on — Finality.

The question whether a person has an interest or is interested in a tenure is essentially a question of fact, and the finding thereon cannot be impeached in second appeal, unless there is an utter absence of evidence on the point. AIR (V 37) 1950 Pat 391 (DB).

——S. 100 — It is a question of law as to whether the plaintiff is entitled to receive interest upon the transaction in suit, and when the facts on record about this question are admitted or proved beyond controversy, the plea of interest can be raised in appeal even for the first time, even though the defendant may not have specifically denied in his pleadings the plaintiff's claim for interest. AIR (V 36) 1939 Rang 42 : 130 Ind Cas 300 (DB).

——S. 100 — Findings as to whether rate of interest is excessive.

A finding as to whether the rate of interest is excessive involves a question of fact with which the Appellate Court has no power to interfere. AIR (V 22) 1935 Lah 440 : 159 Ind Cas 205.

——S. 100 — Whether a payment of interest can be said to be made "as such", is a question of fact in each case. AIR (V 13) 1926 All 329 : 93 Ind Cas 295 (DB).

——S. 100 — Question of the award of future interest is discretionary with the Court and is not a pure question of law. AIR (V 10) 1923 Lah 513 : 77 Ind Cas 416.

——S. 100 — Interest, rate of — Finding that rate hard and unconscionable — High Court will not interfere. AIR (V 7) 1920 Cal 884 : 61 Ind Cas 275 (DB).

——S. 100 — New plea — Interest.

The question about the liability to interest under the Interest Act cannot be raised in the second appeal for the first time. AIR (V 6) 1919 Cal 1077 : 48 Ind Cas 465 (DB).

——S. 100 — Rate of interest.

Rate of interest — Finding as to, is one of fact — Discretion exercised by lower Court — Appellate Court will not interfere unless it be arbitrary — Appeal. AIR (V 9) 1922 All 335 : 69 Ind Cas 758 (DB).

——S. 100 — Decree objected to in second appellate court — No appeal to first Court.

Where interest was not allowed to plaintiff at a certain rate in the first court and there was no appeal to the first appellate court as to that portion of the decree the party cannot take the objection in the second appellate court. But the objection was allowed where the second appellate court was remanding the case to the lower appellate court for disposal with instructions to give effect to the objection in case it ultimately varies the first court's decree. (1903) 30 C 953 (960).

36. Jurisdiction.

——S. 100 — Question of law — Lower Court wrongly entertaining appeal which does not lie — Second appeal.

Obiter — Where a subordinate Court wrongly entertains an appeal when it has no jurisdiction to do so, a second appeal lies against that Court's order. AIR (V 37) 1950 Pat 90.

——S. 100 — Question of fact going to the root of jurisdiction of trial and lower Appellate Courts.

The questions of fact which go to the root of the jurisdiction of the trial and the lower Appellate Courts cannot be treated as finally determined by the appellate decision of the lower Appellate Court, and the finding must be treated as subject to scrutiny before the High Court can declare that the trial Court has jurisdiction. AIR (V 26) 1939 Pat 140 : 5 BR 199 : 179 Ind Cas 128.

——S. 100 — Decree of lower Court, when can be set aside.

The High Court in second appeal cannot set aside the decree of the lower Appellate Court unless it can be shewn that that decree was wrong. AIR (V 25) 1938 All 116 : (1937) ALJ 1305 : 1937 AWR 1200 : 174 Ind Cas 254.

——S. 100 — Lower Court wrongly refusing to grant equitable relief.

The High Court will always interfere in second appeal when a lower Court has wrongly refused to grant an equitable relief. AIR (V 24) 1937 Mad 520 : (1937) MWN 245 : 45 MLW 648 : 170 Ind Cas 242.

——S. 100 — Appeal lies to High Court on point of jurisdiction.

Where the lower Appellate Court has heard an appeal which it was not competent to entertain, as the order appealed against was not appealable, it is open to the High Court to set aside the order entertaining the appeal, and, therefore, an appeal lies to the High Court merely on the question of jurisdiction. AIR (V 23) 1936 Lah 212 : 38 PLR 717 : 163 Ind Cas 121.

——S. 100 — Question of jurisdiction depending upon public documents is one of law and can be raised at a late stage. AIR (V 21) 1934 Sind 123 : 28 SLR 54 : 155 Ind Cas 677 (DB).

——S. 100 — Question of — Finding of fact — Finality — Excess of jurisdiction.

Appellate Court cannot interfere if decision of lower Court though defective is based on findings of facts. But where the lower Court goes beyond findings of facts, and its decision is wrong. the appellate Court can interfere. AIR (V 16) 1929 Oudh 447 : 6 OWN 859 : 10 LRA Rev. 358.

——S. 100 — New plea — Question of jurisdiction not raised in second appeal — Question can be raised in Letters Patent Appeal. AIR (V 16) 1929 Rang 77 : 6 Rang 783 : 114 Ind Cas 540 (DB).

——S. 100 — Jurisdiction — Decree of lower Appellate Court without jurisdiction.

A second appeal lies to the High Court against a decree of the Appellate Court passed without jurisdiction. AIR (V 6) 1919 Cal 368 : 29 CLJ 48 : 49 Ind Cas 137 (DB).

——S. 100 — Jurisdiction — Second appeal.

Where a decree has been made by the Appellate Court without jurisdiction an appeal lies against the precisely in the same way as if it had been made with jurisdiction. AIR (V 5) 1918 Cal 435 : 45 Cal 926 : 27 CLJ 115 : 43 Ind Cas 758 (DB).

——Ss. 100 and 101 — Finding of fact — Gross error.

The High Court has no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however, gross or inexcusable the error may seem to be. AIR (V 4) 1917 Lah 363 : 104 PWR 1917 : 89 PR 1917 : 40 Ind Cas 772 (DB).

——S. 100 — Finding of fact — Jurisdiction of High Court.

The High Court in deciding a second appeal said that on a careful consideration of evidence and circumstances, it thought the appellant must succeed:

Held, that it was beyond the limits of the High Court in second appeal. (1910) 6 Ind Cas 760 Cal (DB).

——Ss. 100 and 115 — Jurisdiction — Question of.

Appellant though not applying under S. 115, C. P. C., is not prevented from coming in second appeal on the question of jurisdiction. (1910) 5 Ind Cas 158 (Cal).

——S. 100 — Question of jurisdiction when can be allowed to be raised for the first time in second appeal.

The Court will allow a question of jurisdiction to be raised for the first time in second appeal, but the contention must be substantiated on the facts already found or else fail. (1908) 12 CWN 1036 : 8 CLJ 116 (117) (DB).

——S. 100 — Second appeal — Court determining questions arising from facts — When facts are undisputed — Remand when unnecessary.

Where the lower appellate court judge declined to exercise the jurisdiction vested in him by law, the facts being undisputed, their Lordships, proceeded to decide the question raised in the case upon those facts instead of remanding the case to the lower appellate court. (1904) 31 C 737 (742) (DB).

37. Legal Necessity.

——S. 100 — Absence of power to bind or of legal necessity are findings of fact.

A finding that the elder brother had no power to bind his younger brother with a promise to pay a barred debt or that a particular amount was not borrowed for legal necessity is a finding of fact and cannot be disturbed in second appeal. AIR (V 30) 1943 All 63 : (1942) ALJ 656 : ILR (1943) All 171 : 1942 AWR (HC) 382 : 206 Ind Cas 377 (DB).

——S. 100 — Finding as to, is one of fact — When based on consideration of evidence it cannot be interfered with.

Where the necessities recited in the sale-deeds have been minutely scrutinized and both the Courts have found that these never existed, the finding is a concurrent finding of fact based on a consideration of the evidence on the record and cannot be interfered with in second appeal. AIR (V 30) 1943 Cal 203 : 47 CWN 288 : 206 Ind Cas 599 (DB).

——S. 100 — Question of legal necessity is one of fact. AIR (V 23) 1936 Pat 275 : 2 BR 495 : 17 PLT 488 : 162 Ind Cas 797 (DB).

——S. 100 — Alienation by Hindu widow, whether for legal necessity or not.

Where both the Courts below have held that the alienation was justified by legal necessity, this being a finding of fact, cannot be questioned in second appeal. AIR (V 22) 1935 Pat 175 : 1 BR 642 : 156 Ind Cas 774 (DB).

——S. 100 — Finding that necessity has not been proved.

A finding that necessity for certain terms has not been proved is one of fact and cannot be challenged in second appeal. AIR (V 21) 1934 Lah 517: 35 PLR 532: 153 Ind Cas 241.

——S. 100 — Although a finding of fact on the question of necessity may be challenged in certain circumstances, for example, when there is no evidence to support it or when it proceeds on erroneous principles of law, yet when the finding is not vitiated by any error of law, it cannot be challenged. AIR (V 20) 1933 Lah 343 : 34 PLR 113 : 14 Lah 584 : 150 Ind Cas 184.

——S. 100 — Where, in a suit by a minor impeaching an alienation by his guardian, the lower Court, upon a consideration of all the evidence adduced by the parties found that the alienation was for necessity, that finding is one of fact and is binding in second appeal. (1932) 140 Ind Cas 686 : 33 PLR 607 (DB).

——S. 100 — Question of legal necessity is not a mere question of law and where an enquiry into the question is shut out in the lower Appellate Court by the omission of the appellant to challenge the same, the matter cannot be re-opened in the second appeal. AIR (V 18) 1931 Nag 147 : 14 NLJ 84 : 133 Ind Cas 390.

——S. 100 — A concurrent finding that a debt was incurred for legal necessity cannot be impugned in second appeal if it is based on admissible evidence. AIR (V 18) 1931 Oudh 144 (2) : 8 OWN 222 : 132 Ind Cas 271 (DB).

——S. 100 — Alienation — Question as to necessity is one of law. It is not possible to lay down a principle that in all tribes custom would recognise an alienation for a debt due from a previous holder of the land as a justifiable necessity. AIR (V 14) 1927 Lah 896 : 100 Ind Cas 803.

——S. 100 — Hindu Law — Alienation — Necessity — Finding as to existence of legal necessity can be examined in second appeal. AIR (V 13) 1926 Nag 486 : 96 Ind Cas 1006.

——S. 100 — Existence of necessity is question of fact — Whether lender should see to the application of money is a question of law. AIR (V 12) 1925 Oudh 740 : 90 Ind Cas 345.

——S. 100 — Alienation by Hindu widow — Enquiry by alienee, as to legal necessity — Sufficiency of enquiry is question of law. AIR (V 12) 1925 Oudh 557 : 85 Ind Cas 489 : 27 OC 329.

——S. 100 — Finding as to passing of consideration and existence of legal necessity is not one of fact. AIR (V 11) 1924 Lah 689 : 75 Ind Cas 674.

——S. 100 — The finding of the Lower Appellate Court that one of the vendors was a cripple and incapable of working, and that his share of the price was required for his personal necessities, is a finding of fact and cannot be contested in second appeal. AIR (V 11) 1924 Lah 685 : 78 Ind Cas 148 : 6 LLJ 313.

——S. 100 — Finding as to existence of necessity for alienation is a finding of fact. AIR (V 10) 1923 Lah 669 : 78 Ind Cas 11.

——S. 100 — Finding as to necessity on wrong principles can be examined in Second Appeal. AIR (V 10) 1923 Lah 660 : 79 Ind Cas 980.

——S. 100 — Question of necessity for an alienation may be one of fact or of law, and when the point raised is whether the Court below has infringed rules and maxims laid down by High Court and has decided on wrong principles as to the quantum of proof of necessity required, then the question is one of law. AIR (V 10) 1923 Lah 41 : 79 Ind Cas 211.

——S. 100 — Consideration and necessity — Finding as to, is one of fact. AIR (V 9) 1922 Lah 398 : 4 Lah LJ 243 (DB).

——S. 100 — The defendant cannot be allowed to raise in appeal the point of failure to prove legal necessity for the stipulated rate of interest when no such plea was taken in the Court below nor any issue raised on that point. AIR (V 9) 1922 Pat 356 : 67 Ind Cas 790 : 1 Pat 612 : 3 Pat LT 367 (DB).

——S. 100 — Alienation of ancestral property by Hindu father — Finding as to legal necessity is a finding of fact. AIR (V 8) 1921 Lah 304 : 63 Ind Cas 515 : 3 LLJ 491 (DB).

——S. 100 — Legal necessity — Alienation — Evidence — Finding of fact.

A finding of fact not based on evidence or proceeding on a wrong principle is open to question in second appeal. In deciding the question of legal necessity the Court should take into consideration all the circumstances of the alienor. AIR (V 5) 1918 Lah 8 : 38 PLR 1918 : 92 PWR 1918 : 47 Ind Cas 39.

——S. 100 — Finding of fact — Legal necessity.

An Appellate Court will not interfere with a concurrent finding of the two lower Courts as to the legal necessity for a sale. AIR (V 2) 1915 Lah 177 : 1 PLR 1915 : 234 PWR 1915 : 27 Ind Cas 645.

38. **Limitation.**

——S. 100 — Question of limitation not depending upon additional facts can be raised for first time.

A question of limitation not depending upon additional facts and being purely a question of law can be allowed to be raised & argued for the first time in second appeal. AIR (Vol 33) 1946 Mad 453.

——S. 100 — Question of limitation, when founded on facts which are not disputed, is a question of law and may be taken for the first time in appeal. AIR (Vol 28) 1941 Sind 158 : ILR (1941) Kar 124 : 196 Ind Cas 565 (DB).

—— S. 100 — Condoning delay.

District Judge exercising discretion and condoning delay in filing appeal which was originally filed in wrong Court:

Held, that the order was not illegal and could not be contested in second appeal. AIR (Vol 24) 1937 Lah 767: 39 PLR 995: 175 Ind Cas 927.

——S. 100 — New plea.

If the decision on the questions of limitation involves questions of fact, it cannot be raised for the first time in second appeal. AIR (Vol 21) 1934 Cal 467 : 38 CWN 168 : 152 Ind Cas 172 (DB).

——S. 100 — Limitation Act (IX of 1908), S. 5 — Discretion, exercise of — Whether can be questioned in second appeal.

Where a discretion under S. 5, Lim. Act, has been exercised on proper lines, that discretion will not be questioned in second appeal. But where the discretion has been exercised arbitrarily without due regard to principles, that discretion cannot be said to have been properly exercised, and it may be challenged in second appeal. AIR (Vol 20) 1933 All 294: (1933) ALJ 561: 144 Ind Cas 133.

——S. 100 — After consideration of all facts and circumstances, Court coming to conclusion that no case has been made out for exercise of discretion under S. 5, Lim. Act and appeal dismissed — Case is not fit one for interference under S. 100. AIR (Vol 18) 1931 All 28 (1): (1930) ALJ 1256: 130 Ind Cas 840 (2) (DB).

——S. 100 — Plea depending on facts.

Plea of limitation though point of law but depending upon facts, if not raised in lower Courts or in memorandum of second appeal cannot be raised only at time of argument in second appeal. 125 Ind Cas 607: 57 Cal 114: AIR (Vol 17) 1930 Cal 385 (DB).

——S. 100 — Wrong exercise of discretion — Second appeal lies.

Where the lower appellate Court declined to extend the time under S. 5, of the Limitation Act on a ground which is untenable, the High Court can interfere in second appeal. AIR (Vol 17) 1930 Lah 1068: 122 Ind Cas 575.

——S. 100 — Question of law — Reducing period for redemption in mortgage suit.

When in a mortgage suit the Court reduces the period for redemption from forty to fifteen years, the decision 'qua' the justifiability of allowing the term of forty years to stand can be questioned in second appeal. AIR (Vol 17) 1930 Lah 1060.

——S. 100 — Proper exercise — No interference in second appeal.

The question whether sufficient cause existed for the non-presentation of appeal within time in the lower appellate Court is primarily one for decision by that Court and the High Court will not interfere if the lower Court has exercised the discretion in a judicial manner. (1930) 123 Ind Cas 83 (Lah).

——S. 100 — Plea depending on facts.

Where the question of limitation depends upon the finding of fact relating to the possession of a party and the point was not raised before the lower Appellate Court, it is not open to the appellant to raise it in second appeal. (1929) 115 Ind Cas 680: 10 PLT 53 (DB).

——S. 100 — Plea depending on facts.

Limitation Act, S. 3 — Court of appeal cannot take up the question of limitation 'suo motu' when it depends on enquiry on facts — The plea must be raised in pleadings or put in issue. 115 Ind Cas 71: 11 LLJ 91: 30 PLR 296: AIR (Vol 16) 1929 Lah 432.

——S. 100 — New plea.

Plea — Even if raised for first time in second appeal must not be refused where facts necessary to support plea are admitted or apparent. 114 Ind Cas 734: 1929 ALJ 229: AIR (Vol 15) 1928 All 689 (DB).

——S. 100 — New plea.

Plea of limitation should be allowed even for first time in second appeal but case cannot be remanded to find out facts for showing that claim is barred — Limitation Act, S. 3. 115 Ind Cas 606: 32 CWN 778: AIR (Vol 15) 1928 Cal 870 (DB).

——S. 100 — Mixed question of law and fact.

Limitation is a mixed question of law and fact. 97 Ind Cas 635: AIR (Vol 14) 1927 Cal 30 (DB).

——S. 100 — Plea depending on facts — Even a plea of limitation cannot be raised in second appeal for first time if dependant on evidence.

Although questions of limitation being questions of law are not excluded from being heard in second appeal when they have not been raised in the lower courts, still where a question of law depends upon a finding of fact on evidence and that evidence has not been led in the trial court, High Court in second appeal will not deal with the question of law. 72 Ind Cas 326: 25 Bom LR 245: AIR (Vol 10) 1923 Bom 254 (DB).

——S. 100 — New plea.

Limitation, question of — Is one of law and can be raised in second appeal for the first time. 65 Ind Cas 580: AIR (Vol. 9) 1922 Lah 240 (DB).

——Ss. 100 and 115 — Conversion of revision into second appeal — Appeal barred at time of alteration.

When a revision petition is by order of Court altered into a second appeal, the second appeal will be in time if at the date of the filing of the revision, the time for second appeal, had not expired. (1916) 11 UBR 106: 10 Bur LT 10: 34 Ind Cas 264: AIR (Vol 4) 1917 Upp Bur 9.

——S. 100 — New plea — Limitation.

Per Macleod J.: — There may be cases where admissions on the pleadings clearly show that the plaintiff's claim is barred, but it is very rarely that such admissions appear and in such cases, the plea of limitation on the ground of adverse possession can be raised in second appeal. 38 Bom 227: 16 Bom LR 111: 24 Ind Cas 716: AIR (Vol 1) 1914 Bom 47 (DB).

——S. 100 — New plea — Limitation and adverse possession.

The question of limitation by adverse possession could not be raised for the first time in second appeal. (1909) 5 LBR 82: 3 Ind Cas 711.

——S. 100 — (S. 584, old Code) — Omission to decide a material issue, ground of second appeal — Issue as to 'limitation', importance of.

Where the first court dismissed a suit on one of the issues, viz., that of title, observing that it was not necessary to decide the other issues, one of which was an issue as to limitation, and the second Court decreed the suit by reversing the finding of the first Court on the issue of title, but omitted to record a finding on the issue of limitation: Held, that the case must be remanded to the lower appellate Court for findings on the remaining issues. (1906) 4 CLJ 86 (87) (DB).

——S. 100 (S. 584, old Code) — Limitation, question of mixed law and fact.

Where the lower Courts had found that an agent had knowledge of a certain fact in a certain year, but held that it was no notice to the principal, a Court of second appeal will not be exercising its jurisdiction wrongly, if it finds that the same facts amount to notice to principal, the action of the appellate Court in so doing being merely the application of a well known and universal rule of law as to the facts before it. (1902) 4 Bom LR 832 (837, 838): 6 CWN 849: 25 A 1: 29 IA 203 (PC).

——S. 100 — (S. 584, old Code) — Second appeal — Limitation saved by waiver, question of, how far a question for second appellate Court.

The question whether the starting point of limitation for enforcing the right under an instalment decree on default has been postponed by acceptance of overdue instalments and consequently an application for enforcing the rights under such decree within three years from the last unwaived default is within time is a mixed question of law and fact and can be dealt with by a second appellate Court. (1902) 4 Bom LR 688 (698): 27 B 1 (FB).

39. Malice.

——S. 100 — Second appeal — Suit for damages for malicious prosecution — Question as to existence of malice or absence of reasonable and probable cause — Questions of fact. See 1946 OWN 330: AIR (Vol 34) 1947 Oudh 88.

——S. 100 — Tort — Malicious prosecution — Existence of reasonable and probable cause — Finding on, influenced by question of malice and based on no materials — Finding can be interfered with in second appeal.

In a case of malicious prosecution, even if the question as to the absence of reasonable and probable cause is treated as a question of fact and of nothing but fact, a finding thereon can be interfered with in second appeal when the Judge has failed to distinguish the issue of reasonable and probable cause from the issue of malice and has wrongly allowed himself to be influenced by the issue of malice in reaching his conclusion as to the absence of reasonable and probable cause with the consequence that he has found absence of reasonable and probable cause in a case in which there are no materials whatever on which he could properly arrive at such a finding. AIR (Vol 33) 1946 All 204 (DB).

——S. 100 — Defamation case — Findings that allegations were not true and were malicious are of fact.

In a defamation case, the findings that the allegations alleged to be defamatory were not true and that they were made maliciously, are findings of fact and no second appeal lies with regard to them. AIR (Vol 29) 1942 Mad 343. (1942) 1 MLJ 247: 55 MLW 111: 1942 MWN 155: 205 Ind Cas 516.

——S. 100 — Question of fact.

The question as to the existence of malice is always one of fact and cannot be gone into in second appeal. AIR (Vol 22) 1935 Bom 355: 37 Bom LR 468: 158 Ind Cas 31 (2).

——S. 100 — Where inference is drawn from number of facts in the case and the question does not involve any wrong application of legal principle, the finding as to malice is a question of fact. AIR (Vol 21) 1934 Lah 907 (DB).

40. Marriage.

——S. 100 — Question of unchastity is one of fact.

The question of unchastity is one of fact and when there are concurrent findings and evidence on which the conclusion can be based, the matter cannot be re-opened in second appeal. (AIR Vol 33) 1946 Nag 375.

——S. 100 — Question whether re-marriage was proved — Mutation proceedings relating to re-marriage not taken into consideration — Absence of evidence to rebut presumption.

Where the lower Court had not taken into consideration the effect of mutation proceedings relating to re-marriage of a woman, the question being whether the re-marriage had been proved, and there was not sufficient evidence to rebut the presumption arising from the mutation proceedings:

Held, that the finding could be challenged in second appeal. AIR (Vol 23) 1936 Lah 864: 38 PLR 225: 167 Ind Cas 651 (DB).

——S. 100 — When a person does not state in his grounds of first appeal anything about marriage of A with B, he should not be allowed to urge in second appeal that the marriage took place and was valid. AIR (Vol 16) 1929 Nag 343: 119 Ind Cas 698.

——S. 100 — Question of fact.

The finding as to Karewa (a form of marriage) is one of fact. (1928) 111 Ind Cas 712 (Lah).

——S. 100 — Whether the facts found justify the legal inference of valid marriage is not a question of fact. AIR (Vol 14) 1927 Lah 811: 28 PLR 406: 104 Ind Cas 702.

——S. 100 — Question of Law.

Form of marriage is a question of law. AIR (Vol 13) 1926 All 1: 48 All 126: 23 ALJ 981: 6 LRA Civ 557: 90 Ind Cas 358 (DB).

——S. 100 — Question of fact.

Whether a valid marriage took place between the parties is a question of fact. AIR (Vol 11) 1924 Lah 188: 5 LLJ 505: 73 Ind Cas 896 (DB).

——S. 100 — Question of fact.

Whether a marriage has been proved is a question of fact. AIR (Vol 8) 1921 Lah 201: 5 LLJ 117: 84 Ind Cas 1039 (DB).

41. Mis-joinder.

——S. 100 — **Objection as to non-joinder of party for first time in second appeal.**

It is impossible for a party to raise an objection regarding non-joinder of a party for the first time in second appeal. AIR (Vol 28) 1941 Mad 506: 53 MLW 193: (1941) 1 MLJ 190: 1941 MWN 294: 200 Ind Cas 612.

——S. 100 —Objection as to misjoinder of parties cannot be taken for the first time in second appeal. AIR (Vol 15) 1928 Mad 635: 110 Ind Cas 548 (DB).

——S. 100 — A finding of fact on a question of misjoinder arrived at on evidence cannot be disturbed in second appeal. AIR (Vol 4) 1917 Mad 671: (1916) 1 MWN 9: 33 Ind Cas 188 (DB).

42. Misreading evidence.

——S. 100 — **Lower Appellate Court holding that admission had been made whereas no such admission had been made.**

Misconstruction of certain historical materials would not be a ground for a second appeal. But if it is a question of misreading of evidence and holding that an admission has been made, whereas, as a matter of fact, no such admission had been made, in other words, if the plaintiff had stated a certain fact and the defendant had controverted it and the lower Appellate Court, under some misapprehension, had held that the defendant in his evidence had admitted the said fact, though as a matter of fact the defendant had made no such admission, it cannot be held that, in such circumstances, no second appeal would lie. AIR (Vol 27) 1940 Lah 278: 42 PLR 216: 189 Ind Cas 676.

——S. 100 — **Finding based on conjecture and misunderstanding of evidence.**

Finding of fact based partly on conjectures and partly on a misunderstanding of the evidence is liable to be set aside in second appeal. AIR (Vol 26) 1939 Lah 510: 185 Ind Cas 137 (1).

——S. 100 — **Misapplication of law of evidence.**

Where, in a case, the convincing evidence has been set aside in the lower Appellate Court on a ground that can have no legal basis whatever, such a glaring misapplication of the law of evidence is open to correction in second appeal. AIR (Vol 25) 1938 Nag 385: ILR (1939) Nag 324: 178 Ind Cas 920.

——S. 100 — **Partnership — Legal effect of proved fact.**

In appeal from a suit for wrongful conversion, it was stated in the judgment that there was no evidence of any express contract of partnership but a contract might be implied under the circumstances under which the parties worked together. The Judge then reviewed the circumstances under which the parties worked together, and made use of three arguments; the fact of working together, the use of the hammer mark of defendant No. 1, and the fact that no remuneration was paid to the person who alleged that partnership existed or to the others, to justify him in concluding that a partnership between these persons should be implied:

Held, that from the evidence a partnership could be implied is a question of law. The legal effects of these proved facts did not amount in law to partnership, or put in another way, there was no evidence in law from which the Judge could come to the conclusion that a partnership had been established and that he, therefore, misdirected himself. Consequently, a second appeal was maintainable. AIR (Vol 24) 1937 Rang 225: 171 Ind Cas 718.

——S. 100 — Court of second appeal is not bound by finding of fact arrived at by erroneous and unwarranted assumption of facts and misreading of accounts. AIR (Vol 17) 1930 Lah 712: 125 Ind Cas 623 (DB).

——S. 100 — **Law or procedure.**

High Court can interfere with findings of fact when they result from misconstruction of document or misapplication of law or procedure. AIR (Vol 17) 1930 Pat 71: 10 PLT 630: 120 Ind Cas 292 (DB).

——S. 100 — Finding of fact — Lower court misdirecting itself as to conclusions to be drawn — Finding is not binding. AIR (Vol 15) 1928 All 39: 50 All 180: 25 ALJ 1014: 108 Ind Cas 721 (DB).

——S. 100 — Obiter — Even a misreading of the evidence by a Court of fact is not a ground of second appeal. (1928) 113 Ind Cas 575 (Cal) (DB).

—— S. 100 — Second appeal — Decision in lower appellate Court on supposed admission by plaintiff —Decision can be challenged in second appeal. AIR (Vol 15) 1928 Oudh 333: 108 Ind Cas 102.

——S. 100 — **Question of law.**

Inferences from incorrect construction — Finding can be considered. AIR (Vol 14) 1927 Mad 1167: 39 MLT 633: 104 Ind Cas 781 (DB).

——S. 100 — Finding on the question of fact based on misappreciation of true meaning of "sharing in cultivation" is vitiated. AIR (Vol 13) 1926 All 465: 94 Ind Cas 190.

——S. 100 — Judgment of lower appellate Court based on misreading of evidence is liable to be set aside in second appeal. AIR (Vol 13) 1926 Lah 541: 95 Ind Cas 240.

——S. 100 — High Court will interfere in cases where the lower Courts have misread evidence or overlooked important evidence or relied for their conclusion upon inadmissible evidence, or where they misdirected themselves as to any question of importance or where they relied upon personal knowledge or where they took a wrong view as to the onus of proof, or where they decided points not raised by the parties, or where they misconstrued important documents. When a Court misconstrues a document it relies upon a construction which it is not capable of bearing and such misconstruction leads not merely to a wrong view of the evidence but to relying upon what it considers to be an inference from the evidence which the evidence is not capable of bearing. The misconstruction of an important document, therefore, is a ground for interference. AIR (Vol 13) 1926 Mad 652: 24 MLW 88: 93 Ind Cas 307 (DB).

——S. 100 — Original grant not produced — Inam register and inam patta are foundation of inamdar's title in the absence of original grant — Their misconstruction is ground for second appeal. AIR (Vol 13) 1926 Mad 652: 24 MLW 88: 93 Ind Cas 307 (DB).

——S. 100 — Findings based on mistaken view of pleadings are not binding. AIR (Vol 13) 1926 Oudh 353: 13 OLJ 536: 3 OWN 460: 94 Ind Cas 779.

——S. 100 — Misreading of documentary evidence — Finding is not binding. AIR (Vol 13) 1926 Pat 49: 88 Ind Cas 820.

——S. 100 — **Misconception as to nature of claim.**

Misconception as to nature of claim — Second appeal lies. AIR (Vol 12) 1925 Lah 251: 6 Lah LJ 508.

——S. 100 — Document wrongly read or misconstrued by lower Court — High Court will interfere if finding is vitiated. AIR (Vol 12) 1925 Mad 1226: 88 Ind Cas 924.

——S. 100 — A finding on an issue of a lower appellate Court which is based on a misconception of what the evidence is cannot be accepted in second appeal as a legal finding on it. AIR (Vol 11) 1924 All 848: 80 Ind Cas 25: 46 All 773: 22 ALJ 739: 5 LRA Civ 533 (DB).

——S. 100 — Misapplication of law.

If the finding of fact of the lower appellate Court has been arrived at by misreading the evidence and misapplication of law, it can be interfered with in second appeal. AIR (Vol 10) 1923 Lah 585: 76 Ind Cas 553.

——S. 100 — Misreading of evidence — Finding of fact — Document not supporting — Finding — Remand.

Where the finding of a Subordinate Court is based on documentary and oral evidence and the High Court on second appeal finds that the documentary evidence does not support the conclusion, it will remand the case for a fresh finding. (1912) MWN 821: 15 Ind Cas 103 (DB).

——S. 100 — Misreading of evidence — Interference by High Court.

The High Court will interfere in second appeal with the finding of a lower Appellate Court, if it finds that it has misread and misinterpreted certain documentary evidence and based its finding on no evidence at all. (1912) 13 Ind Cas 629 (Oudh).

——S. 100 — Misreading of evidence as opposed to misconstruction of document is not a ground of second appeal especially when the whole deposition has not been misread. (1909) 3 Ind Cas 101 (Cal).

43. Mixed question.

——S. 100 — Mixed question of law and fact — Proof of Custom — Question as to — High Court's powers in second appeal to go into evidence — Extent of.

A question involving the proof of custom is a mixed question of law and fact, and therefore the High Court in appeal will go into the evidence regarding the custom, though keeping in mind that the question of credibility of the evidence is one for the Courts below. AIR (Vol 38) 1951 Orissa 327: ILR (1949) Cut 312 (DB).

——S. 100 — Mixed questions of fact and law.

The proper appreciation of the material documentary evidence in the case & the legal effect of certain important pieces of evidence and proved facts are mixed questions of fact and law which are open to reconsideration by the High Court in second appeal. AIR (Vol 33) 1946 Pat 278 (DB).

——S. 100 — Question of law — Question whether family or tribe of non-Hindu origin is governed by Hindu Law — Mixed question of law and fact.

The question whether a family or tribe of non-Hindu origin has been so far hinduised as to attract the provisions of Hindu Law in matters of inheritance and succession is a mixed question of law and fact. AIR (Vol 33) 1946 Pat 218: 24 Pat 727: (DB).

——S. 100 — Mixed question of law and fact based on interpretation of decree.

The question whether a decree for future maintenance creating the maintenance a first charge upon certain specified properties is capable of being executed is a mixed question of law and fact based on the interpretation of the decree, and cannot be raised for the first time in second appeal. AIR (Vol 33) 1946 Pat 216: 223 Ind Cas 173: 12 BR 333.

——S. 100 — Question of validity of will.

The question of the validity of a will is a mixed question of law and fact and should, therefore, be raised in the trial Court. It is too late to raise that question in appeal for the first time. AIR (Vol 31) 1944 Oudh 139: 1944 OWN 37: 1944 AWR (CC) 11: 19 Luck 55: 214 Ind Cas 276 (DB).

——S. 100 — A contention which raises a mixed question of law and fact cannot be allowed to be raised in second appeal. AIR (Vol 30) 1943 Nag 252: 1943 NLJ 331: ILR (1943) Nag 577: 208 Ind Cas 490.

——S. 100 — Question of adverse possession is mixed one of fact and law.

The question whether adverse possession is established or not is a mixed question of fact and law and can be raised in second appeal.

The property was in the actual possession of one brother B and his descendants since after the first regular settlement; the other brother C or his descendants were never in actual possession of the property. Although they set up a plea that they used to receive their share of the profits, this plea was found against them. The names of B's predecessors-in-interest all along found a place in the khewats both at the second and third settlements exclusively. During this long period, there were as many as five transfers by B and his descendants. In 1900 the village was partitioned and B alone was entered as the owner of the property. No evidence was tendered on behalf of C's descendants to show that any application for mutation was made on the death of C by his sons or by the descendants or subsequently on the death of his other sons in respect of the property:

Held, that possession of B was hostile and amounted to a clear denial of the title of C and his descendants who were excluded from participation in the rents and profits of the property. AIR (Vol 30) 1943 Oudh 398: 1943 OWN 274: 212 Ind Cas 555.

——S. 100 — Damages or interest.

Question whether amount paid by Improvement Trust in land acquisition proceedings was by way of interest or damages is a mixed question of law and fact. It is certainly not a substantial question of law. AIR (Vol 29) 1942 All 258: (1942) ALJ 352: ILR (1942) All 753: 1942 AWR 176: 202 Ind Cas 164 (DB).

——S. 100 — Question whether agreement to sell had merged in conveyance is one of mixed law and fact.

The question whether an agreement to sell contained in a sale-deed had ceased to exist by having merged in the conveyance is one of intention of the parties to the contract and being one of fact or, in any case, one of mixed law and fact, cannot be permitted to be advanced in second appeal when not specifically raised in the written statement. AIR (Vol 29) 1942 Mad 716: 1942 MWN 571: 55 MLW 563: (1943) 1 MLJ 469: 206 Ind Cas 564.

——S. 100 — Whether an application is a "fresh application within the meaning of Section 48, Civil P. C., is a mixed question of law and fact and a second appeal is competent. AIR (Vol 27) 1940 Lah 35: 186 Ind Cas 360.

——S. 100 — Misapplication of law.

Where a finding has been arrived at by misapplication of law, by wrongly placing the burden of proof, the finding is not merely a finding of fact but is one of mixed law and fact and can be set aside in second appeal. AIR (Vol 23) 1936 Rang 262: 163 Ind Cas 604.

——S. 100 — Erroneous decision — Interference.

Where the question is a mixed one of fact and law, and from one point of view, the lower Court

has decided erroneously, this fact does not give the High Court jurisdiction to interfere in revision. AIR (Vol 22) 1935 Pat 267: 1 BR 444: 155 Ind Cas 419.

——S. 100 — The question whether information given to the Police is directed against a particular person is a question partly of fact and partly of law. AIR (Vol 21) 1934 Pat 14: 154 Ind Cas 219.

——S. 100 — Mixed question of law and fact — Agency.

Per Madhavan Nair. J.— The question of agency is a mixed question of fact and law. AIR (Vol 18) 1931 Mad 381: 128 Ind Cas 455: 1930 MWN 729 (DB).

——S. 100 — Mixed question of law and fact — Merger.

On confiscation a zemindari does not merge in the permanent right of the Government so as to create a new zemindari when the estate is re-settled with another. The question whether there was merger or not is a mixed question of law and fact, and it has to be determined upon a construction of the order of confiscation the interest which the Government was capable of holding in those days and upon various other matters. AIR (Vol 14) 1927 Cal 136: 98 Ind Cas 211 (DB).

——S. 100 — Mixed question of law and fact — Dower.

Amount of dower is a mixed question of law and fact. AIR (Vol 13) 1926 Oudh 128: 89 Ind Cas 672.

——S. 100 — Mixed question of law and fact — Alteration of document.

The question whether an alteration is material or not is always dependent upon the nature of each transaction and it also depends upon the nature of the alteration and its juxtaposition in the particular part of the document where it is interpolated and the new complexion the instrument is made to bear by reason of the alteration. It is not therefore a pure question of law. AIR (Vol 15) 1925 Nag 243: 86 Ind Cas 185: 8 NLJ 1.

——S. 100 — Nature of tenancy — Determination of, on certain facts — Mixed question.

The question whether a tenancy is one at will or of permanent nature on certain given facts is mixed question of law and fact. AIR (Vol 4) 1917 Cal 496: 44 Cal 119: 24 CLJ 350: 21 CWN 530: 35 Ind Cas 605 (DB).

——S. 100 — Mixed question of law and fact — Execution sale — What passes under.

In an execution sale what the Court intended to sell and what the purchaser understood, he bought, is a mixed question of law and fact. How the parties themselves viewed it at the time is of much greater value than evidence procurable some 20 years after the transaction. In determining what the Court intended to sell, the state of the law at the time of the sale is not conclusive. AIR (Vol 2) 1915 Mad 208: 37 Mad 22: 24 MLJ 652: 10 MLT 298: (1911) 2 MWN 328: 12 Ind Cas 389 (DB).

——S. 100 — Mixed question of law and fact — Second appeal.

A finding as to a mixed question of law and fact can be interfered with in second appeal. AIR (Vol 1) 1914 All 517: 36 All 231: 12 ALJ 303: 25 Ind Cas 162 (DB).

——S. 100 — Nature of tenancy — Presumption as to tenancy — Mixed question of law and fact.

Where certain facts concerning a tenancy go to prove that the tenancy was in nature of permanent one. Held, that the question was one of mixed law and fact, one of law so far as the interference from the facts concerned and of fact (with which the High Court will not interfere) so far as the length of the tenancy, fixity of rent and other matters. (1912) 15 CLJ 220: 16 CWN 567: 13 Ind Cas 606 (DB).

——S. 100 (S. 584 old Code) — Question of — Inference from documentary evidence — Mixed question of law and fact — Jurisdiction of second appellate Court to interfere.

The question whether the documentary evidence properly construed entitles to a finding that a party has mirasi rights in a land is a mixed question of law and fact and a second appellate Court can enter into such a question. (1902) 4 Bom LR 801 (808) (DB).

44. **Nature of tenancy.**

——S. 100 — Finding of fact — Nature of tenancy — Question as to.

The question whether a tenancy is permanent or precarious is not in itself a question of fact, but is a mixed question of law and fact. (1948) 13 Cut LT 66: 29 PLT 81 (DB).

——S. 100 — Findings that landlord had both warams and tenant had no permanent tenancy rights are findings of fact.

The findings of the lower Appellate Court that the temple had both the warams and that the tenancy had no permanent rights of occupancy are findings of fact binding on the High Court, when in arriving at those findings the Judge had not adverted to any irrelevant evidence and there is nothing to show that he had not correctly considered the question of onus of proof. AIR (Vol 30) 1943 Mad 311: (1943) 1 MLJ 43: 56 MLW 102: 1943 MWN 75: 209 Ind Cas 561.

——S. 100 — Tenants have occupancy rights and are raiyats, are findings of fact.

Findings that the tenants are raiyats and they have acquired rights of occupancy are findings of fact. AIR (Vol 25) 1938 Cal 724: 68 CLJ 435 (DB).

——S. 100 — Creation of new tenancy — Whether a pure question of law.

Whether a new tenancy has been created can never be said to be a pure question of law; it is a question of mixed fact and law and a question which certainly depends upon a number of facts. AIR (Vol 23) 1936 Pat 411: 2 BR 631: 163 Ind Cas 538.

——S. 100 — Question whether a tenancy is permanent — Question depending on proof of local custom.

The proper effect of a proved fact being a question of law, the question whether a tenancy is permanent or precarious is, in cases where the question depends on proof of a local custom, a legal inference from facts (and not itself a question of fact,) and accordingly the Court in second appeal must decide the case for itself on the facts found by the lower Appellate Court, instead of saying that the Courts below were at liberty to presume, if they thought fit, that the interest in question was of a permanent character. AIR (Vol 23) 1936 Pat 384: 17 PLT 202: 2 BR 599: 163 Ind Cas 415.

——S. 100 — Question whether certain land is part of occupancy holding.

The question whether certain land is occupancy holding or not is to some extent a mixed question of law and fact and not a pure question of law. AIR (Vol 22) 1935 All 588: 1935 AWR 494: 1935 RD 193: (1935) ALJ 490: 156 Ind Cas 810 (DB).

——S. 100 — The question whether a tenancy is permanent or precarious, is a legal inference from facts, and is not itself a question of fact. AIR

(Vol 21) 1934 Cal 288: 38 CWN 65: 61 Cal 32: 150 Ind Cas 238 (DB).

——S. 100 — Question whether tenancy is permanent is a question of law and not of fact. The question is one of proper inference in law from the facts as found. AIR (Vol 21) 1934 Cal 51: 57 CLJ 509: 150 Ind Cas 30 (DB).

——S. 100 — There is no doubt about the proposition that the inference from facts alleged and found whether a certain tenancy is permanent or not is an inference of law and not one of fact. AIR (Vol 19) 1932 Cal 398: 54 CLJ 353: 137 Ind Cas 658 (DB).

——S. 100 — The question of permanent tenancy though it is to be decided on facts, is a legal inference from facts and therefore a question of law, which it is open to consider in second appeal. AIR (Vol 17) 1930 Bom 39: 123 Ind Cas 492: 31 Bom LR 1279 (DB).

——S. 100 — Proper effect of proved fact is question of law — Question whether tenancy is permanent is legal inference from facts and not a question of fact. 8 Cal 960, Not foll. AIR (Vol 16) 1929 Cal 37: 116 Ind Cas 378: 33 CWN 211: 56 Cal 738 (DB).

——S. 100 — Landlord and tenant — Permanent tenure — Court must decide whether a tenancy is permanent or not as an inference of law. AIR (Vol 15) 1928 Cal 597: 112 Ind Cas 180: 32 CWN 771: 55 Cal 1029 (DB).

——S. 100 — Finding of permanent tenancy depending on inferences of fact — Finding can be challenged but not the facts found in support of the finding. AIR (Vol 15) 1928 Lah 720: 10 Lah LJ 251: 111 Ind Cas 76.

——S. 100 — The proper effect of a proved fact is a question of law. The question whether a tenancy is permanent or precarious is one of legal inference from facts and not itself a question of fact. AIR (Vol 14) 1927 PC 102: 52 MLJ 663: 101 Ind Cas 355: 8 Lah 573: 54 IA 178: 29 Bom LR 870: 31 CWN 677: 1927 MWN 481: 39 MLT 161: 25 ALJ 959: 28 PLR 658: 26 MLW 334.

——S. 100 — The question whether the tenants are raiyats ultimately depends on the question of fact and Court must look to the attendant circumstances. No importance can be attached to the mere form of the kabuliyat or to the use in it of the word "cultivator". Nor does the receipt of rent in which the tenant is described as a raiyat carry the matter any further. AIR (Vol 14) 1927 Cal 413: 100 Ind Cas 466 (DB).

——S. 100 — Though a substantial question of law may and generally does, arise in determining whether a tenant is a raiyat or a tenure-holder, the point depends ultimately on questions of fact. In second appeal the High Court is not entitled to go behind the findings of fact of the lower appellate Court unless such findings result from the misconstruction of a document of title or the misapplication of law or procedure. Such findings cannot be assailed however gross and inexcusable the error therein if the lower appellate Court had before it evidence proper for its consideration in support of its findings. AIR (Vol 13) 1926 Pat 9: 90 Ind Cas 895: 6 PLT 787: 1925 PHCC 281 (DB).

——S. 100 — The finding that a holding was a joint holding of the parties is one of fact. AIR (Vol 11) 1924 All 231: 79 Ind Cas 367: 21 ALJ 899: 5 LRA Rev 1.

——S. 100 — The question as to whether permanent tenancy can be presumed is a mixed question of fact and law. AIR (Vol 11) 1924 Cal 465: 73 Ind Cas 2 (DB).

——S. 100 — A decision on a question of the nature of the tenancy, viz., whether it is a permanent one or a tenancy at will is a mixed question of law and fact and can be decided in second appeal. AIR (Vol 9) 1922 Lah 329: 72 Ind Cas 177: 29 PWR 1922 (DB).

——S. 100 — The decision of the question whether a certain 'joti' (tenancy) is a tenure or a raiyati holding is a question of fact while the question whether a tenure is a permanent tenure is not merely one of fact if it depends to a large extent on the construction of the kabuliats executed from time to time by the tenant or his predecessor. AIR (Vol 5) 1918 Cal 517: 21 CWN 809: 40 Ind Cas 513 (DB).

——S. 100 — Nature of tenancy — Question of law.

The nature of a tenancy is a question of law when it turns on the construction of some written instrument. The question whether a tenancy is a tenancy-at-will or a yearly tenancy may be a question of law but it does not mean, that the whole question is open in second appeal on the merits. It means that it is open to a party to show that one or other of the terms have been wrongly applied to the facts found. A question of law arises where the finding of a Court is not based on any evidence capable of supporting it or where the evidence is all the other way pointing irresistibly to another or opposite conclusion. (1913) 17 CWN 1073: 20 Ind Cas 363 (DB).

——S. 100 — Nature of tenancy — Question of law — Determination of lease.

The question whether a legal right, such as the right of tenant in the land, has determined is a question of law and not of fact and is open to second appeal. (1912) 15 OC 295: 15 Ind Cas 857.

——S. 100 — Nature of tenancy — Question of law.

The High Court can in second appeal deal with question of nature of tenancy as it is a question of law. (1911) 15 CWN 263: 7 Ind Cas 785 (DB).

——S. 100 — Question of permanent tenancy cannot be raised for the first time in second appeal.

When no question of permanent tenancy was raised by the defendants in their written statements or in any of the issues framed, the defendants are not entitled, for the first time, in second appeal, to raise the question of either a permanent tenancy or of a tenancy in the nature of a raiyati holding at a fixed rate of rent. (1909) 9 CLJ 467 (471): 1 Ind Cas 112 (DB).

——S. 100 (S. 584 old Code) — Nature of tenancy — Jurisdiction.

The question as to the nature of a tenancy, i. e., whether the tenants are merely tenants at will or whether they are yearly tenants, is a question of law which can be dealt with by the High Court in second appeal. (1904) 8 CWN 774 (778) (FB).

45. Negligence.

——S. 100 — Finding of fact — Cause of accident.

That the accident was due to negligence of the defendant is primarily a finding of fact. AIR (Vol 32) 1945 PC 168 : 47 Bom LR 959 : 58 MLW 571 : 1945 MWN 661 : (1945) ALJ 518 : 49 CWN 788 : (1945) 2 MLJ 257 : 72 IA 206 : ILR (1946) Mad 73.

——S. 100 — Want of negligence.

The finding that there was no neglect of duty by the chairman of the Board is a finding of fact. AIR (Vol 30) 1943 Cal 59 : 75 CLJ 491 : 205 Ind Cas 483 (DB).

——S. 100 — The question of negligence is a question of fact. AIR (Vol 27) 1940 Sind 254 : 192 Ind Cas 494 (DB).

——S. 100 — No legal defect in finding — It cannot be upset in second appeal.

Negligence is a mixed question of law and fact and unless it is shown that the Court has approached the question from a wrong standpoint or that the evidence is such that there was no option but to draw the converse conclusion or unless the finding is vitiated by some other legal defect, it may be difficult to upset such a finding in second appeal. AIR (Vol 23) 1936 All 771 : (1936) ALJ 262 : 1936 AWR 301 : 58 All 771 : 165 Ind Cas 882 (DB).

——S. 100 — Finding of no neglect or no misconduct, whether one of law.

It is never a question of law when a Court has said that there is no neglect or no misconduct in fact. AIR (Vol 23) 1936 Pat 84 : 16 PLT 887 : 2 BR 290 : 160 Ind Cas 1086.

——S. 100 — Question of reasonable diligence on part of bailee.

The question whether the bailee has used all reasonable diligence is one of fact and cannot be gone into in second appeal. AIR (Vol 20) 1933 All 158 : 142 Ind Cas 691 (DB).

——S. 100 — Finding of 'default'.

A finding of negligence or a finding that there was or was not default is not necessarily in all cases a finding of fact, if the finding has not been approached from the proper legal standpoint.

Finding of the District Judge that there was 'default' within the meaning of S. 6, Post Office Act, held was one of fact. AIR (Vol 19) 1932 All 139 : (1931) ALJ 961 : 136 Ind Cas 569 (1) (DB).

——S. 100 — Evidence Act, S. 65 (c) — Question of sufficient reason for non-production required under S. 65 (c) is question of fact. AIR (Vol 17) 1930 All 550.

——S. 100 — Finding of negligence on wrong principles is not binding. 118 Ind Cas 655 : 30 PLR 128 : 11 Lah LJ 82 : AIR (Vol 16) 1929 Lah 314.

——S. 100 — Second appellate Court is not bound by deductions of lower Courts as to negligence — Whether certain facts constitute negligence is question of law. Negligence cannot be imputed to a subsequent purchaser of a lease, who, if he had made ordinary inquiries that an ordinary prudent man would have made in purchasing the lease, would not have come across anything which would have put him on an enquiry of a prior sale of the lease. 116 Ind Cas 470 : 6 Rang 643 : AIR (Vol 16) 1929 Rang 17.

——S. 100 — The finding of a lower appellate Court that there was no negligence is a finding of fact. 107 Ind Cas 702 : 9 LRA Rev 23 : AIR (Vol 15) 1928 All 166.

——S. 100 — Whether facts established amount to "wilful neglect" is a question of law — Railways Act, S. 72. 111 Ind Cas 523 : 10 Lah 329 : AIR (Vol 15) 1928 Lah 837 (DB).

——S. 100 "Wilful neglect" is not a concrete fact which can be proved by direct evidence but is a matter of inference. The finding in a case is based on certain facts and the question for determination is whether those facts are sufficient to establish "wilful negligence" in law. 112 Ind Cas 736 : 10 Lah 360 : 30 PLR 541 : AIR (Vol 15) 1928 Lah 774 (DB).

——S. 100 — Question as to negligence of a solicitor is one of fact. 103 Ind Cas 31 : 1927 MWN 213 : 39 MLT 15 : AIR (Vol 14) 1927 Mad 443 : 53 MLJ 375 (DB).

——S. 100 — Negligence is question of fact. 105 Ind Cas 565 : 1 LC 498 : AIR (Vol 14) 1927 Oudh 478 (DB).

——S. 100 — Wilful neglect is not a pure question of law, and, therefore, if an appellate Court records a categorical finding of fact based on certain evidence and circumstances that finding cannot be questioned in second appeal. 96 Ind Cas 1046 : 48 All 766 : AIR (Vol 13) 1926 All 394 (DB).

——S. 100 — Whether particular facts found constitute gross negligence is a question of law. 95 Ind Cas 707 : 1926 MWN 350 : AIR (Vol 13) 1926 Mad 905.

——S. 100 — Question of law — Whether particular facts justify inference of wilful neglect is a question of law. 97 Ind Cas 195 : 9 NLJ 111 : AIR (Vol 13) 1926 Nag 399.

——S. 100 — Wilful neglect is a question of fact. (1926) 94 Ind Cas 348 (Lah).

——S. 100 — What is gross negligence is a qestion of mixed law and fact, and the High Court can interfere with the findings of the lower appellate Court. Thus a finding of negligence attributed to the Court of Wards in representing a minor in not relying upon a previous judgment for the purpose of raising the plea of res judicata was set aside by the High Court. 85 Ind Cas 812 : 1925 MWN 75 : AIR (Vol 12) 1925 Mad 258 : 47 MLJ 700.

——S. 100 — In a suit by co-sharers against lambardar for profits the question of negligence of lambardar is a question of mixed fact and law and it is open to review in second appeal. 77 Ind Cas 1032 : AIR (Vol 11) 1924 All 613 (DB).

——S. 100 — Finding that there was wilful neglect on the part of the Railway is a finding of fact. 79 Ind Cas 428 : 6 Lah LJ 237 : AIR (Vol 11) 1924 Lah 594.

——S. 100 — A finding that there was a gross negligence on the part of a lambardar involves a question of mixed fact and law and is open to review in second appeal. 70 Ind Cas 591 : AIR (Vol 9) 1922 All 421 (DB).

——S. 100 — Suit for profits against Lambardar — Misconduct or negligence by Lambardar — Question is not purely one of fact — Agra Tenancy Act, S. 164. 60 Ind Cas 643 : 43 All 29 : AIR (Vol 8) 1921 All 314 (DB).

——S. 100 — Negligence — Question of law.

If the contention is that there is no evidence of negligence, the question is one of law; on the other hand the question, whether the evidence is sufficient to justify the inference of negligence is one of fact. AIR (Vol 3) 1916 Cal 647 : 21 CLJ 565 : 29 Ind Cas 260 (DB).

46. New plea

(a) Admissibility.
(b) Admissibility of Evidence.
(c) Alteration of nature.
(d) Consideration of Evidence.
(e) Construction of document.
(f) Estoppel.
(g) Further evidence.
(h) Jurisdiction.

See also Note 36 and Civil P. C. S. 21.

(i) Limitation.
(j) Maintainability of Suit.
(k) Mixed Question.
(l) Nature of Transaction.
(m) Point of Law.
(n) Practice.
(o) Prejudice to opposite party.
(p) Procedure.
(q) Question of fact.
(r) Question of Law.

(s) Registration.
(t) Res judicata.
See Note 46 and Civil P. C. S. 11.
(u) Waiver.

——S. 100 — New plea — Plea based on S. 53-A, T. P. Act — If open in second appeal for first time. AIR (Vol 38) 1951 Pat 502: 30 PLT 388.

——S. 100 — New plea — Plea not raised in Courts below — Facts on record making out plea — Duty of Court to allow plea to be raised.

If the facts on record are sufficient to make out a plea, raised for the first time in second appeal, it cannot be ignored simply because that plea was not raised in the Courts below or that it did not strike counsel in the Courts below. AIR (Vol 36) 1949 EP 301: 51 PLR 44 (DB).

——S. 100 — Interference on point taken 'suo motu' by the judge for first time in second appeal.

A judge sitting in second appeal is not justified in deciding the second appeal on a point which has not been raised at any stage by the parties and which is taken by him 'suo motu'. AIR (Vol 34) 1947 Mad 360 (1): 60 LW 217: 1947 MWN 186: (1947) 1 MLJ 248 (DB).

——S. 100 — Pleadings — No reasons necessary in support of contentions in plaint — Point that decree was not money-decree and was not executable raised throughout — Contention that there is no reference to defendant in decree and so decree is not money-decree is not new one and can be raised in second appeal.

The pleadings cannot be argumentative and it is not necessary for the plaintiff to state the grounds or reasons in support of his contention in his plaint. When the point that the decree was not a money-decree and was not executable was raised throughout, the contention that there is no reference to defendant in the decree and therefore, the decree is not a money-decree cannot be said to be a new one and, therefore, can be raised in second appeal. AIR (Vol 29) 1942 Mad 748: 55 MLW 627: (1943) 1 MLJ 504: 206 Ind Cas 466.

——S. 100 — Non-compliance with O. 13 not complained at the earliest opportunity — Such plea cannot be raised in second appeal. AIR (Vol 15) 1928 Lah 704: 108 Ind Cas 374.

——S. 100 — A point which is not taken in the Trial Court or in the grounds of appeal in the lower Appellate Court, should not be allowed to be raised for the first time in second appeal. (1926) 98 Ind Cas 268 : 8 LLJ 430 : 27 PLR 628.

——S. 100 — Legal representative.

Impropriety of substitution of legal representative cannot be raised for first time in second appeal — Practice. AIR (Vol 12) 1925 Mad 207: 81 Ind Cas 498.

——S. 100 — New point not raised in pleadings nor in the Lower Courts cannot be raised in second appeal. AIR (Vol 10) 1923 Cal 177: 76 Ind Cas 213: 27 CWN 218 (DB).

——S. 100 — New plea cannot be raised in second appeal. AIR (Vol 10) 1923 Lah 53: 70 Ind Cas 838 (DB).

——S. 100 — New plea cannot be raised for the first time in second appeal. AIR (Vol 9) 1922 Bom 329: 67 Ind Cas 322: 24 Bom LR 323: 46 Bom 966 (DB).

——S. 100 — Want of evidence.

A new point taken for the first time in second appeal before High Court without having any evidence on record or any finding to support it should not be allowed to be raised. AIR (Vol 9) 1922 Pat 68: 65 Ind Cas 277: 1922 PHCC 39: 3 Pat LT 623 (DB).

——S. 100 — New plea — When allowed.

A new point, which is not a pure question of law cannot for the first time be taken up in second appeal. AIR (Vol 7) 1920 Cal 754: 32 CLJ 75: 59 Ind Cas 3 (DB).

——S. 100 — New plea — Question of law.

A point of law, which is patent, upon the record but which is not raised in the lower Court or in the Chief Court, can be given effect to by the Chief Court 'suo motu' in second appeal. AIR (Vol 5) 1918 Lah 88: 31 PR 1918: 54 PWR 1918: 27 PLR 1918: 45 Ind Cas 101.

——S. 100 — New plea — Question of law raised for the first time.

A plea in law which goes to the root of the plaintiff's claim and arises on the facts found and is not affected by any facts outside those findings may be taken for the first time in second appeal. AIR (Vol 4) 1917 Nag 213: 13 NLR 98: 41 Ind Cas 45.

——S. 100 — New plea — Raising for the first time.

A new contention not raised either in the first Appellate Court or in the memorandum of Second Appeal cannot be entertained in Second Appeal. A point not taken in the Court of first instance cannot be taken for the first time in appeal. AIR (Vol 2) 1915 Lah 312: 3 PLR 1915: 14 PWR 1915: 27 Ind Cas 646.

——S. 100 — New Plea — Not to be raised.

A new plea cannot be raised for the first time in second appeal. AIR (Vol 2) 1915 Lah 326: 2 PLR 1915: 233 PWR 1915: 27 Ind Cas 673.

——S. 100 — New plea — Second appeal.

The Court will not allow a new point to be raised in the course of second appeal. AIR (Vol 1) 1914 Lah 398: 222 PLR 1914: 123 PWR 1914: 24 Ind Cas 941 (DB).

——S. 100 — New plea — Not to be entertained.

Arguments opposed to the pleadings will not be accepted in second appeal. AIR (Vol 1) 1914 Lah 11: 77 PR 1914: 217 PLR 1915: 25 Ind Cas 697 (DB).

——S. 100 — New plea — If can be raised in second appeal.

A point not taken in the pleadings or in the grounds of first appeal nor covered by any issue found in the case, will not be allowed to be raised for the first time in second appeal. 255 PLR 1913: 163 PWR 1913: 20 Ind Cas 22 (DB).

——S. 100 — New plea — Plea raised but not tried.

Where a point raised in the written statement is not made the subject of an issue and was not also brought to the notice of the Appellate Court in an appeal by the plaintiff the defendant is entitled to raise it in second appeal. (1913) 18 Ind Cas 367 (Oudh).

——S. 100 (S. 584, Old Code) — Estoppel raised for the first time in argument in second appeal — Point disallowed.

Case where the Court refused to allow a question of estoppel under S. 116, Evidence Act, to be raised for the first time in argument in second appeal. (1902) 4 Bom LR 28: 26 B 410 (413) (DB).

(a) Admissibility.

——S. 100 — Objection to validity of attachment cannot be raised for first time in second appeal. (Per Abdul Rahman, J., in Order of Reference).

Where no definite objection to the validity of attachment is taken in the lower Courts, a plea that the attachment was invalid as no notice was affixed on the court-house as required by O. 21,

R. 54 cannot be raised for the first time in second appeal. In the absence of such a definite objection, the High Court will presume that the attachment was valid and that all necessary steps had been taken which would validate the attachment. AIR (Vol 33) 1946 Lah 134: 48 PLR 147 (FB).

——S. 100 — New claim — A new claim for damages or mesne profits cannot be set up in second appeal.

The mortgagee of the usufructuary mortgage filed a suit for recovery of the mortgage money and also claimed by way of interest the profits of the property not delivered to him. The plaintiff did not claim damages for breach of covenant to deliver possession or mesne profits with regard to the property not delivered to him, either at the time the suit was instituted or when the case was argued in the lower Court. His claim for profits of the property not delivered to him, by way of interest, was not allowed:

Held, that the plaintiff should not be allowed to set up a new claim for damages or mesne profits in the second appeal for the first time. AIR (Vol 32) 1945 All 202: 46 Cr LJ 743: (1945) ALJ 242: 1945 AWR (H C) 197: ILR (1945) All 676: 221 Ind Cas 454 (FB).

——S. 100 — New question of fact raised for first time in second appeal — Admissibility of.

A new question of fact never pleaded before, or considered by the lower Courts, cannot be raised in second appeal. (1945) 1945 OWN (C C) 399.

——S. 100 — In a case of trust, a point not raised in the lower Court nor in memorandum of second appeal was sought to be raised at the time of argument, to the effect that the respondent who was a trustee had purchased certain property which ought to be surrendered to the trust:

Held, that considering it was a case of trust, the point should be allowed to be raised. AIR (Vol 29) 1942 Mad 317: (1942) 1 MLJ 99: 55 MLW 324: 1942 MWN 396: 201 Ind Cas 745.

——S. 100 — Where a case is never put before the Courts below, it cannot be set up in second appeal. (1940) 42 PLR 142.

——S. 100 — Patna High Court — Point requiring certificate can be disallowed in absence of certificate.

The High Court in second appeal is justified in refusing to allow the appellant to raise a point which required a certificate according to the rules of the Patna High Court, in the absence of the certificate. AIR (Vol 27) 1940 Pat 322: 19 Pat 104: 7 BR 52: 190 Ind Cas 418 (DB).

——S. 100 — A point of law which depends entirely upon admitted facts can be raised for the first time in second appeal. AIR (Vol 27) 1940 Rang 27: 187 Ind Cas 254.

——S. 100 — A plea which was not raised in the plaint and was never put in issue cannot be raised in second appeal. AIR (Vol 26) 1939 Lah 141: 184 Ind Cas 449.

——S. 100 — A point of law not taken in the Court below cannot be permitted to be raised in the High Court except in certain cases. The general rule is that where the point which is raised requires new evidence and new findings of fact, the Court of second appeal will not allow it to be raised. AIR (Vol 24) 1937 All 99: 1936 AWR 1264: (1937) ALJ 90: 167 Ind Cas 37.

——S. 100 — Where the plea was not raised in any of the two lower Courts or even in the grounds of appeal filed in the High Court, it cannot be determined at a late stage in second appeal. AIR (Vol 24) 1937 Oudh 127: 1936 OWN 1241: 165 Ind Cas 793 (DB).

——S. 100 — It is necessary that pleadings should be clear and definite, and should contain all the pleas required to be discussed in the judgment. The plea not in the pleadings will not be allowed to be raised at the appellate stage. AIR (Vol 24) 1937 Pesh 97: 171 Ind Cas 810 (DB).

——S. 100 — Highly technical plea should not be allowed to be raised for first time in second appeal.

Where a highly technical point was not raised either in the lower Appellate Court or in the grounds of appeal in the High Court:

Held, that in second appeal it was open to the High Court not to allow the appellant to raise it for the first time.

(But the Court allowed the Counsel for both parties to argue the point, especially as it was a pure question of law apparent on the face of the record and did not depend upon evidence). AIR (Vol 23) 1936 Lah 612: 165 Ind Cas 66.

——S. 100 — Finding not based on cases of respective parties — Whether can be accepted in second appeal.

A finding not based on the cases of the respective parties cannot be accepted in second appeal. AIR (Vol 23) 1936 Mad 488: 70 MLJ 627: (1936) MWN 272: 43 MLW 677: 162 Ind Cas 876.

——S. 100 — Plea argued in trial Court but not argued in lower Appellate Court.

Where a point was argued in the trial Court and decided against a party and the point was raised in the memorandum of appeal filed in the lower Appellate Court but not argued in that Court, the point must be taken to have been abandoned in that Court and having been abandoned in that Court, it cannot be allowed to be raised in second appeal. AIR (Vol 22) 1935 All 1004: 1935 AWR 1185: (1936) ALJ 475: 159 Ind Cas 984 (DB).

——S. 100 — Where, before the primary Court, no point as to legality of a certain tax by a Municipality is raised, nor is it raised before the Subordinate Judge on appeal, it cannot be allowed to be raised in second appeal. AIR (Vol 22) 1935 Cal 726: 62 CLJ 479: 159 Ind Cas 542 (DB).

——S. 100 — It is a principle of wisdom and prudence that Courts of final appeal should be very chary of entertaining an argument which has not been sifted in the Court below on the question more particularly when there is no complete uniformity of opinion in all the Courts in India. AIR (Vol 21) 1934 Cal 414: 38 CWN 33: 151 Ind Cas 268 (DB).

——S. 100 — A party cannot set up a new plea in second appeal which has not been claimed in the pleadings in the trial Court. It is not open to the plaintiffs in a suit to place their reliance on a different cause of action in second appeal than the one they claimed in the plaint. AIR (Vol 21) 1934 Lah 633: 35 PLR 494: 152 Ind Cas 773.

——S. 100 — The question whether the lower Appellate Court's judgment has been vitiated by a particular view of the burden of proof can be taken for the first time in second appeal. AIR (Vol 21) 1934 Nag 253: 152 Ind Cas 441.

——S. 100 — In second appeal, a party will not be allowed to take advantage of a new plea not raised by him before. AIR (Vol 20) 1933 Lah 845: 35 PLR 85: 147 Ind Cas 260 (DB).

——S. 100 — New plea involving questions of law and fact.

A plea involving questions of fact as well as of law cannot be taken for the first time in appeal. AIR (Vol 20) 1933 Lah 150: 34 PLR 983: 146 Ind Cas 513 (DB).

——S. 100 — It is not open to a party to raise a new plea in the second Appellate Court for the first time. AIR (Vol 18) 1931 Oudh 242: 8 OWN 243: 132 Ind Cas 78 (DB).

——S. 100 — A point not raised in the trial Court but which was raised in the first appeal and not decided can be raised in second appeal. AIR (Vol 18) 1931 Rang 314: 135 Ind Cas 328.

——S. 100 — New and inconsistent plea raised in a second appeal by plaintiff — Plaintiff should not be given decree. AIR (Vol 16) 1929 Mad 349: 118 Ind Cas 291: 30 MLW 787 (DB).

——S. 100 — Question of admissibility for want of registration or irrelevancy of document can be raised at any stage. AIR (Vol 12) 1925 Cal 370: 82 Ind Cas 949.

——S. 100 — New question for first time.

Their Lordships declined to allow a new point (here whether an assignee of a mortgage is not affected by the colourable nature of the transaction by reason of his being a bona fide transferee for value without notice) to be taken up for the first time in second appeal. (1904) 15 MLJ 28: 28 M 122 (123) (DB).

(b) Admissibility of evidence.

——S. 100 — New plea — Admissibility of document — Objection on ground of non-registration.

An appellant in second appeal is not debarred from raising an objection to the admissibility of a document on the ground of its non-registration although no such objection was taken at any earlier stage of the proceedings. (1948) 82 CLJ 183.

——S. 100 — New point — Question of inadmissibility of document — Question of law.

The question of the inadmissibility of documents being a question of law can be allowed to be raised in second appeal for the first time. AIR (Vol 35) 1948 Pat 185.

——S. 100 — Point as to inadmissibility of mortgage-deed.

Where a point that the mortgage-deed cannot be given in evidence on account of S. 63-A, Dekkhan Agri. Relief Act, had not been taken in the lower Court, it cannot be allowed for the first time in second appeal. AIR (Vol 27) 1940 Bom 63: 41 Bom LR 1251: 186 Ind Cas 528 (DB).

——S. 100 — Party agreeing to evidence being relied on in trial Court — He is estopped from disputing its correctness.

Where a party clearly agrees to certain evidence being relied on in proceedings before the trial Court, he is estopped in appeal from challenging the procedure of the trial Court on the ground that the evidence was wrongly relied upon. AIR (Vol 27) 1940 Lah 308: 42 PLR 265.

——S. 100 — Objection on ground that anonymous document cannot be taken to have been properly proved by virtue of S. 90, Evidence Act, not taken at proper time cannot be entertained in second appeal.

Where a person has put document into the Court relying on the presumption under S. 90 and no objection has been taken at the proper time on the ground that an anonymous document cannot be taken to be properly proved by virtue of this presumption, the objection cannot be sustained in second appeal. An objection to the genuineness of the document cannot be taken to include the lesser objection to its technical proof. AIR (Vol 26) 1939 Mad 962: (1939) MWN 946: (1939) 2 MLJ 593: 50 MLW 527.

——S. 100 — Question as to admissibility not raised in lower Courts and particularly in the lower Appellate Court can be agitated in second appeal. AIR (Vol 23) 1936 Lah 1005: 167 Ind Cas 704.

——S. 100 — Second appeal — New facts.

Though in appropriate cases the liability may be apportioned in unequal shares, the plaintiff should not be allowed to throw an additional burden upon any of the defendants at this stage of the litigation.

New facts cannot be investigated in second appeal. AIR (Vol 23) 1936 Pat 49: 16 PLT 813: 2 BR 264: 15 Pat 219: 160 Ind Cas 976 (DB).

——S. 100 — Suit on pro-note by assignee from legal representatives of executee — Succession certificate not filed in trial Court.

Where the defendant executed a pro-note in favour of a person whose legal representatives transferred it to the plaintiff and the plea that a succession certificate was not produced was not taken in the Court of first instance:

Held, that the plea could be taken for the first time in appeal and the succession certificate may be accepted by Appellate Court. AIR (Vol 21) 1934 All 296: (1934) ALJ 579: 3 AWR 574: 147 Ind Cas 1168.

——S. 100 — Objection to.

Admissibility of document is a question of fact — Objection to admissibility not taken in lower Courts cannot be taken in second appeal. (1926) 97 Ind Cas 414 (Cal) (DB).

——S. 100 — The plea that according to S. 91, Evidence Act, oral evidence is inadmissible, cannot be raised for the first time in second appeal. AIR (Vol 9) 1922 All 493: 70 Ind Cas 953: 45 All 21: 20 ALJ 777 (DB).

——S. 100 — Admissibility of evidence — Objection to — Non-joinder — Objection on the ground of.

An objection as to the mode of proof of certain documents taken for the first time in second appeal could not be entertained nor can an objection as to non-joinder of parties be allowed for the first time in second appeal. AIR (Vol 6) 1919 Cal 814: 52 Ind Cas 463.

——S. 100 — Admissibility of evidence — Objection.

Where no objection is taken in the first Court to the admission in evidence of a document, objection cannot be taken in second appeal that it has not been proved that the conditions exist which make S. 22 applicable. AIR (Vol 6) 1919 Cal 499: 53 Ind Cas 863.

——S. 100 — Admissibility of evidence — Objection to.

Private Chittas were admitted in evidence in the trial Court without objection and acted upon by the Courts. The point of inadmissibility of the documents cannot be permitted to be taken in second appeal. AIR (Vol 5) 1918 Cal 394: 41 Ind Cas 726 (DB).

——S. 100 — Admissibility of evidence — Objection.

The appellant cannot raise objections to the admissibility of documents received in evidence in the lower Court if under the circumstances the application is quite too late. AIR (Vol 3) 1916 All 11: 34 Ind Cas 57 (FB).

——S. 100 — Admissibility of evidence — Objection.

An objection to the admissibility of a document in evidence cannot be allowed to be raised in second appeal when, in the lower Appellate Court, the party objecting only endeavoured to explain away its effect. A finding of fact arrived at by the Lower Appellate Court is conclusive in second appeal unless it is vitiated by an error in law or by there being no evidence to support the conclusion or unless the conclusion drawn is not warranted by the findings. AIR (Vol 3) 1916 Mad 147: 29 MLJ 362: (1915) MWN 614: 2 LW 650: 30 Ind Cas 983 (DB).

——S. 100 — New plea — Not allowed.

A finding of fact based on admissible evidence cannot be impugned in second appeal. Where in

a redemption suit, the defendant's plea that the mortgagor had transferred the equity of redemption to the mortgagee had been found against, it is not open to him in second appeal to change his ground and plead that there had been a foreclosure. AIR (Vol 3) 1916 Oudh 313: 3 OLJ 244: 19 OC 166: 34 Ind Cas 745.

(c) **Alteration of nature.**

——**S. 100 — Plea by defendant requiring change in frame of suit.**

Where a plea has been taken by the defendants that the transaction was not a fictitious or collusive transaction, but they never put the plaintiffs to election in the manner contemplated by the law to enable them to take up a certain position (the frame of the suit being different in two cases) the plea cannot be allowed to be raised at the second appellate stage. AIR (Vol 31) 1944 All 214: (1944) ALJ 360: 1944 AWR 188 (2): ILR (1944) All 325: 1944 OWN 98.

——**S. 100 — Plaintiff cannot be allowed to change basis of suit in second appeal.**

Where the plaintiff claimed certain property on the footing that the widow held it only as a limited owner, he cannot be allowed to change the basis of his suit in second appeal and claim the property on the footing that it belonged to the widow absolutely. AIR (Vol 30) 1943 Mad 731 : 56 MLW 428: (1943) 2 MLJ 173: 16 RM 640: 212 Ind Cas 529.

——S. 100 — Nature of the suit cannot be allowed to be changed at a late stage in second appeal. A suit by vendee for return of consideration for sale on ground of his vendor's defective title cannot be allowed to be changed as one for recission of the conveyance in the second appeal. AIR (Vol 29) 1942 Sind 81: ILR (1942) Kar 32: 202 Ind Cas 584.

——S. 100 — The plaintiff cannot be allowed to abandon the case put forward by him before the lower Courts and set up a new case in the High Court. AIR (Vol 27) 1940 Pat 161: 18 Pat 854: 6 BR 549: 187 Ind Cas 727 (DB).

——S. 100 — The High Court cannot spell out a new case without any trace thereof in the pleadings and evidence and resting on no substantial evidence which can be believed. AIR (Vol 26) 1939 Pat 323: 5 BR 874: 20 PLT 825: 183 Ind Cas 179 (2).

——**S. 100 — Lower Appellate Court making out case not pleaded.**

The Appellate Court, as the final Court of fact, is entitled to draw such inferences from the facts as it thinks proper and in second appeal there is no power in the High Court to interfere with those findings; but when the Appellate Court, on the slenderest evidence, makes out a case which is not in the pleadings, its findings of fact cannot be binding in second appeal. AIR (Vol 25) 1938 Pat 181: 4 BR 521: (1938) PWN 741: 175 Ind Cas 91.

——**S. 100 — Point setting up new right different from that asserted during trial.**

A point of law cannot be taken for the first time in second appeal if it sets up a new right differing in kind from that asserted throughout the trial. AIR (Vol 23) 1936 Rang 260: 14 Rang 738: 163 Ind Cas 364.

——**S. 100 — New case in second appeal.**

In second appeal an entirely new case should not be made the basis of a judgment reversing the lower Court's decision. AIR (Vol 21) 1934 Mad 639: (1934) MWN 118: 40 MLW 479: 152 Ind Cas 464 (DB).

——S. 100 — Suit for damages for malicious prosecution — Defendant sued personally — New case in appeal to make him liable as master for servant's act — Held, that apart from the fact that it clearly contradicts the case set up in the trial Court, it is a mixed question of law and fact and cannot be allowed in second appeal. AIR (Vol 20) 1933 Nag 299: 30 NLR 101: 147 Ind Cas 1084.

——S. 100 — A party cannot be allowed to set up an alternative case in second appeal when he finds that his case has been disbelieved by the lower Court. AIR (Vol 20) 1933 Pat 269: 145 Ind Cas 613.

——**S. 100 — Alternative argument on facts admitted or proved.**

Although it is not open to the appellant to urge a point for the first time in the High Court which he had not urged in the lower Courts, he can urge a new case as an alternative argument that even on the facts admitted or proved in the Courts below he is entitled to succeed. AIR (Vol 19) 1932 All 289: 134 Ind Cas 449 (DB).

——S. 100 — A new plea materially altering nature of the suit cannot be allowed to be put forward in second appeal. AIR (Vol 17) 1930 Oudh 389.

——S. 100 — Where a plaintiff did not come into Court claiming as the heir of his father.

Held, that he cannot be allowed to claim as such heir as it would be setting up a new case in second appeal. AIR (Vol 14) 1927 Lah 426: 28 PLR 181: 102 Ind Cas 426.

——S. 100 — The plaintiff should be pinned down to the specific case he has set up in the plaint and should not be allowed to set up a new case in the second appeal for which there was no adequate investigation in the lower Courts. (1926) 96 Ind Cas 304 (All) (DB).

——S. 100 — A tenant brought a suit claiming to be a ryot under the Madras Estates Land Act to set aside an alleged sale of his holding against an inamdar, both in the Trial Court as well as in first appellate Court.

Held, that it was not open to the defendant in second appeal to contend that he was a ryot and that the plaintiff was an under-tenant under him and that the Madras Estates Land Act was not applicable as between them. AIR (Vol 13) 1926 Mad 635: 92 Ind Cas 1047.

——S. 100 — Suit by a Mahomedan widow on a pronote executed by her husband in lieu of dower cannot be allowed in second appeal to be converted into an administration action even though the widow is willing to confine her action to the dower amount and give up her claim to the loan evidenced by the note. AIR (Vol 12) 1925 Mad 1064: 86 Ind Cas 367.

——S. 100 — Plaint alleging title by purchase-decree on title by prescription given — Objection not raised in the lower Courts is not permissible in second appeal. AIR (Vol 11) 1924 Mad 116: 75 Ind Cas 613: 18 MLW 553 (DB).

——**S. 100 Inconsistent pleas.**

A suit having been tried out on a certain basis in the Courts below, High Court would not allow the decision of those Courts to be interfered with upon a plea which was not merely not raised by the defendants in those Courts, but which is contrary to and inconsistent with the position there taken up by the defendants. AIR (Vol 10) 1923 All 358: 74 Ind Cas 1004: 45 All 53 (DB).

——**S. 100 — New plea — Not allowed.**

In a suit for an injunction against certain tenants improperly using the land, the tenants after having failed to establish their plea of permanent tenancy could not in second appeal, ask for the scope of the suit to be enlarged and a fresh enquiry started for the purpose of determining whether pecuniary compensation to the plaintiffs would be sufficient instead of an injunction. AIR (Vol 7) 1920 Cal 177: 55 Ind Cas 951 (DB).

——S. 100 — A pure question of law arising out of the findings of the Courts below and patent on the record can be raised for the first time in second appeal. The suit for arrears of maintenance cannot be changed into one for contribution in second appeal. AIR (AIR (V 7) 1920 Lah 489 : (1922) 67 Ind Cas 919 : 2 LLJ 255.

——S. 100 — New plea — Custom — Personal law.

A plaintiff basing his right on custom, could not in second appeal ask the Court to base it on Mah. omedan law. AIR (Vol 2) 1915 Lah 115: 67 PR 115: PWR 1915: 31 Ind Cas 85 (DB).

——S. 100 — New plea — Partition suit.

Where a plaintiff sues for partition alone, he cannot be allowed in second appeal to raise a plea of easement and ask for an injunction restraining the defendants from interfering with his user of the property as a cattle pen. (1910) 8 MLT 87: 6 Ind Cas 423 (DB).

——S. 100 — Raising of new issue.

Their Lordships refused to raise a new issue and send down the case to the lower Court for trial on the ground that the issue was one which should have been raised before the lower Court, and they should not raise it in second appeal with the result of inaugurating a different case from that which the plaintiff made before the lower Court. (1908) 10 Bom LR 141 (144): 3 MLT 197 (DB).

(d) Consideration of evidence.

——S. 100 — Evidence or contention not pressed in lower Courts — High Court will not consider them.

The High Court in second appeal would not be justified in taking into consideration evidence which does not appear to have been brought to the notice of either of the lower Courts or contentions which were not pressed in those Courts. AIR (Vol 31) 1944 Oudh 206: 1944 OWN 138: 1944 AWR 96: 1944 RD 187: 217 Ind Cas 217 (DB).

——S. 100 — New point cannot be allowed to be raised, if for its decision, fresh facts are to be found — Point raised for first time that no valuation of property was made under Ss. 13 and 14, Bihar Money-lenders Act before execution sale took place cannot be entertained.

The High Court in second appeal cannot entertain an entirely new point if for its decision fresh facts have to be found. Hence a point that no valuation of the property was ever made as required by Ss. 13 and 14, Bihar Money-lenders Act which were in force before the execution sale took place, cannot be allowed to be raised for the first time in second appeal, as before the High Court could decide this question, the facts would have to be gone into afresh. AIR (Vol 29) 1942 Pat 264: 8 BR 465: 198 Ind Cas 821 (DB).

——S. 100 — Whether Court should or should not not order sale of part of property in execution.

The High Court will not entertain a point for the first time in second appeal if that point involves any further investigation of fact. Whether the Court should or should not order the sale of a portion of the property in execution proceedings must depend upon whether there is any reasonable probability of sale of a portion of the property being sufficient to satisfy the decretal amount. It is not, therefore, open to a party in second appeal to raise this point and ask the High Court to remand the case to the Court below to be considered from this new point of view. AIR (Vol 29) 1942 Pat 152: 22 PLT 855: 8 BR 194: 197 Ind Cas 361 (DB).

——S. 100 — New plea cannot be allowed in second appeal.

An objection not taken before cannot be allowed to be taken in second appeal if it is a point that could easily have been met by evidence had it been raised at the proper time. AIR (Vol 28) 1941 Lah 345: 43 PLR 499: 196 Ind Cas 619.

——S. 100 — Plea of undue influence.

Where undue influence is not pleaded in the lower Courts it cannot be raised for the first time in second appeal because evidence would have been necessary to prove or disprove the exercise of undue influence if it had been taken up in the trial Court. AIR (Vol 28) 1941 Pesh 6: 193 Ind Cas 51 (DB).

——S. 100 — When a plea raises a question of fact which requires investigation, it cannot be allowed to be raised in second appeal. (1940) 21 PLT 894 (DB).

——S. 100 — Plea requiring evidence to be produced.

Where facts are neither admitted nor proved beyond controversy and there is no finding whatever about a point, it is neither competent nor in the interest of justice to entertain such a point in second appeal. AIR (Vol 26) 1939 All 194: (1938) ALJ 1238: 1939 AWR 141: 180 Ind Cas 621 (DB).

——S. 100 — Where the determination of a new point will necessitate the taking of further evidence, it will not be allowed to be raised for the first time in second appeal. AIR (Vol 24) 1937 Lah 193: 39 PLR 408: 172 Ind Cas 596 (DB).

——S. 100 — Compensation — Prior mortgagee obtaining possession — Sale to mortgagor — Acquisitions — Subsequent mortgagee's suit for redemption — Question of compensation, if can be raised.

The prior mortgagee obtained possession of the mortgaged property in pursuance of his foreclosure decree and sold it to the mortgagor who made some acquisitions to the property. On the subsequent mortgagee, who was not a party to the suit, bringing a suit for redemption of the prior mortgage, the mortgagor contended for the first time in second appeal that he was entitled to compensation for the acquisition:

Held, that the presumption under S. 8, T. P. Act, arose that all the interest of the mortgagor passed to the subsequent mortgagee, and that as the question of compensation involved questions of fact, it was too late to agitate it in second appeal. AIR (Vol 24) 1937 Nag 205: ILR (1937) Nag 367: 172 Ind Cas 289.

——S. 100 — Appeal — Fresh plea.

When a question of law is raised for the first time in a Court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interest of justice to entertain the plea. But it is too late for the issue to be raised in argument in first appeal where the matter would require evidence. AIR (Vol 23) 1936 All 723: (1936) ALJ 841: 58 All 1069: 1933 AWR 703: 165 Ind Cas 439 (DB).

——S. 100 — New point of law.

The High Court will not entertain a point of law raised for the first time in second appeal if the point cannot be decided without remanding that case for further evidence. AIR (Vol 23) 1936 Rang 260: 14 Rang 738: 163 Ind Cas 364.

——S. 100 — Whether the sum tendered to satisfy a mortgage is sufficient or not is a question which cannot be allowed to be raised for the first time in second appeal. Similarly the question whether the money was kept ready after tender for payment is a question which requires consideration of evidence and cannot be allowed to be raised for the first time in second appeal. AIR (Vol 9) 1922 Pat 167: 65 Ind Cas 666: 3 Pat LT 332: 1 Pat 350: 1922 PHCC 58 (DB).

(e) Construction of document.

——S. 100 — Where a question of law is raised for the first time in a Court of last resort upon the

construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea. AIR (Vol 27) 1940 All 353: 1940 AWR 300: 189 Ind Cas 757 (DB).

——S. 100 — When a question of law is raised for the first time in a Court of last resort upon the construction of a document or upon facts, either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea. AIR (Vol 26) 1939 Oudh 233: 1939 OWN 736: 1939 AWR 111: 1939 RD 455: 14 Luck 678: 183 Ind Cas 604 (DB).

——S. 100 — Question whether stipulation in mortgage is clog on redemption.

Where a question of law is raised for the first time, upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice, to entertain the plea, so the question as to whether a stipulation in a mortgage deed amounts to a clog or not can be raised for the first time in appeal as it is unnecessary to go into any question of fact. AIR (Vol 25) 1938 Mad 405: (1938) MWN 356: 182 Ind Cas 287 (DB).

——S. 100 — Question of law raised for first time upon facts admitted or proved.

Per Mackney, J.:— When a question of law is raised for the first time in a Court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea. AIR (Vol 25) 1938 Rang 376: 1939 Rang LR 83: 179 Ind Cas 6.

——S. 100 — Landlord contending in lower Courts that area mentioned in 'kabuliyat' was actual area — Findings against him in both lower Courts — Second appeal — Appellant arguing that this must in any case be assumed to be the area for which the previous rent was being paid:

Held, that this was not such a new case as the appellant was not entitled to raise in the second appeal. AIR (Vol 24) 1937 Cal 632: 42 CWN 276: 176 Ind Cas 336.

——S. 100 — Question of law.

When a question of law is raised for the first time in a Court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea. The expediency of adopting that course may be doubted when the plea cannot be disposed of without deciding nice questions of fact in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below. The course ought not in any case to be followed unless the Courts are satisfied that the evidence upon which they are asked to decide, establishes beyond doubt that the facts, if fully investigated, would have supported the new plea. AIR (Vol 19) 1932 PC 118: 36 CWN 677: 55 CLJ 362: 10 Rang 242: (1932) MWN 680: 34 Bom LR 1021: (1932) ALJ 706: 36 MLW 75: 63 MLJ 131: 9 OWN 930: 59 IA 161: 136 Ind Cas 737.

——S. 100 — Deeds — Construction.

Right construction of a document is a question of law and can be raised for the first time in second appeal. AIR (Vol 18) 1931 Nag 25: 130 Ind Cas 103.

——S. 100 — When a question of law is raised for the first time in a Court of last resort upon the construction of a document or upon the facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea. The expediency of adopting that course may be doubted when the plea cannot be disposed of without deciding nice questions of fact in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below. But in any case Courts ought not to follow the course unless to their satisfaction the evidence upon which they have to decide establishes beyond a shadow of doubt that the facts if fully inquired into would have sustained the new plea. AIR (Vol 12) 1925 Nag 104: 80 Ind Cas 607.

——S. 100 — Question as to construction of lease is not allowed in second appeal if not raised in lower Court but a particular construction was assumed and the construction involved investigation into facts. AIR (Vol 11) 1924 Cal 353 : 69 Ind Cas 655 (DB).

——S. 100 — New plea — Question of law raised for first time.

If a question of law is raised for the first time in a Court of second appeal upon the construction of a document or upon facts either admitted or found beyond controversy, the Court should entertain the plea. AIR (Vol 4) 1917 Cal 716: 44 Cal 47: 20 CWN 1099: 24 CLJ 140: 34 Ind Cas 869 (DB).

(f) Estoppel.

——S. 100 — Plea of estoppel cannot be raised for first time in second appeal (Per Abdur Rahman, J.).

The question of estoppel is a question of fact or, in any case, a mixed question of fact and law and cannot be raised for the first time in second appeal. AIR (Vol 33) 1946 Lah 134: 48 PLR 147 (FB).

——S. 100 — Where a party has not pleaded estoppel in trial Court, the Court should not allow the question of estoppel to be raised for the first time in appeal. AIR (Vol 29) 1942 Pat 71: 22 PLT 821: 8 BR 127: 196 Ind Cas 849 (DB).

——S. 100 — Provided the necessary facts have been pleaded and proved, the defence of estoppel is a question of law which can be raised for the first time even on second appeal. AIR (Vol 27) 1940 Rang 172: 189 Ind Cas 735.

——S. 100 — Question of estoppel raised for the first time in second appeal, can be entertained, if it is based on the facts on record and urged on the footing of the findings of the lower Appellate Court. AIR (Vol 25) 1938 Lah 558: 40 PLR 848: 178 Ind Cas 436.

——S. 100 — A question of law can be raised for the first time in appeal but this does not mean that it can be so raised after once having been abandoned in the lower Court. AIR (Vol 23) 1936 Oudh 52: 1935 OWN 1217: 11 Luck 575: 159 Ind Cas 117 (DB).

——S. 100 — Question of estoppel is not a pure question of law. AIR (Vol 22) 1935 Cal 713: 159 Ind Cas 370 (DB).

——S. 100 — Estoppel on ground of compromise — Whether can be raised for first time in second appeal.

Where, in the grounds of appeal before the lower Appellate Court, the point was not expressly taken that a compromise operated as an estoppel and the lower Appellate Court has not discussed the question and it does not appear that the point was expressly pressed before, it is not proper to allow this point to be raised in second appeal. AIR (Vol 21) 1934 All 941: 151 Ind Cas 263.

——S. 100 — Omission to raise objection as to competency of appeal in lower Appellate Court — Whether stops the point being taken in second appeal.

The omission on the part of the plaintiff to contend in the lower Appellate Court that the appellant was not competent to file an appeal from a decree which did not adversely affect him does not estop him from taking it in second appeal as the objection goes to the very root of the appeal. The

utmost that can be done is to make him pay costs of this appeal, which was rendered necessary by his negligence in the lower Appellate Court. AIR (Vol 21) 1934 All 677: 3 AWR 737: 151 Ind Cas 25.

——S. 100 — There can be no estoppel against statute and estoppel cannot confer jurisdiction where there was none. Where the absence of jurisdiction in the Court is patent on the record, the Appellate Court is not precluded from interfering. AIR (Vol 18) 1931 All 490: (1931) ALJ 715: 54 All 25: 134 Ind Cas 236 (FB).

——S. 100 — Second appeal — New plea.

Where the plaintiff asked for possession in respect only of some properties and for declaration in respect of some other properties, it cannot be allowed to be argued for the first time in second appeal that the plaintiff should have prayed for possession in respect of all the properties. AIR (Vol 17) 1930 Mad 541: 126 Ind Cas 730.

——S. 100 — Where the facts are all admitted and the only question is what consequence would flow from them, the plea of estoppel is one of pure law and can be taken in appeal, though not taken in trial Court. (1928) 110 Ind Cas 190 (Lah).

——S. 100 — The proposition that a point of law can always be taken in second appeal is limited to cases where the point of law does not require a finding of fact to support it. AIR (Vol 15) 1928 Pat 109: 8 PLT 850: 105 Ind Cas 33 (DB).

——S. 100 — Burden of proof — Acceptance — Estoppel.

When the burden of proof put by the Court below was accepted and witnesses produced by the plff. he cannot turn round and say in second appeal that his evidence should be disregarded as he was not bound to call any evidence. AIR (Vol 1) 1914 Oudh 341: 1 OLJ 352: 17 OC 134: 25 Ind Cas 138.

(g) Further evidence.

——S. 100 — Question of fact involving further investigation cannot be raised for the first time.

In a suit relating to respective rights to use water of a defined channel, a decree was passed awarding damages of Rs. 150/- to the plaintiff. In second appeal the defendant for the first time objected to the amount of damages as being given in respect of more area than was comprised in the compromise between the parties entitling the plaintiff to use the water from the channel:

Held, that as it was a question of fact and could not be decided without further investigation, it could not be allowed in second appeal. AIR (V 33) 1946 Mad 334.

——S. 100 — Where a member of a joint Hindu family received a payment from the judgment-debtor on a representation that he is the agent of the family, the question wheter he is liable to make good his representation is a question of law and cannot be raised in second appeal for the first time if an investigation of facts and fresh findings of fact on the question of representation are required before such a point can be determined. AIR (V 30) 1943 Pat 10 : 21 Pat 322 : 9 BR 131 : 204 Ind Cas 234 (DB).

——S. 100 — Point that there was no acceptance of gift by donee in life-time of donor.

A point that there was no evidence to prove acceptance of the gift by the donee in the life-time of the donor is not purely a question of law but would involve evidence as to whether there was or there was not acceptance and cannot be considered in second appeal when it was not taken in the lower Courts. AIR (V 27) 1940 Oudh 318 : 1940 OWN 600 : 1940 AWR 264 : 188 Ind Cas 666 (DB).

——S. 100 — The question of adverse possession must necessarily depend on facts, and a point of this kind cannot be raised for the first time in second appeal. AIR (V 27) 1940 Rang 136 : 190 Ind Cas 609.

——S. 100 — Pela of adoption.

The plea that the adoption was invalid on the ground that the boy was not selected by all the executors of the will of the deceased husband of the widow cannot be raised for the first time before the High Court without giving the opposite party an opportunity to give evidence in support of the fact that all the executors gave consent to the adoption. AIR (V 24) 1937 PC 292 : 3 BR 773 : 46 MLW 394 : 1937 OWN 934 : (1937) MWN 1211 : ILR (1938) Lah 1 : 1937 AWR 956 : 40 PLR 1021 : 169 Ind Cas 902.

——S. 100 — Point involving investigation of facts.

Point involving investigation of facts cannot be allowed to be raised for the first time in second appeal. AIR (V 22) 1935 Cal 779 : 160 Ind Cas 250.

——S. 100 — A point, necessitating the calling of further evidence, cannot be raised for the first time in second appeal. AIR (V 22) 1935 Lah 702 : 37 PLR 576 : 160 Ind Cas 777.

——S. 100 — The appellant cannot raise orally the question that constructions complained of might have been in the agricultural field or in any other place, for the first time in second appeal as the point will require additional evidence to be taken. AIR (V 21) 1934 All 802 : (1934) ALJ 662 : 3 AWR 796 : 150 Ind Cas 1117.

——S. 100 — Plea involving question of fact requiring evidence cannot be raised. AIR (V 14) 1927 All 763 : 101 Ind Cas 773 : LR 8 A 89 Rev.

——S. 100 — Plea of part performance cannot be allowed for the first time in second appeal where there is not sufficient evidence on the record to dispose of the plea. AIR (V 14) 1927 All 344 : 100 Ind Cas 566 (DB).

——S. 100 — Question of law not requiring fresh investigation of facts can be allowed. AIR (V 14) 1927 Cal 393 : 54 Cal 424 : 45 CLJ 191 : 101 Ind Cas 130 (DB).

——S. 100 — Practice.

Adverse possession is a mixed question of fact and law and cannot be allowed to be pleaded for the first time in the appeal, as a decision on it cannot be arrived at without giving the parties an opportunity of placing on the record all facts relevant thereto. AIR (V 14) 1927 Lah 522 : 102 Ind Cas 476.

——S. 100 — Issue of fact requiring fresh materials cannot be raised. AIR (V 13) 1926 All 707 : 97 Ind Cas 342 (DB).

——S. 100 — New point involving determination of new question of facts cannot be raised in second appeal. AIR (V 12) 1925 Cal 225 : 85 Ind Cas 875 : 29 CWN 17 : 40 CLJ 564 (DB).

——S. 100 — Question whether a particular defendant was a necessary party and could contest the suit is one of law and may be raised in second appeal if it does not involve the taking of further evidence. AIR (V 12) 1925 Lah 65 : 6 LLJ 351 : 82 Ind Cas 603.

——S. 100 — A ground as to part-payments under S. 20 of the Limitation Act is one which necessarily involves the determination of a question of fact and cannot be allowed for the first time in second appeal. AIR (V 10) 1923 Bom 82 : 76 Ind Cas 115 : 47 Bom 128 : 24 Bom LR 1284 (DB).

——S. 100 — Point involving evidence cannot be taken in second appeal. AIR (V 10) 1923 Bom 37 : 72 Ind Cas 993 (DB).

——S. 100 — Question of law depending on evidence cannot be raised. AIR (V 9) 1922 Bom 233 : 70 Ind Cas 417 (DB).

——S. 100 — New plea — Questions to be taken in second appeal.

The High Court will not entertain an objection which was not raised in the Lower Courts and which involves a determination of question of fact and thus compels the Court to remand the case to the Lower Court. AIR (V 7) 1920 Cal 530 : 57 Ind Cas 883 (DB).

——S. 100 — New plea — Lis pendens.

A new plea of 'lis pendens' cannot be allowed to be raised in the High Court in the second appeal for the first time, especially as the raising of it would entail a remand for further enquiry. (1920) 2 Lah LJ 230.

——S. 100 — Mixed question of law and fact — Question not to be allowed, if involves remand.

A question which necessitates a remand and the taking of evidence, if not raised in the Courts below, cannot be raised for the first time in second appeal. The High Court will not entertain an objection raised for the first time in second appeal to the jurisdiction of the Sub-Registrar in whose jurisdiction a certain lease deed had been registered on the ground that a ficititious plot of land had been entered in the lease to give him jurisdiction. AIR (V 6) 1919 Cal 407 : 51 Ind Cas 862 (DB).

——S. 100 — New plea — Question of law — Investigation of facts.

A point of law that requires investigation into facts cannot be allowed to be taken for the first time in second appeal. AIR (V 5) 1918 Pat 291 : 3 Pat LW 213 : 43 Ind Cas 857.

——S. 100 — New plea — Not to be set-up.

In second appeal a party cannot be permitted to make a new case involving the investigation of facts. AIR (V 2) 1915 Cal 438 : 19 CWN 768 : 29 Ind Cas 811 (DB).

——S. 100 — New plea — Not to be raised.

New points involving fresh investigation of facts cannot be raised in second appeal. (1911) 14 OC 382 : 12 Ind Cas 321.

——S. 100 — New plea — Question of law.

If a point of law is apparent on the face of the record, and does not require further development by evidence it may be taken for the first time in second appeal. The fact that plaintiff did not appeal from the first Court's decree does not preclude them from attacking the decree of the lower appellate Court on the findings on their cross-objections. (1909) 3 SLR (106) : 4 Ind Cas 599 (DB).

(h) Jurisdiction.

See also N. 36 and Civil P. C., S. 21.

——S. 100 — Plea of — When may be decided in second appeal.

When a question of jurisdiction can be decided in a Court of appeal without coming to any further finding of fact, the question becomes a pure question of law and can be decided in second appeal even though it is an entirely new point not taken even by the parties themselves. AIR (V 30) 1943 Bom 427 : 45 Bom LR 810 : ILR (1943) Bom 534 : 213 Ind Cas 348 (DB).

——S. 100 — Question of want of jurisdiction must be considered howsoever late it has been raised.

Where the Appellate Court had no jurisdiction to entertain the appeal, its decree is a nullity and it is incumbent upon the second Appellate Court to consider this objection, however late it may have been brought to its notice. AIR (V 29) 1942 Oudh 481 : 1942 OWN 493 : 1942 AWR (CC) 310 (1) : 202 Ind Cas 126 (DB).

——S. 100 — Objection to jurisdiction not raised either in trial Court or in Appellate Court cannot be raised in second appeal. AIR (V 27) 1940 Oudh 164 : 1940 OWN 462 : 15 Luck 619 : 1940 AWR 207 : 185 Ind Cas 467 (DB).

——Ss. 100, 21, 20 — Point that lower Appellate Court should not have entertained plea of want of jurisdiction not raised in lower Appellate Court on grounds of second appeal.

A point that in view of the provisions of S. 21, the lower Appellate Court ought not to have entertained the plea of want of jurisdiction and ought not to have reversed the decision of the trial Court without recording a finding that there had been a failure of justice, cannot be raised in second appeal when it was not raised in the lower Appellate Court and no such ground has been taken in the memorandum of appeal to High Court. The question whether there has been a failure of justice or not is not a pure question of law and cannot be decided without finding of facts. AIR (V 26) 1939 All 163 : (1939) ALJ 50 : ILR (1939) All 167 : 1938 AWR 873 : 180 Ind Cas 409 (DB).

——S. 100 — Plea of jurisdiction of Revenue Court to deal with landholder's claim to recover under Madras Estates Land Act sum paid by him as water-cess can be raised in second appeal.

The plea regarding jurisdiction of a Revenue Court to deal with a claim by landholder to recover under the Madras Estates Land Act a sum of money paid to the Government on account of water-cess payable by the 'ryot' to the Government was not taken by the 'ryot' in the written statement as it should have been. But in appeal he explained that the plaintiff did not set forth the circumstances in which this claim for irrigation cess was made and as soon as the position was made clear, the contention was put forward that the Revenue Court had no jurisdiction and a ground of appeal was taken in the lower Appellate Court:

Held, that it was open to the appellant to urge this contention in second appeal. AIR (V 26) 1939 Mad 918 : 50 MLW 463 : (1939) MWN 836 : (1939) 2 MLJ 440.

——S. 100 — Where the matter relates to jurisdiction and goes to the foundation of the plaintiffs' rights, the Court is entitled to entertain it at any stage, the only consequence of the plaintiffs' not having raised it in the lower Court being that they should be mulcted in costs. AIR (Vol 24) 1937 Nag 170 : 19 NLJ 308 : ILR (1938) Nag 276 : 168 Ind Cas 601.

——S. 100 — A new objection not raised in a lower Court can be entertained by the High Court, if it is one of law and raises the question of jurisdiction. AIR (Vol 23) 1936 Oudh 64 : (1935) OWN 1201 : 158 Ind Cas 921 (DB).

——S. 100 — Question of jurisdiction can be raised for first time in second appeal.

The Court of second appeal can, in the interests of justice, allow to be raised for the first time a plea involving a question of jurisdiction. AIR (Vol 22) 1935 Oudh 325 : 1935 OWN 487 : (1935) RD 238 : 11 Luck 106 : 155 Ind Cas 92.

——S. 100 — Question of jurisdiction can be raised in Letters Patent appeal.

A new plea involving the question of jurisdiction can be raised for the first time in Letters Patent appeal. AIR (Vol 21) 1934 All 893 : (1934) ALJ 848 : 18 RD 389 : 4 AWR 88 : 57 All 230 : 150 Ind Cas 767 (DB).

——S. 100 — **Objection to competency of appeal.** Omission to raise objection as to competency of appeal in lower Appellate Court, does not estop the party from raising it in second appeal. AIR (Vol 21) 1934 All 677 : 3 AWR 737 : 151 Ind Cas 25.

——S. 100 — Questions involving jurisdiction can be raised in appeal even though they have not been raised in the Court below if such questions can be decided on the materials before the Court. AIR (Vol 18) 1931 All 406: 15 RD 623: 134 Ind Cas 253.

——S. 100 — Question of jurisdiction can be raised in second appeal even though it was overruled in the trial Court and not pressed in the lower Appellate Court. AIR (Vol 18) 1931 Cal 29 : 52 CLJ 247 : 130 Ind Cas 232 (DB).

——S. 100 — Question of maintainability of suit cannot be raised in second appeal in first instance. 50 CLJ 543 : AIR (Vol 17) 1930 Cal 267 (DB).

——S. 100 — When the Judge has no inherent jurisdiction over the subject-matter of the suit, the parties cannot by their mutual consent convert it into a proper judicial process. It is the settled practice of the Bombay High Court to entertain objections taken for the first time even in second appeal, and even in England the Court can raise the question of jurisdiction at any time in proceedings for divorce. 77 Ind Cas 654 : 47 Bom 843 : 25 Bom LR 945 ; AIR (Vol 10) 1923 Bom 321 (FB).

——S. 100 — Question of jurisdiction for the first time in second appeal is competent. 77 Ind Cas 532 : AIR (Vol 10) 1923 Lah 551 (DB).

——S. 100 — A question of jurisdiction or of law, pure law though not raised in the lower Court can be entertained and adjudicated upon in second appeal. AIR (Vol 8) 1921 All 290 : 57 Ind Cas 206 (DB).

——S. 100 — A question of jurisdiction or law, may be raised for the first time in second appeal. (1910) 12 CLJ 53 : 5 Ind Cas 525 (DB).

——**S. 100 — New plea—Decision on—Irregularity.** An Appellate Court cannot go into a question not raised in the pleadings and commits material irregularity if it mis-applies the law relating to a case and decides it on a point not raised in an appeal. 80 PWR 1910 : 6 Ind Cas 1010.

(i) Limitation.

——**S. 100 — New plea — Plea of limitation not pressed in first appellate Court — If can be raised in second appeal.**

A point of limitation taken but not pressed, before the lower appellate Court, cannot be raised in second appeal when no materials were placed before the lower Court in support of the plea of limitation. 25 Pat 145: 223 Ind Cas 251: 12 BR 361: AIR (Vol 33) 1946 Pat 365 (DB).

——S. 100 — The plea of limitation was raised by the defendant in the grounds of appeal before the first Appellate Court but was not urged by Counsel as he considered that his case was so strong in view of a decision of the Chief Court that it was not worthwhile to argue the question of limitation. The defendant's appeal was allowed. In the second appeal by the plaintiff:

Held, that the second Appellate Court could go into the question of limitation. AIR (Vol 30) 1943 Pesh 43: 206 Ind Cas 497 (DB).

——**S. 100 — Point of minority for calling in aid S. 6, Limitation Act.**

It is too late to raise the point of minority of the plaintiff in the second Appellate Court for the purpose of calling in aid the provisions of S. 6 of the Limitation Act where the point was not raised in either of the Courts below. AIR (Vol 28) 1941 Nag 100: 1940 NLJ 607: ILR (1941) Nag 144: 194 Ind Cas 806 (DB).

——S. 100 — In second appeal, Court is not concerned with ascertaining the facts. The facts as found by the lower Appellate Court must be accepted and where no mention of limitation has been made in the pleadings, in argument or in any memorandum of appeal and there is no finding on the question, appellant is not entitled to raise this new point of limitation at the stage of second appeal. AIR (Vol 24) 1937 All 696: (1937) ALJ 855: 1937 AWR 718: 171 Ind Cas 910.

——S. 100 — Where a question of limitation involves a finding of fact, when such question is not raised in the grounds of appeal, it cannot be allowed to be raised in second appeal. AIR (Vol 24) 1937 Nag 184: ILR (1938) Nag 167: 171 Ind Cas 783.

——S. 100 — Where a plea of limitation has not been waived and it is apparent on the record, it can be taken for first time in appeal. AIR (Vol 20) 1933 Lah 1044: 147 Ind Cas 507 (1) (DB).

——S. 100 — Where a plea of special limitation depends on a question of fact and such a plea is neither pleaded nor urged in the lower Court, the High Court will not consider it as a question of fact; but it can do so as far as it raises the question of law. AIR (Vol. 20) 1933 Pat 224: 12 Pat 261: 14 PLT 113: 149 Ind Cas 561 (DB).

——S. 100 — A point of limitation may be reopened in second appeal even if it was not urged in the lower Appellate Court where the facts on which it rests are not in dispute. AIR (Vol 19) 1932 All 108: (1931) ALJ 997: 53 All 738: 136 Ind Cas 71 (DB).

——S. 100 — Even though the applicability of a particular article of the Limitation Act may not be raised in either of the lower Courts by the plaintiff, it can be raised for the first time in second appeal, provided the defendants are not prejudiced by the fact that the question of applicability was not raised earlier. AIR (Vol 18) 1931 Cal 670: 35 CWN 307: 132 Ind Cas 684 (DB).

——S. 100 — An intention to dissolve a partnership may be inferred from circumstances showing that a partner has in fact abandoned his interests in the concern. (49 PWR 1916, Foll.); and where, upon material before it, the Court concluded that a partnership was dissolved in a certain year, the finding is one of fact and the question of limitation depending on such finding cannot be reagitated in second appeal. 112 Ind Cas 375: AIR (Vol 16) 1929 Lah 154.

——S. 100 — Facts not disputed — Question of limitation can be raised for the first time in second appeal. 99 Ind Cas 280: AIR (Vol 14) 1927 All 177.

——S. 100 — Plea of bar by limitation raised without any fact — New plea of bar by adverse possession or under Art. 137 of the Limitation Act cannot be raised in Second Appeal. 69 Ind Cas 185: 3 Pat 23: 3 PLT 795: AIR (Vol 9) 1922 Pat 398 (DB)

——**S. 100 — New plea — Question of limitation —Mixed question of law and fact.**

If there is any question of fact to be investigated requiring a fresh decision upon an issue not pressed before the Courts below, the High Court will not allow a question of limitation to be raised in second appeal. But where on the face of the record the question arises it may be raised in second appeal. AIR (Vol 5) 1918 Pat 504 : 4 Pat LW 136 : 43 Ind Cas 955 (DB).

——**S. 100 — New plea — Mixed question of law and fact.**

The plea of limitation or estoppel involving questions of fact which are not admitted or undisput-

ed cannot be taken for the first time in appeal. 8 SLR 272: 27 Ind Cas 933: AIR (Vol 1) 1914 Sind 27 (DB).

——S. 100 — Plea of limitation raised — Plea overruled by first Court — No notice taken afterwards of the plea till second appeal.

Where after the decision of the first court overruling the plea of limitation, no notice of the point was taken by the parties or by the appellate court, his Lordship refused to allow it to be raised in second appeal. (1905) 9 CWN 56 (58).

See also, (1902) 6 CWN 218 (223).

(j) Maintainability of suit.

——S. 100 — New plea — Plea of res judicata not taken in grounds of appeal — If open.

A plea of res judicata which has not been put forward in the memorandum of appeal should not be allowed to be taken in the course of the hearing. AIR (Vol 36) 1949 Pat 214: 14 Cut LT 51.

——S. 100 — Plea of res judicata not allowed to be raised in second appeal for first time.

Where the plea of res judicata was not raised in the first appellate Court, it was not allowed to be raised in second appeal. AIR (Vol 33) 1946 All 54: 1945 ALJ 503: 1945 OWN (HC) 284.

——S. 100 — Plea of res judicata in appeal.

An Appellate Court can consider the plea of res judicata for the first time even though it has not been raised before it by the party concerned and was not even taken up in the Court below. AIR (Vol 32) 1945 All 76: 1944 AWR 224: 1944 OWN 136: (1945) ALJ 7: ILR (1944) All 601.

——S. 100 — Full Bench — Plea of res judicata.

The Bench in Letters Patent appeal referred the case to the Full Bench. The plea that the suit in the Civil Court was barred by res judicata by virtue of the decision of the Revenue Court was not raised before the Letters Patent Bench nor before the Single Bench; nor was it raised in the trial Court or the lower Appellate Court :

Held, (Per Full Bench) that the point was not a question of jurisdiction and should not be allowed to be raised before the Full Bench. AIR (Vol 29) 1942 Lah 217: 44 PLR 488: ILR (1943) Lah 191: 202 Ind Cas 497 (FB).

——S. 100 — Plaintiff's competency cannot be challenged in second appeal.

Where the case had proceeded in the trial Court on the footing that the plaintiffs had interest in the suit property and locus standi to maintain the action, it is too late in second appeal to challenge the plaintiff's competency to maintain the suit and to start the case on a new basis. AIR (Vol 28) 1941 Mad 612: 53 MLW 483: (1941) 1 MLJ 557: (1941) MWN 529: 200 Ind Cas 102.

——S. 100 — Plea of res judicata.

The plea of res judicata is not a pure question of law and where the point was neither raised nor pleaded in either of the lower Courts, it cannot be allowed in second appeal. AIR (Vol 27) 1940 Nag 163: 1940 NLJ 1: ILR (1941) Nag 513: 194 Ind Cas 861 (DB).

——S. 100 — Question of law can be raised.

A plea of law which goes to the very root of the case can be entertained in second appeal. AIR (Vol 27) 1940 Oudh 92: 1939 OWN 980: 1939 AWR 284: 15 Luck 92: 185 Ind Cas 25.

——S. 100 — Question of res judicata.

The Appellate Court can rightly decline to allow the appellant to go into the question of res judicata on the ground that it had not been properly raised by the pleadings or in the issues. AIR (Vol 24) 1937 Oudh 243: 1937 OWN 229: 13 Luck 167: 167 Ind Cas 72.

——S. 100 — Res judicata.

That the rule of constructive res judicata has been wrongly applied to a case is a pure question of law and can be considered in second appeal. AIR (Vol 21) 1934 Cal 552: 38 CWN 492: 61 Cal 494: 150 Ind Cas 321 (DB).

——S. 100 — Plea of bar of S. 47 cannot be raised for first time in second appeal. AIR (Vol 21) 1934 Oudh 55: 11 OWN 193: 18 RD 97: 9 Luck 365: 147 Ind Cas 910 (DB).

——S. 100 — Where a party does not take any objection to the competency of the sub-agent to file a suit in lower Court, it is not open to him to raise that point for the first time in appeal in the High Court. AIR (Vol 21) 1934 Rang 289: 153 Ind Cas 168.

— S. 100 — Where a plea of res judicata was raised in the written statement and an issue was raised and evidence was led on it in the trial Court:

Held, that the issue could be considered by their Lordships even though it had not been pressed in the Courts below. AIR (Vol 18) 1931 PC 231: 8 OWN 973: 61 MLJ 415: 34 MLW 439: 35 CWN 1217: 133 Ind Cas 721.

——S. 100 — Res judicata.

It is not necessary for the plaintiff to do more in his plaint than set forth the facts on which he can rely for the application of a rule of law. It is open to him when he has pleaded the proper facts, to argue before the High Court in appeal that under a rule of law he is entitled to a certain finding.

(Plea of res judicata allowed to be raised.) AIR (Vol 18) 1931 All 462: (1931) ALJ 307: 15 RD 322: 53 All 568: 133 Ind Cas 468 (DB).

——S. 100 — A plea that the suit was barred by S. 47, C. P. Code, can be raised for the first time in second appeal, as it is a pure matter of law affecting the very validity of the suit: 1928 MWN 601: 113 Ind Cas 547.

——S. 100 — A technical plea, that the suit was premature, should not be allowed to be taken for the first time in appeal. AIR (Vol 11) 1924 Lah 328: 71 Ind Cas 826 (DB).

——S. 100 — New plea — Abatement — No issue.

The plea of abatement of a suit which was raised in the written statement of the defts, who were substituted in the place of the deceased deft, but as to which no express issue was framed cannot be allowed to be raised in second appeal. AIR (Vol 5) 1918 Cal 177: 41 Ind Cas 1 (DB).

——S. 100 — Question of Law — Res judicata — Raised on appeal.

The plea of res judicata is a question of law and may be raised at any stage of suit. AIR (Vol 5) 1918 Pat 526: 47 Ind Cas 685.

(k) Mixed Question.

——S. 100 — New plea — Mixed question of law and fact — Question if acts of defendant constitute trespass or dispossession of plaintiff.

The question whether the acts complained of by the plaintiff constituted isolated acts of trespass by the defendant or dispossession of the plaintiff, is a mixed question of law and fact and it cannot be decided without fresh evidence. The appellant cannot, therefore, be allowed to raise this mixed question of law and fact for the first time in second appeal. AIR (Vol 37) 1950 Cal 328 (DB).

——S. 100 — Question as to when cause of action arose.

The point that the cause of action did not accrue until certain date, being obviously a mixed question of fact and law, it is doubtful whether it can be raised for the first time in appeal. AIR (Vol 23) 1936 Lah 629: 17 L 737: 165 Ind Cas 723 (DB).

——S. 100 — Abandoned pleas, revival of.

A mixed question of law and fact abandoned in the Court of first instance cannot be revived for the first time in second appeal. AIR (Vol 18) 1931 Sind 170: 25 SLR 493: 134 Ind Cas 1171 (DB).

——S. 100 — The question as to whether a gift is bad as offending against the doctrine of mushaa is a mixed question of law and fact and it cannot for the first time be raised in second appeal. AIR (Vol 15) 1928 Cal 49: 104 Ind Cas 126 (DB).

——S. 100 — Whether a partner was winding up a business and therefore had authority to bind the firm by his acknowledgment of a debt is a mixed question of law and fact and cannot be raised for the first time in second appeal. AIR (Vol 16) 1929 Lah 266: 118 Ind Cas 529.

——S. 100 — Abandonment.

The question as to whether a certain provision in a lease is penal or not is a mixed question of law and fact and as a rule, it will not be permitted to be raised in second appeal if it is clear that it was abandoned in a subordinate Court competent to investigate questions of fact as well as of law. AIR (Vol 16) 1929 Pat 717: 10 PLT 669 (DB).

——S. 100 — A mixed quesion of law and fact not relied on in the lower Courts cannot be raised for the first time in second appeal. AIR (Vol 14) 1927 All 59: 97 Ind Cas 487.

——S. 100 — The question whether a mortgage is properly executed is one of mixed law and fact and cannot be raised for the first time in the second Appellate Court. 97 Ind Cas 611: 1926 MWN 559.

——S. 100 — Mixed questions of law and fact cannot be raised in second appeal for the first time. AIR (Vol 13) 1926 Nag 164: 89 Ind Cas 1009.

——S. 100 — Whether arrears accrued owing to default of usufructuary mortgagee is a question of law and fact — Transfer of Property Act, S. 76. AIR (Vol 11) 1924 All 877: 84 Ind Cas 26: LR 5 A 225 (Rev).

——S. 100 — Where a party claims to have riparian rights for the first time in appeal,

Held, he should not be allowed to put in the claim as it is a mixed question of law and fact. AIR (Vol 11) 1924 Mad 913: 83 Ind Cas 1009: 47 Mad 861: 47 MLJ 503: 20 MLW 815: 1924 MWN 820 (DB).

——S. 100 — The question of what are "necessaries" is not a pure question of law but is a mixed question of law and fact and cannot be allowed to be raised for the first time in second appeal. AIR (Vol 11) 1924 Nag 360: 78 Ind Cas 380.

——S. 100 — A new point may be allowed to be raised by a party for the first time in appeal or second appeal, if it is a pure question of law and does not take his opponent by surprise. But the position is very different when the new plea raises question of fact or mixed question of fact and law.

Held, the new plea cannot be allowed in second appeal. AIR (Vol 10) 1923 Cal 247: 71 Ind Cas 849: 36 CLJ 336 (DB).

——S. 100 — Mixed question of fact and law — Priority — Oral and registered sale.

A mixed question of law and fact cannot be allowed to be raised for the first time in second appeal; a question relating to a contest between a verbal sale and a registered sale-deed is a mixed question of fact and law. AIR (Vol 1) 1914 Low Bur 166: 22 Ind Cas 802.

——S. 100 — Mixed question of law and fact.

The question of estoppel is a mixed question of law and fact. (1904) 6 Bom LR 630 (632) (DB).

(l) Nature of Transaction.

——S. 100 — Second appeal — Plaintiff's allegation that consideration was cash, found not true— Plaintiff can prove what real consideration was.

It is customary in India when a bond is given wholly or partially in consideration of an existing debt to describe the consideration as cash. This practice has been judicially recognised. Hence where the plaintiff's case is based on the allegation that the consideration of the khatas in suit was cash and it is found not to be true, the plaintiff is entitled in second appeal to prove what the real consideration was and can ask for a decree on the basis that the consideration was a past debt. Such a plea does not amount to a new case. AIR (Vol 30) 1943 Bom 447: 45 Bom LR 837: 211 Ind Cas 421.

——S. 100 — Plea of plaint in previous suit being acknowledgment, cannot be raised in second appeal for first time.

When a plea that a previous plaint by a co-mortgagor amounts to an acknowlegment is not taken in the trial Court and the plaint which is said to contain the admission is not even on the record and has not been proved, the other co-mortgagors in a subsequent suit cannot be allowed to take such a point in second appeal. AIR (Vol 30) 1943 Bom 191 : 45 Bom LR 253: 208 Ind Cas 285 (DB).

——S. 100 — Question whether deed of waqf was made to defeat or delay creditors, not raised in lower Courts.

The question whether the deed of waqf was made, with an intention to defeat or delay the creditors, by the waqif, involves the determination of certain questions of fact and when such plea is not raised in the Courts below, it cannot be allowed to be raised for the first time in second appeal. AIR (Vol 27) 1940 Oudh 324: 1940 OWN 689: 1940 AWR 27: 15 Luck 586: 189 Ind Cas 391 (FB).

——S. 100 — New plea not raised in proper time — Whether can be entertained in second appeal.

A decree for money was passed against the assets of a deceased Muhammadan in the hands of his son. The son's wife having failed in her objections in the execution proceedings, filed a suit for declaration that a house was not liable to be attached, the basis of her claim being a deed of gift executed by her husband in payment of her dower debt. It was found that the deed was executed for consideration. It was contended in second appeal that in order to entitle her to the declaration prayed for, it was necessary for her also to prove that the transaction of gift was bona fide in its nature :

Held, that having failed to raise this plea at a proper time, the appellant could not be allowed to raise the point in second appeal. (1934) 147 Ind Cas 952: 10 OWN 1186.

——S. 100 — Where the point raised in appeal for the first time was that a deed was not a will but a deed of gift which was inadmissible being unregistered,

Held, that the point involved a question of fact, and hence could not be raised in argument in appeal for the first time. AIR (Vol 16) 1929 Lah 875: 117 Ind Cas 907.

(m) Point of law.

——S. 100 — Where the point that the plaintiff had acquired a title by adverse possession after the previous suit had not been taken in the original Court and there was no issue framed to cover it, the Judicial Commissioner's Court refused to allow the Counsel to take it up for the first time in the High Court. AIR (Vol 30) 1943 Pesh 37 : 207 Ind Cas 282.

——S. 100 — Point as to applicability of S. 82, Transfer of Property Act is point of law.

The point about the applicability of S. 82, T. P. Act, though not taken in the memorandum of

appeal, is a point of law and the High Court should not hesitate to allow it to be argued. AIR (Vol 29) 1942 Bom 95 : 44 Bom LR 15 : 199 Ind Cas 723 (DB).

——S. 100 — **Point depending on question of fact.**

It would not be right in first or second appeal to allow a point of law to be raised, which depends on questions of fact which the party relying on the point of law has not chosen to raise in the lower Court. AIR (Vol 28) 1941 Bom 197 : 43 Bom LR 222 : 195 Ind Cas 732.

——S. 100 — **Whether parties are governed by Muhammadan Law or custom.**

A pure point of law can be raised even in second appeal provided no evidence is required for deciding it. The decision of the point whether the parties are governed by Muhammadan Law or custom does not require any evidence and therefore, it is permissible to allow the party to raise it in second appeal. AIR (Vol 27) 1940 Pesh 52 : 192 Ind Cas 343 (DB).

——S. 100 — **Point of law patent on record.**

A point of law patent on the record can be raised for the first time in second appeal. AIR (Vol 26) 1939 Lah 556 : 41 PLR 524 : 185 Ind Cas 609.

——S. 100 — **All facts on record — Question whether they show trust coming under S. 92 — Whether one of law.**

A point of law can be taken at any time, and though the question whether a suit falls under S. 92 is a mixed question of law and fact, if all the material facts are on the record, the question whether such facts do or do not show the trust to be a trust within the provisions of S. 92, is a question of law which can be taken at any time. AIR (Vol 24) 1937 Sind 230 : 31 Sind LR 510 : 171 Ind Cas 344 (DB).

——S. 100 — A point of law pure and simple and not depending upon evidence may be raised by a party at any stage of the proceedings and even in appeal. AIR (Vol 23) 1936 Sind 99: 29 SLR 455 : 164 Ind Cas 43 (DB).

——S. 100 — It is open to the High Court to ignore a point even of law if it is raised for the first time in the High Court. At the same time the power of a Court of second appeal to give effect to a plain provision of law even though not raised in the Courts below cannot be questioned. Where the equities of a case require such a course to be adopted, there is no legal bar to the point being taken cognizance of by the Court itself. AIR (Vol 22) 1935 All 143 : 4 AWR 974 : 157 Ind Cas 615.

——S. 100 — **No additional evidence necessary.**

Where a point was one of law and no additional evidence was necessary, nor was it necessary to make assumptions before the point could be decided:

Held, that it could be raised in second appeal. AIR (Vol 22) 1935 Cal 179 : 60 CLJ 18 : 38 CWN 1209 : 155 Ind Cas 720.

——S. 100 — **When can be urged in second appeal.**

A new point of law may be urged in second appeal, provided the facts found are sufficient for the determination of the point. AIR (Vol 21) 1934 All 722 (1) : 18 RD 159 : 3 AWR (HC) 456 : 151 Ind Cas 256.

——S. 100 — A point of law may be taken at any time provided that, for the decision of that point, no fresh finding is necessary. If the facts admitted or if the finding of the Court be enough for the decision of the point of law, a Court is bound to hear it and, if necessary, give effect to it. AIR (Vol 21) 1934 All 719 : 3 AWR 611 : 57 All 77 : 149 Ind Cas 315 (DB).

——S. 100 — The ground that the lower Appellate Court erred in allowing an objection which it could not do unless there was a failure of justice, is a point of law which may be taken in second appeal even though it was not specifically set forth in the memo of appeal. AIR (Vol 18) 1931 All 556 : 131 Ind Cas 603 (DB).

——S. 100 — Per Sulaiman C. J. — There is nothing in AIR (Vol 18) 1931 All 35 : 133 Ind Cas 428 (FB) to suggest that although a party cannot claim permission to raise a new point of law, the Court itself is precluded from deciding a case on such new point. AIR (Vol 18) 1931 All 490 : (1931) ALJ 715 : 54 A 25 : 134 Ind Cas 236 (FB).

——S. 100 — New points even of law cannot be allowed to be raised in second appeal when they were not taken in the lower Appellate Court, unless good ground is shown for failure to take them before. 126 Ind Cas 18 : AIR (Vol 17) 1930 All 885 (DB).

——S. 100 — A new point of law may be raised for the first time in second appeal. 52 CLJ 68 : AIR (Vol 17) 1930 Cal 616.

——S. 100 — **Abandonment — When contention barred.**

Point abandoned before lower appellate Court — Point though of law cannot be raised in second appeal. 7 OWN 523 : AIR (Vol 17) 1930 Oudh 268 (DB).

——S. 100 — In second appeal, a Court will not take up a point of law for the satisfactory determination of which there is no material in the pleadings and judgments of the lower Courts. 116 Ind Cas 749 : AIR (Vol 16) 1929 All 456.

——S. 100 — Where before the Subordinate Judge the whole case proceeded on the common ground that there did exist a definite custom that the mohuntship and possession of the properties of the Asthal were limited primarily to 'Chelas' who were blood relatives of the deceased or the outgoing incumbent.

Held, that it is not possible to allow the respondent to raise the question as to the validity of this custom at the stage of appeal. 67 Ind Cas 464 : AIR (Vol 10) 1923 Pat 309 (DB).

——S. 100 — Question of jurisdiction cannot, but point of law not involving question of fact, can be raised in second appeal. 66 Ind Cas 856 : AIR (Vol 9) 1922 All 124.

——S. 100 — New point of law requiring evidence cannot be allowed in second appeal. A deed of gift to be valid must be accepted by the donee: but nowhere was it suggested in the Court below that the deed was invalid, because it had not been accepted.

Held, it is not competent in second appeal therefore for the appellants to urge the invalidity of the gift on the ground of non-acceptance. AIR (Vol 9) 1922 Bom 148 (DB).

——S. 100 — New point of law can be taken but it should be on facts found by lower Court. 2 PLT 285 : AIR (Vol 8) 1921 Pat 326 : 60 Ind Cas 393 (DB).

——S. 100 — A new point which is not a pure question of law cannot for the first time be taken up in second appeal. 59 Ind Cas 3 : 32 CLJ 75 : AIR (Vol 7) 1920 Cal 754 (DB).

——S. 100 — **New plea — Question of law.**

A new point may be raised for the first time in second appeal, provided it is purely a question of law arising on the findings of the Courts below and not affected by facts outside those findings. 12 Bur LT 75 : 10 LBR 10 : 51 Ind Cas 588 : AIR (Vol 6) 1919 Low Bur 58.

——S. 100 — New plea — Involving questions of fact.

A Court of second appeal will not allow a point of law to be taken which was not taken in either of the Lower Courts and which involved questions of fact. 22 CWN 156 : 44 Ind Cas 91 : AIR (Vol 5) 1918 Cal 526 (DB).

——S. 100 — Point of Law — Not taken in lower courts allowed to be taken in second appeal — Question of limitation. (1905) 9 CWN 636 (642) : 33 Cal 257 : 1 CLJ 408.

(n) Practice.

——S. 100 — Application for amendment of plaint rejected — Position taken by plaintiff at trial rendering amendment unnecessary — He cannot be allowed to change his position in appeal.

Where the plaintiff, after the rejection of his application for amendment of his plaint, took up a position at the trial which rendered the application for amendment altogether unnecessary, it is no longer open to him in appeal to argue that he was induced to take up that position because his application for amendment was rejected. Nor can he be permitted to change his position once again in appeal and allowed to introduce new points and ask for remand of the case for a re-trial. AIR (Vol 34) 1947 Oudh 45: 21 Luck 463: 226 Ind Cas 154 (DB).

——S. 100 — Appeal — Plea not taken in the lower Court — Whether can be allowed for first time in appeal.

A plea not taken in the lower Court will not be allowed to be taken in the Appellate Court for the first time. AIR (Vol 34) 1947 Oudh 91: 1946 OA (CC) 228.

(o) Prejudice to opposite party.

——S. 100 — No conceivable defence nor any ground of fact or law to meet it.

Where, though a ground of claim is new and was not put forward in any of the two Courts below, but no conceivable defence can be put forward by the other party, nor can that party possibly meet it on any ground of fact or law, it should be allowed to be raised even at the stage of second appeal. AIR (Vol 25) 1938 All 188: (1938) ALJ 18: 1938 RD 230: 1938 AWR 27: ILR (1938) All 218: 174 Ind Cas 292 (DB).

——S. 100 — The Court will allow, even in second appeal, a question of law to be raised for the first time if it can do so without any unfairness to the opponents, and if the question of law is such that it does not necessitate the taking of further evidence. AIR (Vol 25) 1938 Bom 29: 40 Bom LR 359: 175 Ind Cas 866.

——S. 100 — Secretary of State, if has privilege.

A court of appeal is not justified in exposing a party after he has obtained his decree to the brunt of a new attack of which he had never had notice during the hearing of the suit. The Secretary of State has no special privilege in this respect. AIR (Vol 23) 1936 Bom 19: 37 Bom LR 931: 60 Bom 42: 160 Ind Cas 505 (DB).

——S. 100, O. 11, R. 11 — Objection as to prayer for discovery, not taken in grounds of first appeal.

Where the objection that there has been prejudice by reason of the prayer for discovery not having been given effect to, was not taken in the grounds of appeal before the District Judge in appeal, it is not right in allowing this objection to be raised in second appeal. AIR (Vol 20) 1938 Cal 865: 37 CWN 758: 149 Ind Cas 927 (DB).

——S. 100 — Fresh objection.

An objection should not be allowed for the first time in second appeal though it may be based on proved facts, when the opposite party is prejudiced thereby. AIR (Vol 19) 1932 Mad 739: (1932) MWN 767: 63 Mad LJ 949: 55 M 994: 37 MLW 49: 142 Ind Cas 99 (DB).

——S. 100 — Where, in the Lower Courts, had a plea been raised the opposite party might have produced evidence to rebut it, it is too late to raise it in second appeal. AIR (Vol 10) 1923 Cal 292: 65 Ind Cas 701 (DB).

——S. 100 — No decree against parties against whom there was no first appeal.

In a second appeal no decree can be passed against a respondent against whom there was no first appeal. (1908) 12 CWN 625 (627) (DB).

(p) Procedure.

——S. 100 — Account books — Objection as to mode of proof cannot be raised for first time.

The mode of proof of a document is a question of procedure and is capable of being waived. When the objection as to the manner of proof of a document such as that the entries in the account books could not be looked at without formal proof, was not taken at the time when the document was sought to be proved in the lower Court and the document was freely referred to by the parties and the Court, it is too late to raise it for the first time in second appeal. AIR (Vol 31) 1944 Lah 58: 45 PLR 441: 212 Ind Cas 416 (DB).

——S. 100 — Proof — Documents admitted without objection — Appellate Court, if can entertain plea that they were not properly proved — Appraisement of witnesses — Whether binding.

The question of proof is a question of procedure and if it can be shown that the documents went in without any objection, it cannot be urged in the Appellate Court that they were not properly proved in the Court below. At the same time, the lower Court's appraisement of the witnesses is final and cannot be questioned in secocnd appeal. AIR (Vol 22) 1935 All 293: (1935) ALJ 401: 1935 RD 88: 1935 AWR 196: 159 Ind Cas 39.

——S. 100 — Questions of procedure dependent on facts cannot be raised. (1926) 94 Ind Cas 417 (Cal) (DB).

——S. 100 Cl. (c) (S. 584 old Code) — High Court — Second Appeal — Question of law — Lower appellate Court itself making out a new case for the parties.

Where a lower appellate Court disposes of a suit upon a case not raised by the parties and to which the evidence has not been directed, there is a substantial error or defect of procedure within the meaning of S. 584 and the High Court can in second appeal reverse the decision so arrived at. It is within the jurisdiction of the High Court in second appeal to dismiss a case if the Judges are satisfied that there is, as an English lawyer would express it, no evidence to go to the jury, because that will not raise a question of fact such as arises upon the issue itself but a question of law for the consideration of the Judge. (1904) 6 Bom LR 770: 8 CWN 865: 1 ALJ 637: 29 B 1: 31 IA 154 (159) (PC).

(q) Question of fact.

——S. 100 — New case — Question whether pre-emptor possessed superior right of pre-emption qua-vendee cannot be allowed to be raised for first time.

The question whether a pre-emptor possessed any superior right of pre-emption qua the vendee is essentially a question of fact and cannot be allowed to be raised for the first time in second appeal. AIR (Vol 33) 1946 Pesh 9.

——S. 100 — New plea — New question of fact — Permissibility.

An argument which raises a new question of fact never pleaded before or considered by the lower Courts cannot be allowed to be raised in second appeal for the first time. (1946) 21 Luck 248 : 223 Ind Cas 607 : 1945 OA (CC) 272 : 1945 AWR (CC) 272 : 1945 ALW (CC) 364 : 1945 OWN (CC) 399.

——S. 100 — Point of fact conceded by Advocate in lower Appellate Court — Such point cannot be argued in second appeal.

An Advocate has the right to say whether on the evidence he can challenge a particular fact. For doing this, he need not have the authority of the client. When the Appellate Court puts a question to the Advocate whether this or that fact can be challenged on the record, the Advocate is bound to answer. Where a point of fact was conceded by the Advocate in the lower Appellate Court, the second Appellate Court will decline to entertain arguments on that point. AIR (Vol 32) 1945 Mad 256 : 58 MLW 244 (1) : (1945) 1 MLJ 404: 1945 MWN 361(1): 220 Ind Cas 117.

——S. 100 — Question of fact — Not allowed.

A new question of fact never pleaded in lower Courts or considered by them cannot be raised in second appeal. (The question that the person is a co-sharer and has, therefore, a preferential right to pre-empt, was not allowed to be raised for the first time in second appeal.) (1945) 1945 OWN (CC) 399 : 1945 AWR (CC) 272 : 21 Luck 248.

——S. 100 — Question whether rent was not varied during 20 years.

The question whether the rent was not varied during 20 years is a question of fact and when it was not pressed in the final Court of fact, it cannot be re-agitated before the High Court in second appeal. AIR (Vol 27) 1940 Cal 584 : 44 CWN 1136 : 192 Ind Cas 77.

——S. 100 — The plaintiffs' suit was dismissed by the lower Court on the ground that there were nearer reversioners as between whom and the plaintiffs no collusion was proved. In second appeal it was urged that though on the pedigree put forward by them the plaintiffs were more remote in degree than other relations, still, according to the custom of the family as recorded in the wajib-ul-arz, they were entitled to share in the reversionary estate with the nearer reversioners:

Held, that the plaintiffs could not be allowed to raise such a new plea in second appeal. (1931) 132 Ind Cas 541 : 8 OWN 716.

——S. 100 — Intention.

The question of intention or knowledge of intention is a question of fact and cannot be raised for the first time in second appeal. AIR (Vol 18) 1931 Pat 72 : 13 PLT 38 : 130 Ind Cas 165 (DB).

——S. 100 — Question whether instrument is materially altered is one of fact. 119 Ind Cas 472 : AIR (Vol 16) 1929 Mad 622.

——S. 100 — Finding of facts not questioned in first appeal cannot be raised in second appeal. AIR (Vol 16) 1929 Rang 213.

——S. 100 — Point necessitating inquiry into facts cannot be raised. 99 Ind Cas 691 : AIR (Vol 14) 1927 Mad 455.

——S. 100 — Question of law depending on findings of fact cannot be allowed for the first time in second appeal. 104 Ind Cas 584 : AIR (Vol 14) 1927 Nag 351.

——S. 100 — Where in a suit based on surrender by a widow defendant pleaded insanity in lower Courts and failed, it is not open to him to put further in second appeal a plea that the widow did not act with knowledge of what she was doing in effecting the surrender. 99 Ind Cas 187 : 23 NLR 1 : AIR (Vol 14) 1927 Nag 129.

——S. 100 — New point involving determination of question of fact cannot be allowed in second appeal. 69 Ind Cas 630 : 49 Cal 1048 : 28 CWN 92 : AIR (Vol 10) 1923 Cal 274 (DB).

——S. 100 — It is not open to the appellant to raise, for the first time in second appeal, an issue which would depend on facts. (1922) 65 Ind Cas 706 (Cal) (DB).

——S. 100 — Question of subrogation requiring reference to facts for determination cannot be raised for first time in second appeal. 36 CLJ 186: 64 Ind Cas 266 : AIR (Vol 8) 1921 Cal 781 (DB).

——S. 100 — An appellant cannot in Second Appeal raise a new question turning on facts not investigated by the lower Courts. (1921) 62 Ind Cas 761 (2) (Cal) (DB).

——S. 100 — Question of payment of interest is one of fact. 59 Ind Cas 709 : AIR (Vol 8) 1921 Nag 94.

——S. 100 — A question of fact, not raised in the Courts below cannot be raised for the first time in Second Appeal. 59 Ind Cas 316 : AIR (Vol 7) 1920 Cal 729 (DB).

——S. 100 — A new plea involving the determination of question of fact cannot be raised in second appeal. AIR (Vol 6) 1919 Oudh 283 : 6 OLJ 76: 22 OC 3: 1 UPLR (JC) 30 : 50 Ind Cas 190.

——S. 100 — New issue — Retrial.

It is not open to the plaintiffs to ask in second appeal for a retrial on an issue of fact which had not been raised or considered in the Courts below. AIR (Vol 5) 1918 Cal 250 : 43 Ind Cas 18 (DB).

(r) Question of Law.

——S. 100 — New plea — Question of law — Legal effect of proved facts.

The legal effect of proved facts is a question of law and may be raised and considered even in second appeal. AIR (Vol 38) 1951 Pat 502: 30 PLT 388 (DB).

——S. 100 — New plea — Question of law — Bar under Art. 35 (11), Provincial Small Cause Courts Act — If question of pure law — Plea in second appeal for first time — Competency. AIR (Vol 37) 1950 Pat 284.

——S. 100 — Can be raised in second appeal.

A pure question of law not involving any further investigation of facts can be allowed to be raised for the first time in second appeal though it was not pleaded in the written statement but was allowed to be raised in lower Courts. AIR (Vol 33) 1946 Mad 57: 58 MLW 566: 1945 MWN 683: (1945) 2 MLJ 416: 58 MLW 566.

——S. 100 — Question of law on facts found by trial Court not raised in first appeal.

A question of law on the facts found by the trial Court can be raised in second appeal though that point was not raised in the first appeal. AIR (Vol 30) 1943 Pat 96: 21 Pat 799: 9 BR 105: 204 Ind Cas 41 (DB).

——S. 100 — Materials necessary for decision already on record.

Where the question is a law point and the material on which the point is to be decided is already on the record, the High Court can proceed with the case. AIR (Vol 30) 1943 Pesh 37: 207 Ind Cas 282 (DB).

——S. 100 — Important question of law.

A point which was not directly raised in either of the Courts below but which involves an important question of law can be raised in second appeal. AIR (Vol 28) 1941 Cal 58: ILR (1940) 2 Cal 334: 72 CLJ 66: 193 Ind Cas 451.

——S. 100 — Facts admitted — Question of pure law not taken in plaint but raised and considered in lower Courts — If can be raised in second appeal.

—Where the facts are admitted and the question is one of pure law which is raised in the Court of first instance and considered by that Court as well as by the lower Appellate Court, it can be raised in second appeal even though it had not been taken in the plaint. AIR (Vol 28) 1941 Cal 333: ILR (1941) 1 Cal 339: 45 CWN 277: 199 Ind Cas 403.

——S. 100 — Question of law, if can be entertained for first time in appeal.

When a question of law is raised for the first time in second appeal upon facts either admitted or proved beyond controversy it is not only competent but expedient in the interests of justice to entertain the plea. (1940) 185 Ind Cas 10: 1939 OWN 1026: 1939 AWR 291.

——S. 100 — A question of law not raised in lower Courts and for the decision of which it is necessary to refer the case back for further hearing and a complete re-trial is necessary, cannot be allowed to be raised in second appeal. AIR (Vol 25) 1938 Lah 128: 39 PLR 655: 175 Ind Cas 106.

——S. 100 — A pure question of law can be raised by a Court for the first time in appeal. AIR (Vol 22) 1935 Pesh 113: 157 Ind Cas 953.

——S. 100 — A question of law apparent on the record may be decided by the Appellate Court even if it has not been dealt with in the order under appeal nor mentioned in the written memorandum of appeal. AIR (Vol 21) 1934 Pesh 3: 147 Ind Cas 837:.

——S. 100 — A pure question of law not raised in pleadings may be raised for the first time in appeal. AIR (Vol 20) 1933 Oudh 104: 9 OWN 1052: 143 Ind Cas 338 (DB).

——S. 100 — A point involving a pure question of law can be raised at any stage, even in second appeal. AIR (Vol 20) 1933 Sind 176: 27 SLR 41: 144 Ind Cas 452 (DB).

——S. 100 — A pure question of law can be raised for the first time in appeal when it is argued on admitted facts and goes to the root of the case. AIR (Vol 19) 1932 All 510: 54 A 65: 141 Ind Cas 575 (1) (DB).

——S. 100 — Law point on face of record — Whether it can be allowed to be raised in appeal or not depends on circumstances of case and nature of point raised. AIR (Vol 17) 1930 Lah 937.

——S. 100 — Question of law depending on other questions cannot be raised. AIR (Vol 14) 1927 Mad 411: 38 MLT 102: 99 Ind Cas 367.

——S. 100 — A pure question of law can be raised for first time in second appeal. AIR (Vol 12) 1925 All 361: 86 Ind Cas 589: 47 All 324: 23 ALJ 138: LR 6 A 19 Civ (DB).

——S. 100 — Plea of law patent upon record may be raised for the first time in second appeal. AIR (Vol 10) 1923 Lah 491: 83 Ind Cas 768.

——S. 100 — New plea — Question of law — Depending on facts not raised.

In second appeal the High Court cannot deal with a question of law the determination of which is based upon a question of fact not raised in the Courts below. AIR (Vol 6) 1919 Pat 329: 51 Ind Cas 256 (DB).

——S. 100 — New plea — Question of law.

If the right view of the law can be argued upon the facts found, the High Court can decide the question of law in second appeal. (1910) 6 Ind Cas 75 (Cal).

——S. 100 — New plea — Question of law — Urged for the first time.

A pure question of law may for the first time be urged in second appeal, though the omission by appellant to press it previously may be considered in the order as to costs. (1910) 14 CWN 141: 2 Ind Cas 202 (DB).

(s) Registration.

——S. 100 — Plea that assignment of decree was not registered — Question involving question of fact.

Where an objection as regards registration of deed of assignment of a decree was not taken in either of the lower Courts and the matter involved a question of fact, namely, whether the deed was in fact registered or not:

Held, that the High Court could not allow it to be taken before it as there were no materials on which that question of fact could be decided. AIR (Vol 24) 1937 Nag 237: ILR (1938) Nag 221: 172 Ind Cas 43 (DB).

——S. 100 — The question whether the registration of a document is invalid on account of the inclusion of property simply for giving jurisdiction to the Sub-Registrar to register, cannot be allowed to be raised for the first time in appeal. AIR (Vol 14) 1927 Mad 92: 25 MLW 327: 98 Ind Cas 195.

——S. 100 — New plea — Registration.

The plea of want of registration of a surety bond cannot be entertained in second appeal when the point has not been raised in the two Courts below. AIR (Vol 2) 1915 Lah 217: 53 PWR 1915: 147 PLR 1915: 29 Ind Cas 271.

(t) Res judicata.

See Note 46 and Civil P. C., S. 11.

(u) Waiver.

——S. 100 — Objection to decree under S. 33 (4), U. P. Agriculturists' Relief Act.

Mortgagee was not allowed to raise an objection in second appeal which he had not raised in lower Court that the mortgagor had made an application under S. 33(4) for a decree for the amount of overpayment made to the mortgagee. AIR (Vol 32) 1945 All 305: 1945 AWR (HC) 70: (1945) ALJ 160: 1945 OWN (HC) 126: 1945 RD 276: ILR (1945) All 284.

——S. 100 — Relief under Usurious Loans Act not claimed in lower Court.

Where, in the Courts below, no attempt was made to show that the appellants were entitled to any relief under the Usurious Loans Act, it was held that it was too late to raise this point in second appeal. AIR (Vol 32) 1945 Pat 466: 11 Cut LT 37.

——S. 100 — Finding of trial Court against person not contested in appeal by him — He cannot attack it in second appeal.

Where the appellant in the first Appellate Court does not attack a finding of the trial Court against him, it is not open to him to attack that finding in second appeal. AIR (Vol 30) 1943 All 196: (1943) ALJ 157: 1943 AWR (HC) 68: ILR (1943) All 493: 207 Ind Cas 411 (DB).

——S. 100 — Plea abandoned in lower Court.

It is not open to the appellant to raise a plea in second appeal which he had definitely abandoned in the lower Appellate Court. AIR (Vol 30) 1943 Oudh 83: 1942 OWN 725: 18 Luck 632: 204 Ind Cas 237.

——S. 100 — Finding not challenged in first appeal.

A finding of the trial Court not challenged in first appeal cannot be challenged in second appeal. (1943) 205 Ind Cas 520: 1942 OWN 744.

——S. 100 — Where a finding was not challenged in the grounds of appeal before the first Appellate Court nor is the question raised in the grounds of

second appeal, it cannot be argued in second appeal. AIR (Vol 30) 1943 Pesh 66: 209 Ind Cas 179 (DB).

——**S. 100 — Point set up in pleadings but not made ground of attack and no issue framed.**

A point which was not made a ground of attack in the lower Courts, though it had been set up in the pleadings, and no issue had been framed in respect of it, cannot be allowed to be raised in second appeal. AIR (Vol 27) 1940 Nag 70: 1939 NLJ 573: ILR (1941) Nag 669: 188 Ind Cas 181.

——S. 100 — The point which was given up in the lower Appellate Court cannot be allowed to be raised again in second appeal. (1938) 40 PLR 531.

——**S. 100 — Allegation as to caste — No immediate retort — Whether can be challenged at time of argument in second appeal.**

In a country like India where the people generally are so intensely community-conscious and where the usual reply to the question who are you, is not a name but a caste, if any allegation about the caste or community does not produce an immediate retort, it is too late to challenge it at the stage of argument in second appeal. AIR (Vol 25) 1938 Nag 163: 1938 NLJ 24: ILR (1938) Nag 469: 177 Ind Cas 860 (DB).

——S. 100 — A point taken in the grounds of appeal to the lower Appellate Court but not noticed in its judgment cannot be dealt with in second appeal in the absence of an affidavit from the Advocate who argued the case in the lower Court. (1937) 39 PLR 312.

——S. 100 — It is not fair to ask that a lower Court's decision should be upset when the provisions of law relied on in the High Courts were never brought to the attention, much less pressed upon the lower Court, and the lower Court has, therefore, been given no opportunity of acceding to such argument. AIR (Vol 17) 1930 All 726.

——**S. 100 — New plea — Validity of enactment.**

The question of the validity of the imposition of the personal tax under S. 85, Municipal Act, cannot be raised for the first time in the argument in the High Court. AIR (Vol 16) 1929 Cal 452: 49 CLJ 383: 33 CWN 684 (DB).

——S. 100 — Question of law depending on question of fact not raised in lower Court was not allowed. AIR (Vol 13) 1926 Pat 401: 5 Pat 759: 8 PLT 124: 1926 PHCC 225: 96 Ind Cas 529 (DB).

——S. 100 — Defendant cannot raise for the first time in second appeal a point which he did not raise in the written statement and as to which no issue was framed. AIR (Vol 12) 1925 Lah 192: 6 LLJ 467.

——S. 100 — When a point is not taken in the lower Court, that is a conclusive bar on an appeal in High Court. As soon as it is established that the point ought to have been taken in the Court of first instance the Court should refuse to allow it. AIR (Vol 10) 1923 All 430: 75 Ind Cas 612 (DB).

——**S. 100 — New plea — Issue not framed.**

A controversy cannot be raised in second appeal for the first time in a matter regarding which no issue was framed. AIR (Vol 7) 1920 Cal 499: 24 CWN 53: 31 CLJ 78: 54 Ind Cas 719 (DB).

——**S. 100 — New plea — Point not pressed in Court below.**

A point, raised in the memorandum of appeal to the Lower Appellate Court but not pressed before that Court, cannot be raised in second appeal. AIR (Vol 6) 1919 Oudh 30: 7 OLJ 17: 2 UPLR (JC) 31: 55 Ind Cas 441.

——**S. 100 — New plea — Not to be set up.**

A point not taken in the lower Courts cannot be raised for the first time in second appeal. The parties are bound by the case which arises on their pleadings and which has been enquired into by the trial Court. AIR (Vol 2) 1915 Lah 399: 80 PWR 1915: 153 PLR 1915: 29 Ind Cas 895.

——**S. 100 — New plea — Not to be raised.**

A plea not raised in either of the Courts below cannot be entertained for the first time in further appeal to the Chief Court. AIR (Vol 2) 1915 Lah 169: 61 PWR 1915: 144 PLR 1915: 29 Ind Cas 761 (DB).

——**S. 100 — New plea — Custom or Mohomedan Law.**

When the defendant failed to raise a plea in lower Courts that Mahomedan Law governed them and did not also raise the same in the ground of appeal, Held it was too late to urge that plea at that stage. AIR (Vol 1) 1914 Lah 425: 217 PLR 1914: 127 PWR 1914: 24 Ind Cas 678 (DB).

——**S. 100 — Evidence — Findings not challenged in Lower Appellate Court.**

Facts not challenged by the appellant in the lower Appellate Court cannot be challenged in second appeal. (1910) 6 Ind Cas 331 (All) (DB).

——**S. 100 and O. 1, R. 1 — Non-joinder — Objection cannot be taken in second appeal.**

An objection of non-joinder of parties cannot be allowed to be taken in second appeal if it was decided against the objector in the first Court and was not taken in the lower Appellate Court. (1909) 9 CLJ 91: 3 Ind Cas 693.

——**S. 100 — Plea not raised — Evidence not let in — Plea on appeal.**

Where a plea of transfer of property failed, and on appeal the party claimed an implement of a contract to transfer for valuable consideration, Held that the plea should not be allowed to be taken for the first time on appeal. (1901) 5 CWN 217: 24 M 377: 28 IA 46 (PC).

47. Notice.

——S. 100 — Creation of service-tenure after passing of the T. P. Act — Tenant renouncing character as service tenant — Suit for ejectment — Point not raised by tenant in lower Courts — Express issue raised on question of notice abandoned in trial Court:

Held, that the point could not be raised in second appeal. AIR (Vol 28) 1941 Cal 506 : 73 CLJ 159 : 45 CWN 654 : 197 Ind Cas 45.

——**S. 100 — Court finding on certain evidence that service of notice under S. 7, Bihar and Orissa Public Demands Recovery Act, was valid.**

A finding by the Court upon certain evidence that the service of notice under S. 7, Bihar and Orissa Public Demands Recovery Act, is valid, is a decision on a point of law and not merely a finding of fact. AIR (Vol 25) 1938 Pat 622 : 19 PLT 645 : 5 BR 483 : (1938) PWN 202 : 180 Ind Cas 740 (DB).

——**S. 100 — Notice — Date of.**

Where the date of the report of the serving peon was December 22, but December 19 was mentioned below the marks of thumb impressions of the various persons on the back of the notice just above the report of the peon, and the trial Court concluded that that date was the date on which the peon visited the spot and took steps for publication and posting of the notice as required by the rules framed by the Local Government and the report and notice were exhibited :

Held, that it was open to the trial Judge as a Court of fact to draw such inference as could be drawn from the various parts of the exhibits before him and as he had materials on which he could base the finding, it could not be interfered with in second appeal. AIR (Vol 24) 1937 Pat 479 : (1937) PWN 236: 3 BR 338 : 167 Ind Cas 817.

——S. 100 — Question of notice is not pure question of law.

The question of notice is not a pure question of law. AIR (Vol 22) 1935 Cal 713: 159 Ind Cas 370 (DB).

——S. 100 — A contention that notice should have been given to the Liquidator should not be raised for the first time in second appeal as it is a mixed question of law and fact. AIR (Vol 21) 1934 Nag 201: 17 NLJ 47: 30 NLR 240: 148 Ind Cas 714.

——S. 100 — Landlord and tenant — Denial of title — Notice to quit — Finding as to forfeiture on account of denial of title — Interference in second appeal.

A finding on the question whether there was forfeiture of the tenancy by reason of the defendant's denial of the landlord's title is a finding of fact and cannot be interfered with in second appeal.

If there was any denial of title prior to the institution of the suit, no notice would be necessary.

If one cannot have any reasonable grievance on the ground of lack of notice, the Court may refuse to interfere in second appeal merely on the technical ground of want of notice. AIR (Vol 20) 1933 Lah 377: 34 PLR 884: 145 Ind Cas 992.

——S. 100 — Constructive notice.

The question of constructive notice is a mixed question of law and fact rather than of pure law AIR (Vol 18) 1931 Bom 430 : 33 Bom LR 499 : 135 Ind Cas 431.

——S. 100 — Question of sufficiency of notice, being one of pure fact, cannot be raised for first time in Letters Patent Appeal. 30 MLW 583 : 118 Ind Cas 279 : AIR (Vol 16) 1929 Mad 617 (DB).

——S. 100 — Question whether purchaser had notice of a charge on the property purchased is one of fact and binding on High Court in second appeal. 117 Ind Cas 405 : 6 OWN 493 : AIR (Vol 16) 1929 Oudh 316 (DB).

——S. 100 — Railways Act, S. 140 — Question whether notice was duly served is one of fact. 99 Ind Cas 622 : AIR (Vol 14) 1927 All 215 (DB).

——S. 100 — The question whether certain facts found amounted to giving notice within S. 70, Bengal Tenancy Act, or not is a question of law. 1926 PHCC 258 : 8 PLT 221 : 98 Ind Cas 991 : AIR (Vol 13) 1926 Pat 495 (DB).

——S. 100 — Question of law considered by Trial Court but ignored in appeal — High Court must take notice of such question. 89 Ind Cas 563 : 12 OLJ 382 : 2 OWN 529 : AIR (Vol 12) 1925 Oudh 506.

——S. 100 — Railways Act, S. 77 — Absence of notice — New plea as to, cannot be raised in second appeal. 72 Ind Cas 779 : AIR (Vol 10) 1923 Lah 609.

——S. 100 — New plea — Restoration.

If a respondent first comes to know of the erroneous order restoring the appeal without any notice upon him, he can raise objection to its validity in second appeal. 63 Ind Cas 99 : 3 Pat LT 117 : 1921 PHCC 337 : 6 PLJ 625 : AIR (Vol 9) 1922 Pat 281 (DB).

——S. 100 — New plea — Notice to quit.

Where the defendant did not raise in the Court of first appeal the point as to whether the notice to quit was legal and sufficient the point could not be raised in second appeal. 2 Pat LJ 595 : 2 Pat LW 52 : 42 Ind Cas 655 : AIR (Vol 4) 1917 Pat 469 (DB).

——S. 100 — New plea — Question of notice.

A question of notice cannot be allowed to be raised for the first time in second appeal. 41 Cal 418 : 25 Ind Cas 118 : AIR (Vol 1) 1914 Cal 828 (DB).

——S. 100 — New plea — Notice to quit — Want of.

The defendant, was not entitled to rely on the plea of want of notice in bar of plaintiff's claim in second appeal. (1912) 15 Ind Cas 584 (Mad).

——S. 100 — New plea — Want of notice.

Objection on the ground of want of proof of service of notice can be taken even in second appeal, though not raised before that stage. (1910) 5 Ind Cas 336 (All).

——S. 100 (S. 584 old Code) — Notice to quit — Objection as to want of, raised in second appeal.

An objection as to want of notice to quit can be raised in second appeal. (1902) 4 Bom LR 58: 26 B 360 (362) (DB).

48. Nuisance.

——S. 100 — Whether facts establish nuisance is question of law.

The question whether certain proved facts establish a nuisance is a question of law. AIR (Vol 30) 1943 Lah 306: 46 PLR 125: 209 Ind Cas 462.

——S. 100 — Finding that erection of latrine is nuisance, is one of fact.

The finding that the erection of a latrine is nuisance to the party, is a finding of fact and cannot, therefore, be challenged in second appeal. AIR (Vol 28) 1941 Mad 650: 53 MLW 656: (1941) 1 MLJ 768: 1941 MWN 502: 200 Ind Cas 729.

——S. 100 — The finding that a public lane has not been narrowed down so as to cause damage to the residents in the lane is a finding of fact which cannot be called in question in second appeal in the High Court. AIR (Vol 16) 1929 All 504: 118 Ind Cas 520.

——S. 100 — Existence as to nuisance is a question of fact. AIR (Vol 13) 1926 Nag 50: 89 Ind Cas 929.

——S. 100 — Finding as to, existence of nuisance is one of fact. AIR (Vol 12) 1925 Lah 424: 90 Ind Cas 227: 7 LLJ 192.

——S. 100 — Where the principles of law applicable have neither been ignored nor violated, a finding as to the existence of a nuisance is binding on the Court in second appeal. (1922) 64 Ind Cas 169 (Lah) (DB).

49. Partition.

——S. 100 — Finding that parties are separate in status is one of fact.

Where, on a consideration of the entire evidence, the lower Appellate Court comes to the finding that though there is no partition by metes and bounds, there is a complete cesser of commensality between the parties and the parties are in separate possession as tenants-in-common, the finding is essentially a finding of fact and cannot be re-opened in second appeal. AIR (Vol 33) 1946 Pat 231: 25 Pat 1: 12 BR 218: 221 Ind Cas 683.

——S. 100 — Severance of status, if a question of fact.

As regards partition, the actual severance of status is sometimes effected by a formal document such as a deed of partition or by the use of words indicating an unequivocal intention to separate. Now, there can be no doubt that the actual severance, the actual breaking of the legal tie, is a matter of law, just as much as the actual act of a transfer in a case of sale or gift or mortgage. The construction of the document which effects this legal severance or the interpretation to be placed upon the actual words used when they are known is, therefore, a question of law. It is for the Judge to decide as a matter of law whether the words used are legally capable of effecting a severance in status, just as much as whether the

words used in a document which purports to be one of sale or mortgage or gift can legally effect the transfer contemplated. But when there is no document which in itself purports to effect the severance or when actual words used are not known, then one is thrown back on other kinds of evidence to determine whether there ever was such a severance, not whether it could be legally effected by the particular form of words used but whether such a transaction ever took place. That is a question of fact pure and simple, and once it is found that there was such a transaction then in the absence of proof of the actual words used, the law presumes that everything was done legally, and so the transaction which is now accepted as an actual proved fact is upheld because of the presumption that it was a legal one.

The question whether the parties came together and argued to sever their status, or any of them expressed an unequivocal intention to do so is a question of fact and not of law. Where the lower Appellate Court has considered all these facts and also other facts which lead to the opposite conclusion, its decision that the parties did not separate is conclusive in second appeal. AIR (Vol 24) 1937 Nag 230: 171 Ind Cas 860.

——S. 100 — Plaintiff's case based on jointness of family — Defendant alleging separation — Onus — Shifting of onus — Whether a matter of law.

Whether the plaintiff's case is that a certain property was jointly held by himself and his brother, and defendants allege separation, the onus of proving separation is on the defendant. Cesser of commensality is evidence by which this can be proved, and in so far as it shifts the onus, it shifts it in the secondary sense of the term only, and that is not a matter of law. AIR (Vol 24) 1937 Nag 230: 171 Ind Cas 860.

——S. 100 — Question of disruption of joint Hindu family.

A finding that there has or has not been a disruption of a joint Hindu family is not a finding of fact, and can be questioned in second appeal. It is an inference of the legal effect of the facts found. AIR (Vol 21) 1934 Nag 13: 144 Ind Cas 919.

——S. 100 — Partition suit — Finding that plaintiff had a share in specified trees other than groves which were admitted joint — Interference in second appeal.

In a partition suit, the lower Court found that plaintiff had share in certain specified trees in plots other than the grove admitted to be joint:

Held, that the findings of the lower Court were findings of fact which must be accepted in second appeal. AIR (Vol 21) 1934 Oudh 177 (1): 18 RD 161: 11 OWN 259: 151 Ind Cas 533 (1) (DB).

——S. 100 — Partition.

Suit for partition — Objection to maintainability on the ground of its being for partial partition cannot be raised for first time in second appeal. AIR (Vol 14) 1927 Mad 528: 100 Ind Cas 202.

— S. 100 — Whether the lower appellate Court arrived at the finding on relevant evidence and certain admissible registered deeds that there was a partition.

Held, that being a finding of fact it was conclusive. AIR (Vol 9) 1922 All 283 : 69 Ind Cas 807.

——S. 100 — In a partition suit, a plea on the ground of inconvenience, cannot be urged in second appeal, if not urged in the lower Courts. AIR (Vol 7) 1920 Oudh 231: 7 OLJ 538: 60 Ind Cas 433: 23 OC 281.

50. Partnership.

——S. 100 — Partner also creditor of partnership — Whether he can sue some of partners to recover proportionate share of debt is question of law.

The question whether a partner who is also a creditor of the partnership in respect of a partnership debt is entitled to sue some of the partners to recover proportionate share of debt from them without suing for dissolution of partnership, being a pure question of law, can be raised for the first time in second appeal. AIR (Vol 33) 1946 Nag 266 (DB).

——S. 100 — Time of retirement — Question of fact.

The finding on the question of the time of retirement of a partner from the partnership is one of fact. AIR (Vol 32) 1945 All 332: ILR (1945) All 520: (1945) ALJ 201: 1945 AWR (HC) 344 (DB).

——S. 100 — Whether there is partnership is a mixed question of law and fact. AIR (Vol 26) 1939 Bom 410: 41 Bom LR 899: ILR (1939) Bom 616: 184 Ind Cas 397 (DB).

——S. 100 — Question of partnership.

Under S. 5, Partnership Act, partnership is a legal relationship arising from contract, & when there is no deed of partnership setting out the terms of the contract, the question whether that legal relationship existed between the parties has to be inferred by consideration of the provisions of S. 6, Partnership Act, from the facts as to the manner in which the business, in which the parties were concerned, was conducted and as to their relationship with one another in connection with that business. It is a legal conclusion to be drawn from the findings as to the simple facts, and the correct inference to be drawn from the proved facts, as to the relation of the parties towards one another in the business, must be a matter of law.

The question whether the proper effect of the facts held by the Judge on first appeal to have been proved, is to establish that there was a contract of partnership between the parties is one of law. AIR (Vol 23) 1936 Rang 383: 164 Ind Cas 1100.

——S. 100 — A finding that a partnership was dissolved on a particular date is a finding of fact conclusive and cannot be challenged in second appeal. AIR (Vol 21) 1934 Lah 557: 35 PLR 557: 153 Ind Cas 49 (1) (DB).

——S. 100 — Firm.

The question whether a person is a partner or agent of a firm is a mixed question of law and fact, and therefore High Court is entitled to test the correctness of the lower Court's conclusion by an examination of the relevant evidence in the case. AIR (Vol 12) 1925 Mad 768: 87 Ind Cas 663: 21 MLW 541: 48 MLJ 518 (DB).

51. Powers and duties of Court.

——S. 100 — Findings of fact — Interference — Power of High Court.

It is settled law that in view of S. 100, C. P. Code, a High Court has no power in second appeal to question findings of fact reached by the first appellate Court which there was evidence to support. The High Court will be exceeding its powers under this section if it differs from the view taken by the lower appellate Court upon appreciation of oral evidence. AIR (Vol 37) 1950 PC 28: 1950 ALJ 113: 63 LW 184: 1950 AWR 211: 54 CWN 508: 52 Bom LR 477: 31 PLT 1: (1950) 1 MLJ 294.

——S. 100 — Conversion of second appeal into revision.

A second appeal which is not competent may be treated by the High Court as a petition for revision. AIR (Vol 32) 1945 Lah 34: 46 PLR 348: 219 Ind Cas 162.

——**S. 100 — Duty of High Court.**

When entertaining a second appeal it is the duty of the High Court to clearly specify the grounds upon which they hold the second appeal to be competent. AIR (Vol 30) 1943 PC 208: (1943) ALJ 569: (1943) 2 MLJ 606: 1943 OWN 531: 56 MLW 792: ILR (1944) Kar PC 40: 1943 AWR (PC) 88: 48 CWN 109: 10 BR 348: 1944 MWN 81: 70 IA 225: 78 CLJ 7: 210 Ind Cas 507.

——**S. 100 — Lower Appellate Court wrongfully entertaining appeal and dismissing it on merits — Interference with trial Court's order.**

When the District Judge wrongly entertains an appeal and dismisses that appeal on the merits, the only order which can properly be passed in second appeal would be to set aside the incompetent appellate order. There would be no apparent justification for going into the merits of the trial Court's order, which is unaffected by the incompetent appellate decision. Should the High Court, when hearing a second appeal against an incompetent appellate order, come to the conclusion that the trial Court's order is wrong on the merits, in a proper case, the High Court will interfere in revision with the order of the trial Court. But in second appeal, the only thing which the High Court can properly do is to set aside the incompetent appellate order. AIR (Vol 29) 1942 Mad 741: 1942 MWN 632: (1942) 2 MLJ 450: 206 Ind Cas 359.

——S. 100 — Quaere.—Whether in second appeal the High Court would be justified in applying the principles of O. 41, R. 33, Civil P. C. when that point is not raised in the lower Appellate Courts. AIR (Vol 28) 1941 Oudh 56: 1940 OWN 807: 1940 AWR (CC) 366: 16 Luck 113: 190 Ind Cas 334.

——**S. 100 — Conversion of second appeal into revision.**

Second appeal may be converted into revision by the High Court. (1940) 42 PLR 555.

——**S. 100 — Court's duty is only to see whether evidence is admissible and proper for consideration.**

The Court is not concerned in second appeal with the weight that is to be attached to the evidence but whether the evidence is admissible and proper for consideration. AIR (Vol 26) 1939 Nag 210: 1939 NLJ 252: ILR (1939) Nag 636: 185 Ind Cas 169.

——S. 100 — A High Court has, in second appeal, a right to disturb findings of fact if those findings of fact are based upon inadmissible evidence. AIR (Vol 23) 1936 Oudh 192: 1935 OWN 1388.

——S. 100 — Findings of fact would ordinarily bind the High Court in second appeal; but it has power to reverse them if they appear to be based on reasoning which is manifestly wrong. AIR (Vol 21) 1934 All 902: 18 RD 313: 152 Ind Cas 757.

——**S. 100 — Finding based partly on evidence held inadmissible and irrelevant — Power of second Appellate Court to see if there is other evidence to support the finding.**

Where the District Judge has based his finding partly on evidence which he had himself held to be inadmissible and wholly irrelevant, it is open to the Court of second appeal to see if there is other evidence on the record to support the finding. (1934) 148 Ind Cas 1058: 35 PLR 300 (DB).

——**S. 100 — Second appeal.**

The High Court has the power to deal with a small question of fact such as one relating to damages so as to avoid a remand. AIR (Vol 18) 1931 Cal 129: 34 CWN 951 (DB).

——**S. 100 — Remand.**

Where the finding of fact by the lower Appellate Court is perverse, the case should be remanded for a re-hearing to the lower Appellate Court. (1931) 1931 MWN 102 (103) (DB).

——**Ss. 100 and 103 — Second appeal — High Court whether can substitute finding.**

Where there is no definite finding of fact in the judgment of the lower appellate Court, High Court will go into the question of fact if without a clear finding on the point of fact which goes to the root of the whole case it is impossible to deal with the law in the case. AIR (Vol 18) 1931 Rang 29: 8 Rang 425: 128 Ind Cas 366.

——S. 100 — Lower Court trying to fit facts with law — Finding of fact of lower Court can be set aside in second appeal. AIR (Vol 17) 1930 All 510 (DB).

——**S. 100 — Second appeal — One not a party to first appeal, if can be made party in second appeal.**

Where the appellant had failed to implead a party who would be materially affected by the decision in the appeal, and without whom any adjudication in the appeal would be of little practical consequence, the appellant is not entitled to make such party as a party respondent in the second appeal.

Per Broomfield, J.—The power of the High Court to add a respondent who was not made a party in the Court of first appeal is a matter of some difference of opinion. In any case, such a power is discretionary. AIR (Vol 17) 1930 Bom 554: 32 Bom LR 1252 (DB).

——S. 100 — Calcutta Municipal Act, S. 142 — Appeal to High Court under S. 142 is not a second appeal within S. 100, and the questions of fact can be gone into.

Page, J. — The appeal to the High Court under S. 142 is not preferred under the Code of Civil Procedure but pursuant to the special jurisdiction conferred upon the Court of Small Causes and the High Court under the Calcutta Municipal Act. AIR (Vol 14) 1927 Cal 802: 46 CLJ 260: 31 CWN 1040: 55 Cal 228: 103 Ind Cas 533 (DB).

——S. 100 — According to the amendment of S. 103, the High Court can decide, if there is sufficient evidence, a question of fact wrongly decided by the lower appellate Court. AIR (Vol 14) 1927 Cal 1: 31 CWN 32: 99 Ind Cas 189 (FB).

——S. 100 — Documentary evidence — Court will decide only admissibility and not their evidentiary value. AIR (Vol 13) 1926 Cal 727: 92 Ind Cas 104 (DB).

——S. 100 — In an appeal against an order of remand the only grounds available to the appellant to attack the judgment are those which would be available to him in second appeal. AIR (Vol 13) 1926 Mad 475: 91 Ind Cas 462 (DB).

——S. 100 — Per Dawson-Miller, C. J.—It is not for the High Court, sitting in second appeal, even if it thinks that certain evidence had been improperly rejected by the lower Court, to weigh that evidence as against the evidence on the other side and arrive at a conclusion of fact upon the matter. There may be cases which in second appeal, the appellate Court is entitled to decide itself, because the matter is so clear that no Court acting reasonably can come to any conclusion but one. But if there is evidence on both sides, and the case does not come under S. 103, C. P. Code, the only possible thing to do, is to remand the case for determination of the question of fact, taking into consideration the evidence improperly rejected along with the other evidence in the case.

Per Jwala Prasad, J.—Once a second appeal has been properly laid, Rules 23, 24 and 25 under O. 41

and 42 will apply for the disposal of that appeal. The finding of fact of the lower appellate Court having been set aside under S. 100, C. P. Code, if evidence on the record is sufficient, there is nothing to prevent the High Court from going into evidence and determining the case finally under R. 24 of O. 41, S. 103, which has been added in the new Code (1908) has widened the power of the High Court to determine any issue not determined by the Court below after going into evidence. AIR (Vol 9) 1922 Pat 417: 3 Pat LT 303: 65 Ind Cas 536.

——S. 100 — In second appeal the Court is not in possession of all the evidence or in a position to be able to weigh it and see whether in fact apart from the objectionable evidence there was sufficient evidence to entitle the lower Court to come to the decision which it did, so as to enable the High Court to affirm that decision under S. 167 of the Evidence Act. AIR (Vol 8) 1921 Pat 61: 1921 PHCC 17 (DB).

——S. 100 — Finding of fact — Interference.

The High Court has no power in second appeal to go behind a finding of fact of the Lower Appellate Court. AIR (Vol 4) 1917 Cal 89: 38 Ind Cas 161 (DB).

——S. 100 — Powers of Court — Commissioner of Kumaon.

The Commissioner of Kumaon as a Court of second appeal is bound by the findings of fact of the lower Appellate Court. (1909) 3 Ind Cas 8 (All) (DB).

52. Presumption.

——S. 100 — Finding of fact — Record of rights — Presumption of correctness of entry wrongly raised — Finding based on — Finality — Interference. AIR (Vol 37) 1950 Pat 293.

——S. 100 — Findings of trial Court based on Record of Rights cannot be disturbed by lower Appellate Court.

There is a statutory presumption of correctness attaching to the Record of Rights and when the trial Court had relied upon it as a piece of evidence, the lower Appellate Court should not come to a finding of its own after ignoring this important piece of evidence altogether. In such a case, the finding arrived at by the lower Appellate Court can be disturbed. AIR (Vol 27) 1940 Pat 137: 18 Pat 768 : 6 BR 407 : 21 PLT 420 : 186 Ind Cas 865 (DB).

——S. 100 — Finding that presumption of Record of Rights was rebutted, justified by evidence — Finding, if can be disturbed in second appeal.

Where both the lower Courts hold that the presumption arising from the entry in the Record of Rights has been rebutted and there is some justification for that finding, that finding should not be disturbed in second appeal, although no doubt the mere non-payment of rent for a very long period is not generally in itself sufficient to rebut the presumption arising from the Record of Rights that the land is liable to assessment to rent. AIR (Vol 26) 1939 Cal 366 : 69 CLJ 92 : 184 Ind Cas 41.

——S. 100 — Record of Rights, entry in — Correctness of, if can be opened.

Whether the entry in the Record of Rights be correct or not, cannot be opened in second appeal. The entry must be presumed to be correct in the absence of evidence showing it to be wrong. AIR (Vol 26) 1939 Pat 276 (277) : 5 BR 356 : 180 Ind Cas 127 (DB).

——S. 100 — The question whether a statutory presumption was rebutted by the rest of the evidence is a question of fact. AIR (Vol 25) 1938 Lah 445 : 40 PLR 655 : 180 Ind Cas 969 (DB).

——S. 100 — The question whether a statutory presumption is rebutted by the rest of the evidence is a question of fact. AIR (Vol 25) 1938 Lah 357 : 180 Ind Cas 555 (DB).

——S. 100 — Question, if presumption is rebutted or not.

The question whether the presumption attaching to a document has or has not been rebutted in a particular case is one of fact and cannot be agitated in second appeal. AIR (Vol 24) 1937 Lah 463: 173 Ind Cas 993 (DB).

——S. 100 — Question whether entry in Record of Rights is rebutted.

The question as to whether an entry in Record of Rights is rebutted by evidence is one of fact. It is not permissible for the High Court sitting in second appeal to decide this point of fact for itself. All it has to investigate is whether the decision of the final Court of fact on the particular facts is vitiated by any error of law. AIR (Vol 22) 1935 Pat 415 : 16 PLT 363 : 2 BR 46 : 158 Ind Cas 1134 (DB).

——S. 100 — Where the finding of the District Judge is vitiated by the fact that he did not take into account the presumption attaching to the current settlement record under S. 44, Punjab Land Revenue Act and he also gave his finding under mis-apprehension that settlement had been carried out in the year 1884, the finding can be upset in second appeal. AIR (Vol 21) 1934 Lah 309: 151 Ind Cas 407.

——S. 100 — Where the Court raises a legal presumption that when the equity of redemption is purchased by the mortgagee, the mortgage is extinguished, there is a question of law for purposes of second appeal. AIR (Vol 19) 1932 Lah 56: 32 PLR 759: 135 Ind Cas 201.

——S. 100 — The question whether a presumption is rebutted or not is a question of fact to be determined according to the circumstances of each case. AIR (Vol 19) 1932 Mad 173 : 136 Ind Cas 783.

——S. 100 — The question whether a statutory presumption is rebutted by the evidence is always a question of fact. AIR (Vol 17) 1930 PC 91: 122 Ind Cas 316: 1930 ALJ 292: 32 Bom LR 380: 31 PLR 145: 31 MLW 321: 11 Lah 199: 57 IA 86.

——S. 100 — Question or finding of fact — Mistake or error — Evidence.

Held, that the finding that the presumption as to entries in record-of-rights has been rebutted is one of fact and that it cannot be challenged in second appeal. AIR (Vol 17) 1930 Lah 991: 12 Lah LJ 161 (DB).

——S. 100 — Presumption based on probabilities deduced from evidence is one of fact. AIR (Vol 17) 1930 Lah 557.

——S. 100 — Evidence Act, S. 114 — Document creating obligation in hands of obligor — Court may presume that obligation is discharged — Failure to draw inference sustains second appeal. AIR (Vol 17) 1930 Lah 443: 121 Ind Cas 730: 12 LLJ 21.

——S. 100 — Finding of fact based entirely on presumption arising out of a rule of Mahomedan Law can be attacked in second appeal on the ground of the non-applicability of the rule. AIR (Vol 17) 1930 Lah 97: 120 Ind Cas 495.

——S. 100 — Validity of.

Where finding of fact is based entirely on presumptions validity of presumptions can be examined in second appeal. AIR (Vol 17) 1930 Oudh 17: 118 Ind Cas 808 (DB).

——S. 100 — Failure to evoke.

The second Appellate Court is justified in interfering with a finding of fact of the lower Appellate

Court, where the lower Appellate Court has failed to invoke a presumption of the nature illustrated in S. 114, Evidence Act. AIR (Vol 15) 1928 All 16: 106 Ind Cas 250: 50 All 145: 25 ALJ 833.

——S. 100 — Court proceeding on wrong presumption in law but basing its finding on correct principles — Question cannot be reopened. AIR (Vol 14) 1927 Mad 331: 25 MLW 76: 99 Ind Cas 981: 52 MLJ 100.

——S. 100 — The question that an ala malik must be presumed to have rights in the shamilat is not a question of law. AIR (Vol 13) 1926 Lah 21: 90 Ind Cas 1047: 26 PLR 605.

——S. 100 — Failure to draw.

An open user continued without interruption for a period of over 20 years and not shown to be attributable to permission or sufferance on the owner's part is prima facie evidence of enjoyment as of right within the meaning of S. 26 of the Limitation Act. Failure on the part of Court to draw such a presumption will be an error of law making a second appeal competent. AIR (Vol 12) 1925 Nag 270: 85 Ind Cas 81.

——S. 100 — A merely conjectural finding of the lower Appellate Court that the common ancestor of the parties occupied the land in suit is liable to be set aside in second appeal. (1924) 79 Ind Cas 970: 5 Lah LJ 106.

——S. 100 — The question whether the presumption of the correctness of the Record of Rights has been rebutted in a particular case is more a question of fact than of law. (1922) 65 Ind Cas 527 (Cal) (DB).

——S. 100 — Presumption — Rebuttal — B. T. Act, S. 103.

The question whether the presumption of correctness attaching to an entry in a Record of Rights has been rebutted or not is a matter which is not open to review in second appeal. AIR (Vol 5) 1918 Cal 597: 22 CWN 449: 45 Ind Cas 65 (DB).

53. Procedure.

——S. 100 — Procedure adopted for appointment of guardian ad litem not proper — Decree, if should be reversed in second appeal.

Where, on the death of one of the respondents, his minor sons are brought on record as his legal representatives under the guardianship of their mother without observing the proper procedure for her appointment as guardian ad litem, the mere omission to adopt the procedure which should have been adopted for the appointment of a guardian ad litem does not justify a reversal of the decree in second appeal, when no prejudice has accrued to the minors by such omission. AIR (Vol 29) 1924 Pat 372 : 8 BR 501 : 199 Ind Cas 144.

——S. 100 — Error of procedure must be error affecting merits of case.

It cannot be said that in second appeal an error of procedure will always lead to reversal of the lower Appellate Court's decision. It must be an error affecting the merits of the case but under S. 100, Civil P. C., High Court can interfere on the ground of any substantial error or defect in the procedure which may possibly have produced error or defect in the decision of the case upon the merits. AIR (Vol 27) 1940 Pat 33.

——S. 100 — Error or defect, nature of, to sustain second appeal.

For a second appeal, it is not sufficient to show that there was a defect in the procedure of the trial Court. It is necessary to show that the alleged defect in procedure may possibly have produced error or defect in the decision of the case upon the merits by the lower Appellate Court. AIR (Vol 24) 1937 All 105 : 1936 AWR 1085 : 1936 RD 543 : (1937) ALJ 46 : 167 Ind Cas 397 (DB).

——S. 100 — The Civil P.C. and the rules made under it apply to an appeal from a Judge of the High Court. AIR (Vol 22) 1935 Cal 35 : 39 CWN 155 : 154 Ind Cas 1056 (DB).

——S. 100, O. 41, R. 24 — Trial Court recording evidence but deciding case without considering some evidence as inadmissible — Appeal — Appellate Court holding evidence admissible and affirming decree — Second appeal, whether lies.

Where the trial Court recorded the whole evidence available in a case but decided the case on the facts without considering some of the evidence adduced on the ground of inadmissibility, but the Appellate Court, treating the evidence as admissible without remanding the case affirmed the decree on facts after considering the whole evidence under O. 41, R. 24, Civil P.C. :

Held, that there was no defect of procedure committed by the lower Appellate Court in coming to its own finding on the whole of the evidence, and that its action was entirely justified by O. 41, R. 24 and that there was no ground for second appeal either under S. 100, Civil P C. or under S. 14 of the Burma Courts Act. AIR (Vol 20) 1933 Rang 35 : 142 Ind Cas 829(2).

——S. 100 — Omission to consider important issue.

Where a question of fact was raised in the pleadings but no issue was framed on the point and the importance of the question was also not realized by the first Appellate Court:

Held, that there was substantial error or defect of procedure which may have produced error or defect in the decision of the case under merits so as to bring the appeal within S. 100(1)(c), Civil P. C. AIR (Vol 18) 1931 Rang 312 : 135 Ind Cas 325.

——S. 100 — Disposal of an appeal while a party was dead is a defect covered by (c). AIR (Vol 16) 1929 Lah 119 : 117 Ind Cas 665 : 10 LLJ 497 : 30 PLR 13.

——S. 100 — Agreement by both sides to proceed on the evidence before the Court and also before the Commissioner — Its violation by the Court, is a defect calling for interference in second appeal. AIR (Vol 15) 1928 Cal 136 : 106 Ind Cas 841 : 46 CLJ 558 (DB).

——S. 100 — Decision that a particular question is not in dispute cannot be attacked in second appeal — Proper procedure is review, or the pleader should bring it to the notice of the Court. AIR (Vol 13) 1926 Cal 941 : 95 Ind Cas 300 (DB).

——S. 100 — Misconception of law of evidence and wrong procedure vitiate finding. AIR (Vol 11) 1924 Pat 310 : 76 Ind Cas 347 : 2 Pat 919 : 5 Pat LT 315 (DB).

——S. 100 — Interpreting documents is a question of fact and not of law. Where there is no error or defect in the procedure, the finding of the first Appellate Court upon a question of fact is final. AIR (Vol 10) 1923 All 362 : 71 Ind Cas 369.

——S. 100 — Procedure — Error of.

The failure by an Appellate Court to determine the critical question between the parties to a suit and to consider the oral evidence adduced on behalf of the deft. is a substantial error of procedure AIR (Vol 7) 1920 Pat 359 : 56 Ind Cas 40.

——S. 100 — Finding of fact — False case on both sides — Procedure.

Where the first Appellate Court finds that the case set up by both parties is false the way in

which the High Court ought to deal with the matter in second appeal is to decide the case upon the facts found by the lower Appellate Court irrespective of the original cases respectively made by the parties, in their pleadings. AIR (Vol 6) 1919 Cal 1037 : 22 CWN 149 : 45 Ind Cas 795 (DB).

——S. 100 — Finding of fact — Evidence unsatisfactory.

If an Appellate Court is not satisfied with the local enquiry or the map put in by the parties it is not bound to send it back to the Lower Court for re-enquiry. It can decide on the evidence. The High Court cannot in second appeal consider whether the conclusions arrived at by the Lower Court on a question of fact are right or wrong. AIR (Vol 6) 1919 Cal 672 : 27 CLJ 599 : 23 CWN 593 : 45 Ind Cas 408 (DB).

——S. 100 — Procedure — Error of — Disposal of case on new point.

A Judge who disposes of a suit on a point taken by himself on appeal without affording the parties an opportunity of proving what is necessary to meet the point, commits an error of law. AIR (Vol 5) 1918 Low Bur 69 : 11 Bur LT 1 : 43 Ind Cas 488.

——S. 100 — Procedure — Error in — Case where investigation necessary.

The rejection of a Commissioner's report without directing further inquiry in a case which could not be decided without any investigation is a substantial error or defect in the procedure provided by the Code, which may possibly have produced an error or defect in the decision upon the merits. AIR (Vol 4) 1917 Cal 573 : 23 CLJ 600 : 34 Ind Cas 30 (DB).

——S. 100 — Procedure — Error — Evidence discredited on general grounds.

To discredit oral evidence on merely general reasons not affecting the credit of any particular deponent is an error of law justifying an interference in second appeal. (1915) 29 Ind Cas 673 (U.P.B.R.).

——S. 100 — Procedure — Error — Findings of fact — Powers of High Court.

The High Court will reverse a finding in second appeal if there was substantial error in procedure resulting in a finding not secundum allegata et probata and not sustainable in law. AIR (Vol 2) 1915 Bom 68 : 39 Bom 149 : 17 Bom LR 157 : 28 Ind Cas 921 (DB).

——S. 100 — Procedure — Defect in — Failure to realize true question in controversy.

Failure on the part of the lower Appellate Court to appreciate the true question in controversy is a defect in procedure and the appeal should be reheard. AIR(Vol 2) 1915 Cal 819 : 22 CLJ 380 : 13 Ind Cas 455 (DB).

——S. 100 — Procedure — Failure of Court to examine witnesses — Interference of High Court.

The failure of a Court to examine witnesses is a good ground for interference under S. 100, C.P. C. The lower Appellate Court should not disregard the plea even if it is raised at the hearing of the appeal without its having been raised in the memorandum of appeal as it is a matter which could not take the other side by surprise and which, clearly affects the decision on the merits. (1910) 3 Bur LT 146: 8 Ind Cas 990.

——S. 100 — (S. 584 old Code) — Second Appeal, right of — Suit dismissed as no legal representative was brought on record — Appeal to District Judge dismissed also — Right of alleged representative to appeal.

Where a person claimed to be the representative of a deceased plaintiff and the Court, holding he was not the real representative, dismissed the suit as no other representative was brought on record, and the District Judge also dismissed the appeal against the decree dismissing the suit, the person claiming to be the legal representative can prefer a second appeal to the High Court against the decree dismissing the appeal. (1903) 12 MLJ 380 : 26 M. 224(229).

——S. 100 — (S. 584, old Code) — Error or defect of procedure — First appellate Court not considering all the facts — Power of second appellate Court to interfere — Question of fact.

Where a first appellate Court does not consider all the facts of the case, there is a substantial error of procedure, and a second appellate Court can interfere in a finding of fact by the first appellate Court. (1902) 6 CWN 357 (359, 360) (DB).

54. Public way.

——S. 100 — Question whether road is public or private.

When the question is whether a road is a public road or a private road, the question is one of law, rather than one of fact and in any case, it is partly a question of law. AIR (Vol 23) 1936 Oudh 154 : 1935 OWN 899 : 157 Ind Cas 638 (DB).

——S. 100 — Finding that disputed way is a public way.

A finding that the disputed way is a public way must be taken as a finding of fact and is not vitiated by the mere circumstance that certain documentary evidence has not been referred to in the judgment. AIR (Vol 21) 1934 All 941 : 151 Ind Cas 263 (DB).

——S. 100 — New plea — Points raised in.

The point whether, in the absence of a written and registered document creating a right of way whether a suit for declaration of such a right by part must fail for want of legally sufficient evidence to prove the grant can be opened in appeal though not taken in Courts below. AIR (Vol 4) 1917 Cal 681 : 20 CWN 1158 : 34 Ind Cas 450 (DB).

——S. 100 — Rights to — Privacy.

Whether the rignt of privacy exists and whether it is substantially infringed is a question of fact. (1910) 6 Ind Cas 398 (All)(DB).

55-56. Question of law.

——S. 100 — Question of law — Decision that there is no evidence to support finding.

The decision that there is no evidence to support a finding or that a legal inference drawn from proved facts is wrong is one of law and not of fact. AIR (Vol 37) 1950 Nag 127: ILR (1949) Nag 862: 1950 NLJ 163.

——S. 100 — Question of law — Erroneous inference from proved facts.

When an erroneous inference has been drawn from proved facts, the matter can be reconsidered in second appeal. AIR (Vol 36) 1949 Nag 21: ILR (1948) Nag 299: 1948 NLJ 316 (DB).

——S. 100 — Question of law — Negative finding on mistaken assumption of absence of evidence.

If a negative conclusion is reached by the lower appellate Court on the mistaken assumption that there is no evidence and the conclusion is based solely on that fact, it is as much an error of law as when a finding is reached with no evidence to support it. AIR (Vol 33) 1946 Nag 152: ILR (1946) Nag 73: 1946 NLJ 227.

——Ss. 100 and 115 — Lower Court deciding questions of law — In revision, Court can refuse to interfere but in second appeal, it cannot decide on merely equitable grounds.

In revision, the Court may refuse to interfere with the question of law decided by the lower Court if it were satisfied that substantial justice had been done between the parties. But where the Court is called upon to decide these questions of law in second appeal, no discretion vests in the Court and it has no right to decide a case on merely equitable grounds if they come into conflict with or ignore the provisions of law — statutory or otherwise. AIR (Vol 32) 1945 Lah 175: 47 PLR 130: 223 Ind Cas 301.

——S. 100 — Sufficient reason — Question of law.

The question whether a reason pleaded by a plaintiff landlord is sufficient within the meaning of S. 10, Punjab Urban Rent Restriction Act, 1941, is a question of law for purpose of second appeal. AIR (Vol 31) 1944 Lah 477: 46 PLR 331.

——S. 100 — Question of fact vitally affecting case — Whether it was misconceived or not is question of law.

The question whether there was fraud or not is a question of fact. But the question whether the lower Court had or had not misconceived or failed to appreciate and determine some real question of fact which vitally affected the case and required to be determined was essentially a question of law. AIR (Vol 31) 1944 Sind 209: ILR (1944) Kar 223: 219 Ind Cas 139 (DB).

——S. 100 — Question of law raised in trial Court and also in Appellate Court but not pressed there — If can be raised in second appeal.

A pure question of law which was raised in the trial Court and was also raised before the first Appellate Court but not pressed by the Counsel under a misapprehension, can be raised again in second appeal. AIR (Vol 29) 1942 Oudh 499: 1912 OWN 556: 1942 AWR (CC) 330 (1): 18 Luck 484: 203 Ind Cas 434 (DB).

——S. 100 — Claim involving point of law can be investigated.

There is no reason why the claim, if it involves a point of law, should not be investigated on second appeal. AIR (Vol 27) 1940 Mad 577: 51 MLW 569: (1940) MWN 484.

——S. 100 — Question whether entry in settlement rent roll is conclusive and whether party can prove it to be incorrect, is question of law.

When an obvious point of law has arisen, the practice of the lower Appellate Courts of attempting to shut out a second appeal by the use of language designed to clothe a decision on a question of law with the appearance of a finding of fact should be deprecated. The question whether an entry of rent in the settlement rent roll is conclusive or whether a party can prove by evidence that it is incorrect, is undoubtedly a point of law, and a party is perfectly competent to raise this question in second appeal. AIR (Vol 26) 1939 Pat 402: 18 Pat 204: 5 BR 935: (1939) PWN 37: 5 CLT 10: 183 Ind Cas 428 (DB).

——S. 100 — Party wishing question of law to be decided.

If parties in appeals from appellate orders wish questions of law to be decided, it is necessary that the facts necessary for those decisions should be also raised and decided. Where this is not done, it would not be in the ends of justice for the High Court to decide those questions. AIR (Vol 26) 1939 Pat 19: 5 BR 482: 180 Ind Cas 736 (DB).

——S. 100 — Point of law on facts held to be proved by lower Appellate Court, if can be entertained.

A point of law on the facts held to be proved by the lower Appellate Court, may be entertained in second appeal. AIR (Vol 25) 1938 All 396: (1938) ALJ 585: ILR (1938) All 563: 1938 AWR 385: 1938 RD 628: 176 Ind Cas 226 (FB).

——S. 100 — Whether the question is purely one of law, not requiring any additional evidence for its decision, there is no legal objection to its being raised in second appeal. AIR (Vol 23) 1936 Lah 448: 38 PLR 608: 164 Ind Cas 30 (DB).

——S. 100 — Point of law not dependent on question of fact.

A point of law not dependent upon any question of fact can be allowed to be taken in second appeal. AIR (Vol 23) 1936 Pat 104: 17 PLT 57: 2 BR 286: 15 Pat 356: 160 Ind Cas 1096 (DB).

——S. 100 — Question whether 'sanadi inam' lands are 'kadim or jadid' is one of law. AIR (Vol 22) 1935 Bom 47: 36 Bom LR 1055: 155 Ind Cas 763 (DB).

——S. 100 — The finding of the lower Court that a certain deed is a perpetual lease of under-proprietary rights, is not a finding of fact but is really a finding of law which can be challenged in second appeal. AIR (Vol 22) 1935 Oudh 217: 11 OWN 1494: 18 RD 677: 10 Luck 392: 153 Ind Cas 334 (FB).

——S. 100 — The question whether the admitted facts and circumstances constitute sufficient and reasonable cause for extension of time for preferring an appeal is one of law and not of fact, AIR (Vol 19) 1932 Lah 183: 32 PLR 907: 33 PLR 27: 135 Ind Cas 221.

——S. 100 — Where the proper determination of a question turns upon the application of certain legal principles to the facts proved and the true conclusion to be drawn from those facts viewed in the light of those principles, the question is one of law though it appears to be one of fact. AIR (Vol 19) 1932 Oudh 51: 8 OWN 1281: 15 RD 751: 135 Ind Cas 693.

——S. 100 — The conclusion that a certain process was not scientific involves a question of law. AIR (Vol 13) 1926 Nag 435: 95 Ind Cas 614.

——S. 100 — Question as to plaintiff's 'bona fide' mistake is not one of fact. AIR (Vol 12) 1925 Cal 152: 82 Ind Cas 638: 29 CWN 51 (DB).

——S. 100 — The question as to a stipulation being penal within S. 74 of the Contract Act is a question of law. AIR (Vol 12) 1925 Mad 84: 82 Ind Cas 751: 47 MLJ 605: 1924 MWN 861.

——S. 100 — Whether a word is used in a restricted sense is a point of law. AIR (Vol 9) 1922 Bom 416: 67 Ind Cas 852: 47 Bom 18: 24 Bom LR 416 (DB).

——S. 100 — Question of law — Legal right — Infringement — Tests whether correctly applied.

The question whether in determining the infringement of certain legal rights the correct tests have been applied is a pure question of law. AIR (Vol 1) 1914 PC 45: 42 Cal 46: 41 IA 180: 18 CWN 933: 27 MLJ 117: 1 LW 561: 16 MLT 204: (1914) MWN 631: 12 ALJ 1166: 16 Bom LR 803: 20 CLJ 353: 24 Ind Cas 300.

(Affirming (1912) 39 Cal 59: 12 Ind Cas 60.

——S. 100 — Question of law — Divesting of office.

The question if a trustee could divest himself of his office is a question of law. (1913) 6 Bur LT 180: 7 LBR 39: 21 Ind Cas 232 (DB).

——100 (S. 584 old Code) — Question of law.

Where the lower Court decides on a question of law, but refuses to apply it to the case, the decision is one contrary to law. (1905) AWN 158: 2 ALJ 455: 27 A 688 (691) (FB).

57. Question or finding of fact.

(a) Adoption.
See Note 7.
(b) Adverse interest.
(c) Agreement.
(d) Benefit.
(e) Bona fides,
See also Notes 33 and 57.
(f) Compensation.
(g) Compromise.
(h) Concurrent finding of fact.
(i) Concurrent inferences.
See Note 33.
(j) Consideration.
(k) Contract.
(l) Contradictory.
(m) Custom.
See also Note 20.
(n) Different inferences.
(o) Duty of Court.
(p) Easement.
(q) Evidence.
See also Notes, 6, 11, & 16.
(r) Execution.
See also Note 57.
(s) Existence of things or facts.
(t) Finality.
See also Note 57.
(u) Finding based on document.
See Note 17 (c).
(v) Fraud.
(w) Fraudulent Transfer.
(x) Good faith.
See Note 57 (e).
(y) Grove
(z) Guardianship.
(z-1) Inference.
(z-2) Intention.
See also Note 33.
(z-3) Interference.
(z-4) Knowledge.
(z-5) Legal effect.
(z-6) Legitimacy.
(z-7) Liability.
(z-8) Limitation.
(z-9) Lunacy.
(z-10) Market value.
(z-11) Meaning of words.
(z-12) Mistake of law.
(z-13) Mistake or error.
(z-14) Nature of property.
See also Note 10.
(z-15) Nature of transaction.
See also Note 17.
(z-16) Omission.
(z-17) Ownership.
(z-18) Partnership.
See Note 50.
(z-19) Payment.
(z-20) Possession.
(z-21) Proof.
(z-22) Reasonable and probable cause.
(z-23) Reasonable care.
See also Note 45.
(z-24) Relationship.
See also Note 58.
(z-25) Rent, Rate of.
(z-26) Signature.
(z-27) Site.
(z28) Subject-matter of suit.
(z-29) Undue influence.
See also Note 57.
(z-30) Waqf.
See also Note 59.
(z-31) Will.

——**S. 100 — Finding of fact — Reasoning for — If can be considered.**

It is neither necessary nor proper for the High Court in second appeal to consider whether the reasoning for a finding of fact is acceptable. It is necessary only to see whether the proper legal principles have been applied. AIR (Vol 36) 1949 Cal 204.

——**S. 100 and Limitation Act (IX of 1908), S. 14 — Finding of fact — Finding as to due diligence — Interference in second appeal.**

The finding of a lower appellate Court that a plaintiff did not act with due diligence is prima facie a finding of fact and as such binding in second appeal. AIR (Vol 33) 1946 Oudh 116: 21 Luck 350: 222 Ind Cas 355: 1946 OWN 24: 1946 ALW 24: 1946 AWR (CC) 10: 1946 OA (CC) 10.

——**S. 100 — Question whether certain person was present on particular occasion is one of fact.**

The question whether a certain person was present at a particular place on a particular occasion is one of fact and a finding thereon is binding in second appeal. AIR (Vol 29) 1942 Pat 408: 23 PLT 384: 9 BR 8: 202 Ind Cas 495.

——**S. 100 — Finding that letter was written by particular person to certain person.**

A finding that a letter was written by a particular person and was addressed to a certain person is a finding of fact. AIR (Vol 29) 1942 Pat 408: 23 PLT 384: 9 BR 8: 202 Ind Cas 495.

——S. 100 — Though the trial Court is in the best position to judge the credibility of the witnesses and a finding of fact should not be lightly upset, the law allows an appeal on questions of fact because, if this rule is made of universal application, it would practically debar all appeals on questions of fact. AIR (Vol 26) 1939 Rang 350: 1939 Rang LR 472: 184 Ind Cas 492.

——S. 100 — A finding of fact by one Court in one judgment is not a finding of fact binding upon another Court in another case. AIR (Vol 25) 1938 Sind 198: ILR (1939) Kar 111: 178 Ind Cas 690 (DB).

——S. 100 — A finding of fact cannot be challenged in second appeal unless the appellant can show that there is no evidence to support it. AIR (Vol 23) 1936 Sind 7: 161 Ind Cas 501 (DB).

——S. 100 — Finding of fact is not open to attack in second appeal. AIR (Vol 22) 1935 Lah 108 (DB).

——**S. 100 — Finding of fact not understood to be relevant — Reliance, if can be placed on it.**

No reliance can be placed on a finding of fact which was not understood. at the time of giving the finding, to be relevant to the decision. AIR (Vol 21) 1934 All 1042: 18 RD 483: 4 AWR 696: 151 Ind Cas 961.

——S. 100 — The clear finding of fact of the lower Court is not open to question in second appeal. AIR (Vol 21) 1934 Oudh 370 (1): 11 OWN 579: 151 Ind Cas 297.

——**S. 100 — Finality — Requisites of findings.**

Finding of fact obiter and indefinite can be ignored. AIR (Vol 16) 1929 Lah 653: 120 Ind Cas 5 (DB).

——S. 100 — Findings of facts to preclude second appeal must be precise and definite. AIR (Vol 16) 1929 Oudh 453: 6 OWN 801 (DB).

——S. 100 — While findings of fact cannot be questioned, the soundness of conclusions drawn from any facts may involve matters of law and may be questioned by a Court of second appeal. A party to an appeal is entitled to claim a clear, definite and specific finding on every issue of fact raised in the case, and if the finding is vague, indefinite or ambiguous, it is but right to insist on such a finding being given or to send an issue back in order that the question of fact might

be determined on the evidence adduced in a manner not open to misconstruction or doubt. The finality given by law to a finding of fact, arrived at by a Court of first appeal, renders it necessary that the finding should be arrived at after due circumspection and be expressed in clear and definite terms. AIR (Vol 13) 1926 All 130: 90 Ind Cas 976 (DB).

——S. 100 — It is a question of fact whether or not a caste was split up. AIR (Vol 13) 1926 Bom 69: 50 Bom 124: 27 Bom LR 1503: 92 Ind Cas 549 (DB).

——S. 100 — Foreign law is a question of fact. AIR (Vol 13) 1926 Mad 218: 92 Ind Cas 112: 22 MLW 679.

——S. 100 — A finding of fact should not be accepted by High Court if it is vitiated by errors of law, or misreading of the documentary evidence and based on inadmissible evidence. AIR (Vol 13) 1926 Oudh 464: 2 Luck 172: 96 Ind Cas 455: 6 OWN 1227: 13 OLJ 61 (DB).

——S. 100 — Finding capable of being interpreted both as finding of fact and of law — Untenability as finding of law — High Court is not bound to treat it as finding of fact. AIR (Vol 12) 1925 Cal 993: 85 Ind Cas 540.

——S. 100 — Minority. — Question of fact.

Question of party's minority cannot be re-investigated by High Court. AIR (Vol 12) 1925 Pat 367: 86 Ind Cas 856: 3 Pat LR 16.

——S. 100 — Inference as to plea not raised in the case is not a finding of fact, but a mere opinion. AIR (Vol 10) 1923 All 75: 20 ALJ 756: 69 Ind Cas 912 (DB).

——S. 100 — Defamation — Suit for damages — Question if writing is defamatory of plff. — Quantum of damages — Bona fides and fair comment — Question of fact — Appeal, second — Interference by High Court.

The question whether a writing is defamatory of the plff., the questions of fair comment, justification, 'bona fides' and the 'quantum' of damages awardable to the plff. in an action for libel, are all questions of fact on which the High Court in second appeal, is bound by the findings of the Lower Appellate Court. AIR (Vol 5) 1918 Mad 700: 32 MLJ 392: 5 LW 598: 21 MLT 324: 40 Ind Cas 126 (DB).

——S. 100 — Circumstantial evidence — A finding of fact to be questioned.

When there is no illegality or irregularity in a finding of fact, it cannot be questioned in a second appeal, although it has only circumstantial evidence for its basis. AIR (Vol 4) 1917 Oudh 203: 30 OLJ 644: 37 Ind Cas 439.

——S. 100 — Finding of fact — Consideration of evidence.

When a Judge has only pretended to consider the evidence, the High Court on second appeal will not accept the decision as binding on a question of fact. It is not necessary that the Judge should discuss all the evidence. The evidence discussed should be reasonably adequate for a decision. AIR (Vol 4) 1917 Pat 288: 38 Ind Cas 561 (DB).

——S. 100 — Finding of fact — Immorality.

The finding that a woman has taken to a life of immorality is a finding of fact. AIR (Vol 2) 1915 Lah 279: 150 PWR 1915: 31 Ind Cas 797.

——S. 100 — Finding of fact — Point not decided by first Court but decided on appeal.

Where the trial Court comes to no finding on an issue of fact but the Appellate Court gives a definite finding on the issue after an examination of all the evidence, the second Appellate Court is concluded by the finding of the first Appellate Court. AIR (Vol 2) 1915 Oudh 132: 2 OLJ 388: 30 Ind Cas 503.

——S. 100 — High Court — Second appeal — Finding of fact. The High Court in second appeal is bound by the findings of facts arrived at by the lower appellate Court. (1904) 6 Bom LR 312 (313) (DB).

——S. 100 (S. 584, old Code) — Finding of fact — High Court — Jurisdiction.

Per Chandavarkar and Jacob, JJ.— Where there is a clear finding of fact, right or wrong, the High Court, on second appeal, is precluded from interfering with it, except on grounds mentioned in S. 584, C. P. C. Per Aston J.— A finding of fact arrived at in first appeal after giving insufficient and perverted consideration to matters which justly weighed in appeal, bears too close a resemblance to a capricious or arbitrary decision to permit of its being accepted as a proper adjudication of facts in dispute and binding on second appeal. (1903) 5 Bom LR 956 (964, 969) (DB).

(a) Adoption.

See Note 7.

(b) Adverse interest.

——S. 100 — Minor — Decree against guardian.

The question of adverse interest is one of fact dependent upon circumstances of each case and in the absence of any reason for the suggestion that the guardian 'ad litem' had, in fact, an adverse interest, there is no reason for presuming that his interest must have been adverse simply because he might have had a claim as a reversioner. AIR (Vol 23) 1936 Mad 951: 44 MLW 530: 71 MLJ 619: (1936) MWN 1086: 166 Ind Cas 75 (DB).

(c) Agreement.

——S. 100 — Lease by karnavan of tarwad property.

The question whether, in the circumstances of a case, a lease granted by a 'karnavan' of the 'tarwad' properties is beneficial and binding on the 'tarwad', is one of fact. AIR (Vol 32) 1945 Mad 170: (1945) 1 MLJ 1: 58 MLW 84: 1945 MWN 154.

——S. 100 — Existence of agreement is finding of fact.

Finding that a party had entered into agreement is a finding of fact binding upon the High Court in second appeal. AIR (Vol 31) 1944 Nag 124: ILR (1944) Nag 101: 1944 NLJ 99: 217 Ind Cas 277 (DB).

——S. 100 — Lower Appellate Court's conclusion on question of fact — It cannot be attacked in second appeal unless it is inference based on erroneous view of law. AIR (Vol 16) 1929 Nag 110: 117 Ind Cas 283.

——S. 100 — Genuineness of an agreement or a party's having notice thereof is a question of fact. AIR (Vol 13) 1926 Oudh 257: 13 OLJ 176: 91 Ind Cas 1046

——S. 100 — In second appeal, High Court will not interfere, on a question of fact. AIR (Vol 10) 1923 Nag 7: 68 Ind Cas 664.

(d) Benefit.

——S. 100 — Question of benefit to minor from mortgage executed by guardian.

The finding on the question of benefit to the minor from the mortgage executed by his guardian is a finding of fact which is not assailable in second appeal. AIR (Vol 28) 1941 Oudh 226:1941 OWN 204: 1941 AWR 54: 192 Ind Cas 712 (DB).

——S. 100—The trial Court found that alienation of property made by a person on behalf of his minor brothers was beneficial to the minors. The finding was not seriously impugned in the lower appellate Court.

Held, that such finding could not be assailed in second appeal. (1929) 120 Ind Cas 171 (Lah) (DB).

——**S. 100 (S. 584 old Code) — Question of law — Question when a sale was for the benefit of a minor:**

Per Rampini J:— Whether a certain sale was for the benefit of a minor or not is a question of fact and the finding of the District Judge is conclusive on this point. Per Woodroffe J:— The question can be dealt with in second appeal. The fact must be accepted as found; but the question whether, assuming the fact to be true, the sale did or did not blnd the minors, is another matter, which can be dealt with. (1906) 4 CLJ 485 (486, 487, 489): 34 Cal 36: 11 CWN 71 (DB).

(e) Bona fides.

See also Notes 33 and 57.

——**S. 100 — Diligence and good faith are questions of fact.**

The questions of due diligence and good faith are questions of fact and the concessions made by the party's Advocate on these questions of fact are binding upon the party. AIR (Vol 33) 1946 Sind 14: ILR (1945) Kar. 293 (DB).

——**S. 100 — Good faith, question of fact.**

Good faith is a question of fact and when the finding of the lower Court on this point is amply borne out by the facts and circumstances, it cannot be challenged in second appeal. AIR (Vol 28) 1941 Lah 371: 43 PLR 308: 195 Ind Cas 712 (DB).

——S. 100 — The finding that a certain suit is genuine and bona fide and not a collusive one, is a finding of fact which is binding in second appeal. (1940) 41 PLR 462: ILR (1940) Lah 60 (DB).

——**S. 100 — Question of good faith.**

The question whether a person or a corporation acts in good faith is always a question of fact. AIR (Vol 24) 1937 Cal 314: 41 CWN 524: 65 CLJ 259: 171 Ind Cas 597 (DB).

——**S. 100 — Good faith.**

Whether the applicant was acting in good faith is a question of fact. AIR (Vol 19) 1932 Lah 531 : 33 PLR 740: 14 Lah 106: 138 Ind Cas 646.

——**S. 100 — Question whether the conduct of a party was bona fide.**

Though the question whether the conduct of a person was 'bona fide' is usually one of fact, the High Court can interfere in second appeal if there is no evidence to support the finding. AIR (Vol 19) 1932 Lah 322: 33 PLR 263: 136 Ind Cas 710.

——S. 100 — Whether other proceedings were prosecuted diligently and in good faith is a question of fact — Limitation Act, S. 14. AIR (Vol 14) 1927 Lah 909: 102 Ind Cas 628.

—— S. 100 — 'Bona fides' is a finding of fact. AIR (Vol 12) 1925 Lah 505: 7 LLJ 358: 26 PLR 641: 92 Ind Cas 602.

——S. 100 — Whether lands were excluded in calculating peishcush is question of fact. AIR (Vol 11) 1924 Mad 117: 18 MLW 324: 1923 MWN 732: 75 Ind Cas 465 (DB).

——S. 100 — Finding that certain arrangement was disadvantageous to the minors, could not be said to have been made honestly and in good faith, is one of fact and cannot be assailed in second appeal. AIR (Vol 8) 1921 Lah 291: 4 LLJ 40 (DB).

——S. 100 — Good faith is a question of fact in each case. AIR (Vol 8) 1921 Sind 13: 15 SLR 11: 62 Ind Cas 507 (DB).

——**S. 100 — Attestation — Effect of — Question of fact.**

The question whether the attestation of a document implies assent to the terms of the document is a question of fact and must be determined with reference to the circumstances of each case, and the High Court cannot entertain a second appeal on the point. AIR (Vol 6) 1919 Oudh 384: 51 Ind Cas 621.

(f) Compensation.

——**S. 100 — Finding of fact — Negligence — Suit for compensation for loss and non-delivery of goods consigned — Finding as to negligence — Interference.**

The question of negligence on the part of a Railway Company in a suit for compensation for loss and non-delivery of goods consigned is not purely one of fact; and the High Court in second appeal can examine the matter to find out whether the conclusion of the lower Court is correct. AIR (Vol 36) 1949 Pat 110: 29 PLT 76 (DB).

——S. 100 — What is reasonable compensation is a question of fact and not of law and decision thereon cannot be challenged in second appeal. AIR (Vol 21) 1934 Pat 16: 154 Ind Cas 200.

(g) Compromise.

——**S. 100 — Family settlement.**

The question whether there has been a family settlement is one of fact and not of law. Whether two persons agree on a certain matter is a thing which is capable of being perceived by the senses, and whether they had the requisite mental intention necessary to give legal validity to their outward forms or acts of agreement is a mental condition of which a person can be conscious. It follows that any finding on a matter of this kind must be one of fact and not of law. Even if such a finding was based solely on inferences derived from other facts, it would still be finding of fact, provided it was possible for a prudent man to come to such a conclusion, for a fact can be proved, not only by direct evidence, but also by inferences from other proved or accepted facts. It does not cease to be a fact as defined in S. 3, Evi. Act simply because it is proved in this way. AIR (Vol 23) 1936 Nag 186: 165 Ind Cas 217.

——S. 100 — A finding based on legal evidence that a compromise has been entered into in good faith is one of fact and cannot be challenged in second appeal. (1930) 121 Ind Cas 291 (Lah).

——S. 100 — Workman's Compensation Act (1923), S. 30 — Whether parties to a suit agreed or not to a certain decree is a pure question of fact. AIR (Vol 16) 1929 Bom 68: 30 Bom LR 1610: 114 Ind Cas 372 (DB).

——S. 100 — The finding that there was a 'bona fide' compromise in a pending litigation by a person is one of fact and cannot be challenged in second appeal. (1928) 109 Ind Cas 776 (Lah).

——S. 100 — It is a question of fact whether a guardian is justified in entering into a compromise. AIR (Vol 12) 1925 Mad 1285: 49 MLJ 549: 22 MLW 560: 91 Ind Cas 742 (DB).

(h) Concurrent finding of fact.

——**S. 100 — Question of law — Presumption of Crown grant of ferry right from proved facts — Concurrent findings of fact — Power of High Court in second appeal.**

The question whether on the facts proved a (Crown) grant (of a right of ferry) may be presumed in favour of a person to the exclusion of another and preventing the latter from setting up a rival ferry, is a question of law which can be gone into in second appeal, though there are concurrent findings of fact by both the lower Courts. AIR (Vol 37) 1950 Orissa 19: ILR (1949) Cut 465 (DB).

——**S. 100 — Finding of fact — Finding that purpose of tenancy was agricultural — Interference in second appeal with concurrent findings.**

A finding that the purpose of tenancy was agricultural is one of fact and the High Court will not in second appeal, interfere with the concurrent finding of the lower Courts on the point. AIR (Vol 34) 1947 Cal 139: 225 Ind Cas 337.

——S. 100 — Finding of fact — Finding by both Courts below that alterations in document were made without executant's knowledge and consent —Finality.

A finding concurrently arrived at by both the Courts below, to the effect that certain alterations in a document were made without the knowledge and consent of the executant of the deed, is one of fact, and cannot be challenged in second appeal. AIR (Vol 34) 1947 Nag 145: ILR (1946) Nag 796: 1946 NLJ 622: 226 Ind Cas 568 (DB).

——S. 100 — The concurrent finding of fact arrived at by the Courts below cannot be disturbed on second appeal unless it is vitiated as having been arrived at in complete disregard of the materials on record. AIR (Vol 31) 1944 Lah 1: 45 PLR 325: 211 Ind Cas 145 (DB).

——S. 100 — Concurrent finding.

Where the lower Courts have concurrently held that there was negligence on the part of the railway company, the High Court as a Court of second appeal cannot hold that there was no such negligence. AIR (Vol 30) 1943 Pat 111: 21 Pat 764: 9 BR 209: 205 Ind Cas 252 (DB).

——S. 100 — Where, in a suit to enforce rights given to the plaintiffs under a partition decree, it is alleged that defendants have taken illegal and forcible possession and there is a concurrent finding of both the lower Courts that the plots in suit belonged to the plaintiffs and encroachment had been made on the plaintiffs' land by the defendants, it is not open to the Court in second appeal to interfere with the finding of fact. AIR (Vol 24) 1937 Oudh 226: 1937 OWN 330: 167 Ind Cas 870.

——S. 100 — Fictitious transfers.

Concurrent findings of fact that certain transfers are not colourable and fictitious are not open to challenge in second appeal. AIR (Vol 18) 1931 Oudh 400: 8 OWN 878: 136 Ind Cas 247 (DB).

——S. 100 — Question or finding of fact — Finality — Concurrent.

Where both Courts have concurred with regard to a finding of fact, the finding cannot be challenged in second appeal. AIR (Vol 16) 1929 Lah 165: 117 Ind Cas 813.

——S. 100 — Finding of fact — No evidence — Interference.

The High Court will interfere to upset even concurrent findings of fact if they are not based on evidence but on a wrong presumption. AIR (Vol 1) 1914 Lah 207: 239 PLR 1914: 144 PWR 1914: 25 Ind Cas 278 (DB).

(i) Concurrent Inferences.

See Note 23.

(j) Consideration.

——S. 100 — Finding of fact — Finding in pre-emption suit that exchange is in fact sale.

A finding that a transaction is given the appearance of an exchange only for the purpose of defeating the right of pre-emption and that it is in fact a sale, is a finding of fact when it is not based exclusively upon the interpretation of the deed of transfer but is also based upon a consideration of the facts and circumstances surrounding the transaction.

The fact that the conclusions drawn by the Courts below from the particular facts and circumstances are not reasonable, is not a sufficient ground for interfering with the finding in second appeal. AIR (Vol 34) 1947 Lah 320.

——S. 100 — Whether there was consideration for document is question of fact.

The decision as to whether the document was supported by consideration or not is a question of fact. AIR (Vol 29) 1942 Mad 730: 55 MLW 652: (1942) 2 MLJ 518: 204 Ind Cas 128.

——S. 100 — Question of consideration, if one of fact.

A finding of the lower Appellate Court on the question of consideration is a finding of fact and, where it is based on the evidence in the case, it is binding in second appeal. AIR (Vol 27) 1940 All 414: (1940) ALJ 360: 1940 AWR 341: 191 Ind Cas 759.

——S. 100 — The question whether Rs. 100 is or is not a grossly inadequate consideration for a house which is found to be by the lower appellate court to be worth Rs. 200 is a question of law as it is an inference from proved facts. AIR (Vol 16) 1929 All 872 (DB).

——S. 100 — Question or finding of fact — Contract.

Question as to existence of natural love and affection was held to be one of fact. (1928) 110 Ind Cas 408 (DB) (Mad).

——S. 100 — The finding as to the nature of the consideration is one of fact and cannot be disturbed in second appeal. AIR (Vol 14) 1927 Lah 530: 28 PLR 388: 103 Ind Cas 444: 9 LLJ 319.

——S. 100 — Finding as to consideration is one of fact. AIR (Vol 11) 1924 Lah 39: 71 Ind Cas 783: 5 LLJ 198 (DB).

——S. 100 — Consideration — Passing of — Finding of fact.

A concurrent finding as to receipt of consideration cannot be interfered with in second appeal. AIR (Vol 1) 1914 Lah 127: 186 PLR 1914: 86 PWR 1914: 25 Ind Cas 511 (DB).

——S. 100 — Consideration — Finding as to — Recitals in deed.

A finding based on a recital of consideration in a mortgage deed is conclusive in second appeal. (1913) 21 Ind Cas 841 (All) (DB).

——S. 100 — Consideration — Payment of — Finding of fact.

The finding of fact of the lower Appellate Court as to execution of a deed and payment of consideration is conclusive and could not be questioned in second appeal unless vitiated by some error of law. A point not taken in the first Appellate Court nor in the memorandum of second appeal cannot be raised. (1913) 21 Ind Cas 554 (Oudh).

(k) Contract.

——S. 100 — Finding of fact — Time if essence of contract — Interference.

Although ordinarily a finding as to whether time was of the essence of the contract is a finding of fact, such a finding can be set aside in second appeal if it is contrary to the general principles of law. AIR (Vol 34) 1947 Lah 352: 49 PLR 74.

——S. 100 — Finding of fact — Whether clause in contract is an arbitration agreement or only agreement to refer to valuer or assessor.

The question whether a clause in a contract is an agreement to refer to arbitration falling within S. 2 of the Arbitration Act or is merely an agreement to refer the matter to a valuer or assessor for his opinion, is a question of fact, to be determined on the true construction of the terms of the clause and the words used by the parties therein. AIR (Vol 34) 1947 Lah 215: 236 Ind Cas 444 (DB).

——S. 100 — Finding of fact — Findings that agreement was entered into as manager and that contract was prudent act are findings of fact.

The findings that an agreement of sale w executed by the father as a manager of the joi

Hindu family and that the contract was a prudent act for the benefit of and binding on the family are findings of fact and cannot be challenged in second appeal. AIR (Vol 33) 1946 Nag 139 : ILR (1946) Nag 116 : 1946 NLJ 43 (DB).

——S. 100 — **Finding based on misconception of nature of contract — High Court, if can be addressed on facts.**

Where the finding of fact on question of non-payment of rent was itself based on an obivious misconception of the nature of the contract between the parties:

Held, that the High Court in second appeal could be addressed on facts. AIR (Vol 26) 1939 Lah 455: 41 PLR 457: 185 Ind Cas 858.

——S. 100 — The conclusion that the contract evidenced by the lease was not acted upon by the parties is a finding of fact which cannot be attacked in second appeal. (1936) 38 PLR 590.

——S. 100 — **Finding as to who broke the contract, if can be challenged in second appeal.**

In a contract to sell and to buy, a finding by the lower Appellate Court as to who broke the contract is a finding of fact which cannot be challenged in second appeal. AIR (Vol 22) 1935 Nag 111: 31 NLR 250: 155 Ind Cas 778.

——S. 100 — **Novatio.**

Contract Act, S. 62 — Creditor instead of actually being paid, taking renewed pronote receiving some consideration as increased interest — Old debt is not paid off — Whether new is substituted in place of old is a question of fact. AIR (Vol 14) 1927 Cal 538 : 102 Ind Cas 871 : 45 CLJ 233 : 31 CWN 703 (DB).

——S. 100 — So far as the nature of the contract is to be gathered from the language used, this is a question of construction which is a question of law. So far however as it is to be gathered from external facts proved in evidence, it is a question of fact. AIR (Vol 10) 1923 All 586: 77 Ind Cas 572 : 45 All 581 : 21 ALJ 503 : 4 LRA Civ. 433 (DB).

——S. 100 — **Earnest money.**

Where there is no written contract, the point as to determination of what is and what is not earnest money, must be decided, according to the evidence on the record as a point of fact. AIR (Vol 9) 1922 All 478 : 68 Ind Cas 761 : 20 ALJ 742 (DB).

——S. 100 — **Implied obligation — Question of fact.**

The question of an implied obligation under S. 70 of the Contract Act is a question of fact. AIR (Vol 3) 1916 Bom 302 : 40 Bom 646 : 18 Bom LR 700: 35 Ind Cas 794 (DB).

——S. 100 — **Implied contract — Question of fact.**

Implied contract may be a question of fact or law according to the circumstances. It may be a question of fact when it is used in the sense of an agreement based on offer and acceptance. It may be a question of law when the question depends on inference to be drawn from admitted facts. It may be also a contract implied by law. (1911) 1 MWN 6 : 9 MLT 191 : 9 Ind Cas 41 (DB).

(l) Contradictory.

——S. 100 — **Conflicting statements by person.**

Where a person has made two conflicting statements, it is for the Court of fact to decide which is the true statement and the finding arrived at by such Court cannot be interfered with in second appeal. AIR (Vol 29) 1942 Pat 479: 8 CLT 35: 8 BR 851: 23 PLT 740: 202 Ind Cas 113 (DB).

——S. 100 — **Evidence justifying finding of lower Appellate Court — Mere non-reference in judgment, to particular contradiction, if justifies rejection of finding by High Court.**

Where there is positive evidence on record which, if believed, is sufficient to justify the finding of the lower Appellate Court, the mere fact that the lower Appellate Court did not refer in its judgment to a particular contradiction does not justify the High Court in rejecting its finding, more especially when a similar contradiction was in fact considered and explained. AIR (Vol 27) 1940 Cal 532: 44 CWN 1048: 191 Ind Cas 577 (DB).

——S. 100 — The opinion recorded by a Judge who sees and hears the witnesses should not be lightly brushed aside by an Appellate Court and if that opinion is ignored on grounds which are altogether unreasonable, no value can be attached to the finding of fact arrived at by the Appellate Court. AIR (Vol 27) 1940 Lah 329: 190 Ind Cas 846.

——S. 100 — A finding which is based on nobody's pleading and on nobody's responsibility for any such pleading cannot be accepted in second appeal. AIR (Vol 18) 1931 All 219: 132 Ind Cas 426 (DB).

——S. 100 — **Question or finding of fact — Finality — Contradictory.**

A finding of fact which contradicts the other finding, is open to second appeal. AIR (Vol 15) 1928 Lah 690: 108 Ind Cas 521.

——S. 100 — **Conflicting findings — Interference.**

Where the trial Court found in a partition suit that there was a partition as a family arrangement and the Appellate Court accepted the finding on partition but set aside the family arrangement held the finding as to partition having been accepted, the decision against the family arrangement was unsupportable. AIR (Vol 7) 1920 Pat 285: 1 Pat LT 465: 57 Ind Cas 413 (DB).

——S. 100 — **Question of law — Fndings contrary to facts.**

A wrong decision based upon findings contrary to the facts found raises a point of a law. Dealing with the evidence piecemeal is a vicious practice. (1913) 18 Ind Cas 814 (Cal) (DB).

(m) Custom.

——S. 100 — **Finding of fact — Finding as to local usage of giving residents a right to transfer homes — Binding nature.**

A finding by a lower appellate Court that there is a local usage giving the residents a right to transfer their houses is binding on the second appellate Court. AIR (Vol 33) 1946 All 384: 223 Ind Cas 482: 1946 AWR (HC) 100: 1946 ALW 443.

——S. 100 — **Finding on question of existence of custom of pre-emption is one of fact.**

A finding on the question of existence of custom of pre-emption is a finding of fact and cannot be assailed in second appeal if the finding does not proceed upon a misapprehension or is not liable to condemnation on any other ground. AIR (Vol 33) 1946 All 133: ILR (1945) All 888: 1945 ALJ 407.

——S. 100 — **Question of fact.**

Finding by the lower Courts that no custom as alleged by the plaintiff existed, based on the consideration of evidence, being one of fact cannot be challenged in second appeal. AIR (Vol 33) 1946 Oudh 188: 1945 AWR (CC) 1: 1945 OWN (CC) 3.

——S. 100 — The question whether a custom exists or not is one of fact and the findings of the Courts below cannot be interfered with in second appeal. AIR (Vol 27) 1940 All 535: (1940) ALJ 650: 1940 OWN 1136: 1940 RD 545: 1940 AWR 486: ILR (1940) All 725: 192 Ind Cas 570.

——S. 100 — **Whether custom applicable to parties is established is question of fact.**

The question whether a custom applicable to the parties concerned has been established is,

strictly speaking, a pure question of fact determinable upon the evidence given in the case. And in the absence of any evidence, it would not be proper to interfere in second appeal with the finding of the lower Appellate Court regarding the alleged custom. AIR (Vol 26) 1939 All 437: (1939) ALJ 213: ILR (1939) All 406: 1939 AWR 288: 183 Ind Cas 38.

——S. 100 — High Court, if can go into correctness of findings of fact.

It is not for a Court of second appeal to go into the questions of fact. It is for the Courts which entertained questions of fact to find out which facts are proved and when those facts have been found, the High Court in second appeal can consider the question whether from those facts the conclusion should or should not be drawn that a custom has been legally proved. AIR (Vol 24) 1937 All 290: (1937) ALJ 541: 1937 AWR 169: 169 Ind Cas 119.

——S. 100 — A finding on the question of custom is a finding of fact in so far as it records what happened and in so far as it gives weight to the opinion evidence. AIR (Vol 22) 1935 All 501: 1935 AWR 429: 157 Ind Cas 30.

——S. 100 — Where the Court below has applied its mind to the law bearing on the question as to the requirements of a valid custom & satisfied itself that these requirements are present in a particular custom set up, unless there is an error of law, the conclusions of the Court would be conclusions on a question of fact, and binding upon the High Court in second appeal. AIR (Vol 22) 1935 Bom 371: 37 Bom LR 584: 158 Ind Cas 796.

——S. 100 — Question of fact — Existence of custom.

The question of the existence of custom is substantially a question of fact and the finding would ordinarily be binding on the High Court in second appeal. Of course if the Court below has approached the question from a wrong standpoint or has thrown the burden of proof on the wrong party or had wrongly assumed a condition to be necessary, which is not required, the finding may be vitiated. Similarly if it has acted on illegal evidence or acted upon evidence which is legally insufficient to show that the custom is general and of universal application the finding may be interfered with; or if in any other way a proposition of law is mixed up with the finding the latter may become a mixed question of fact and law. Acts found to be done in pursuance of the alleged custom would be facts but the conclusion whether the facts found fulfilled the requirements of the law may be a question of law. AIR (Vol 18) 1931 All 104: 1930 ALJ 1555 (DB).

——S. 100 — The finding of a lower Court on a question of custom is one of fact and is binding upon the Chief Court in second appeal. (1931) 134 Ind Cas 475: 8 OWN 797.

——S. 100 — Finding as to the existence of a custom to relieve the tenant of rent in respect of land allowed to lie fallow is a finding of fact which cannot be disturbed. AIR (Vol 17) 1930 PC 234.

——S. 100 — The decision of any tribal or family custom is a finding of fact which cannot be disturbed in second appeal. AIR (Vol 17) 1930 Oudh 330: 123 Ind Cas 51: 7 OWN 333.

——S. 100 — Question or finding of fact — Proof — Special custom.

Held, that the question whether by custom the under-raiyat's rights pass by inheritance is one of fact for purposes of second appeal. AIR (Vol 17) 1930 Pat 562: 11 PLT 539 (DB).

——S. 100 — Proof of custom is a question of fact. AIR (Vol 15) 1928 Oudh 121: 107 Ind Cas 560: 4 OWN 1229 (DB).

——S. 100 — Custom — Proof of.

Decision whether a custom is established is a question of fact. The weight or value of evidence is not a subject for discussion in second appeal. AIR (Vol 15) 1928 Oudh 301: 112 Ind Cas 142: 5 OWN 432 (DB).

——S. 100 — Whether single wajib-ul-arz establishes a custom is a question of fact. AIR (Vol 13) 1926 Oudh 143: 91 Ind Cas 942: 13 OLJ 121: 3 OWN 69.

——S. 100 — A finding as to the existence of a local custom of privacy in any particular locality is a question of fact and cannot be attacked in second appeal. AIR (Vol 8) 1921 Sind 155: 66 Ind Cas 833: 16 SLR 17 (DB).

——S. 100 — Finding of fact — Error in.

A finding of fact by a lower Appellate Court, however, erroneous, will not be disturbed in second appeal. AIR (Vol 6) 1919 Pat 309: 52 Ind Cas 739.

——S. 100 — Finding of fact — Question whether parties follow Mahomedan Law — One of fact.

The question whether the parties to a suit follow custom or Mahomedan Law cannot be discussed in second appeal as it is a question of fact. AIR (Vol 3) 1916 Lah 97: 106 PWR 1916: 60 PLR 1917: 34 Ind Cas 219 (DB).

——S. 100 — Custom — Wajib-ul-arz — Proof of custom.

The question whether a wajib-ul-arz is sufficient proof of a custom recorded in, is a question not of law but of fact, relating to the weight due to the evidence. It cannot be said as a matter of law that wajib-ul-arz, if unrebutted, is conclusive proof of custom. AIR (Vol 2) 1915 Oudh 132: 2 OLJ 388: 30 Ind Cas 503.

——Ss. 100, 110 (Ss. 584, 596, old Code) — Question of fact — Family custom.

A family custom of succession in a Hindu family is a question of fact. (1902) 4 Bom LR 372: 6 CWN 459: 29 C 343: 29 IA 62 (66) (PC).

(n) Different inferences.

——Ss. 100 and 107 — Finding of fact — Interference — Powers of appellate Court.

In cases where evidence produced by the parties is fairly balanced, an appellate Court would be reluctant to disturb a finding of fact arrived at by the trial Court. It is open to an appellate Court to come to its own finding of fact if it finds the evidence produced by one side is stronger than that produced by the other and when that finding is not vitiated by any error of law, the second appellate Court will not interfere with it. AIR (Vol 37) 1950 Ajmer 50.

——S. 100 — Considered judgment of trial Court — Appellate Court while reversing it, failing to consider material piece of evidence militating against its own view.

If an Appellate Court, while reversing a well-considered judgment of the trial Judge, fails to advert to or in any way indicate that it has considered a most material piece of evidence which militates against its own view, the finding of such Court is not to be accepted as an unassailable final finding of fact. AIR (Vol 25) 1938 Mad 568: 47 MLW 477: (1938) 1 MLJ 582: (1938) MWN 354: 179 Ind Cas 265 (DB).

——S. 100 — High Court thinking it would have come to different finding.

Where there is evidence on record which would justify the lower Appellate Court in arriving at

a certain finding and it has considered the evidence, the High Court cannot interfere merely because if the matter was raised before it, it might have come to a conclusion different from the conclusion come to by the lower Appellate Court. If indeed there were no evidence upon which the finding could be supported, then the matter would become, not a question of fact, but a question of law. AIR (Vol 24) 1937 Sind 36: 167 Ind Cas 355 (DB).

——S. 100 — In second appeal, a finding of fact cannot be questioned even if the Appellate Court might be inclined to take a different view on the same evidence or if the finding of fact is actually erroneous. AIR (Vol 20) 1933 Oudh 115: 10 OWN 1313: 142 Ind Cas 696 (2).

——S. 100 — Precedent.

Court in second appeal cannot reverse finding of lower Court on strength of authority not quoted in Courts below. AIR (Vol 17) 1930 Lah 737.

——S. 100 — Question or finding of fact — Finality — Different conclusions.

Where the lower appellate Court has arrived at a conclusion which is permissible on the facts established it is not open to the High Court to set aside its finding on second appeal even if the second appellate Court is inclined to come to a different conclusion on those facts. (1926) 98 Ind Cas 876 (Lah).

——S. 100 — It is incumbent on an appellant to show that the judgment appealed from, is wrong. An Appellate Court can come to an independent decision on a point when the lower Court decided it arbitrarily. AIR (Vol 9) 1922 Lah 127: 65 Ind Cas 464 (DB).

——S. 100 — Appreciation of evidence — Finding of first Appellate Court.

A finding of a first Appellate Court is not illegal simply because it does not give as much weight to a certain circumstance as the High Court might have done, if it had been the Court of first appeal especially when it is based also on other facts. AIR (Vol 1) 1914 Mad 106: 1 LW 350: 24 Ind Cas 383 (DB).

——S. 100 (S. 584, old Code) — Question of fact — Whether building is unfit for the purposes of the tenancy.

The question whether the construction of a building is unfit for the purposes of the tenancy agricultural is one of fact and should be decided according to the circumstances of each case, and consequently the High Court is not competent to interfere with the finding of the lower appellate Court in second appeal. (1907) 17 MLJ 364: 2 MLT 399: 9 Bom LR 750: 11 CWN 794: 6 CLJ 19: 34 C 718: 4 ALJ 497: 34 IA 133 (136) (PC).

(o) Duty of Court.

——S. 100 — Finding of fact by first Appellate Court on relevant issue material in second appeal for determining question not raised in first Appellate Court — Finding must be accepted as final.

Finding of fact by the first Appellate Court on a relevant issue must be accepted as final in second appeal, even where such finding is material in second appeal for the determination of a question which, though not raised in the first Appellate Court, is raised in second appeal. AIR (Vol 33) 1946 Mad 198: 1945 MWN 725: (1945) 2 MLJ 508: 58 MLW 652 (DB).

——S. 100 — In second appeal, High Court is bound by the findings of fact recorded in lower Courts if there is evidence on which such findings are based. AIR (Vol 32) 1945 Nag 138: 1945 NLJ 172: ILR (1945) Nag 444 (DB).

——S. 100 — In a case in which the findings of fact of the lower Appellate Court are to be final, it is necessary that the Court should examine the entire evidence and its judgment should indicate that it had done so. (1940) 42 PLR 136.

——S. 100 — High Court in second appeal cannot go behind findings of facts arrived at by the lower Appellate Court, whether those findings are sound or not. AIR (Vol 28) 1941 Lah 345: 43 PLR 499: 196 Ind Cas 619.

——S. 100 — Lower Appellate Court not considering documentary evidence properly.

Where the lower Appellate Court, in arriving at a finding, fails to attach the presumption of genuineness attaching to an ancient document under S. 90, Evidence Act, and fails to consider properly the documentary evidence on record, it is open to the High Court — in fact, it is the duty of that Court — to come to its own opinion in the matter. AIR (Vol 25) 1938 Cal 763: 67 CLJ 111: 182 Ind Cas 413.

——S. 100 — The Courts of fact should be very careful in deciding such cases where the excuse pleaded is the advice given by a lawyer and they should ask themselves whether the litigant should be allowed to suffer for no fault of his other than that he filed his appeal in the forum relying upon the advice of his lawyer. AIR (Vol 25) 1938 Pat 413: 19 PLT 309: 17 Pat 507: (1938) PWN 818: 4 BR 841: 177 Ind Cas 564 (DB).

——S. 100 — High Court's duty to disentangle findings of fact from inferences and to review legal conclusion.

The High Court has no jurisdiction to interfere with the finding of fact but at the same time it is the duty of the High Court to carefully disentangle the findings of fact from the inferences which may be drawn from these facts and review the legal conclusion, if erroneous. AIR (Vol 25) 1938 Pat 413: 19 PLT 309: 17 Pat 507: 4 BR 841: (1938) PWN 818: 177 Ind Cas 564 (DB).

——S. 100 — Two similar suits decided by same Munsif — Appeals heard by different Judges — Dismissal of one and allowing of the other — Second appeal.

Where two suits of a similar nature were decided by the same Munsif and of the appeals therefrom heard by two different Judges, one was allowed and the other dismissed, and both the second appeals came before the same Judge:

Held, that it was the duty of the Court of second appeal to determine whether there was ground for interference with either judgment taken by itself. AIR (Vol 20) 1933 Oudh 115: 10 OWN 1313: 142 Ind Cas 696 (2).

——S. 100 — Practice — Lower Court should carefully consider entire material on record for giving finding of fact. AIR (Vol 17) 1930 Lah 12: 123 Ind Cas 573.

——S. 100 — Question or finding of fact — Finality — Procedure.

Findings of fact arrived at by the Court below not vitiated on any legal principle must be accepted as conclusive. AIR (Vol 16) 1929 Pat 127: 10 PLT 138: 115 Ind Cas 890 (DB).

——S. 100 — Lower Appellate Court reversing finding of fact of primary Court must consider all important materials.

If the Lower Appellate Court means to reverse the finding of the primary Court on any point, it should consider all the important materials on which that finding was based. It would be intolerable if a Court were required to give all its reasonings in its judgment, or notice all the evidence which influences its decision. But the position is wholly different where a Court takes upon itself to reverse a finding of the Trial Court on a question of fact. AIR (Vol 12) 1925 Cal 993: 85 Ind Cas 540.

——S. 100 — In a judgment of reversal it is not enough to say that in the opinion of the Appellate Court, the evidence is meagre and could not be relied on without giving any reason in support of that view. In such a case its finding of fact is not binding in second appeal. AIR (Vol 12) 1925 Cal 408: 79 Ind Cas 412 (DB).

——S. 100 — Findings of fact — No finding as to their effect — Remanding case for preparation of decree as per finding is not a proper order — Remand — Appellate Court must amend or uphold the decree. AIR (Vol 9) 1922 All 192: 66 Ind Cas 866: 20 ALJ 258 (DB).

——S. 100 — It is for the Court of fact to determine whether the presumptions referred to under S. 114, Ill. (f) of the Evidence Act are to be drawn in a particular case or not. AIR (Vol 8) 1921 Nag 116: 17 NLR 25.

——S. 100 —Question or finding of fact — Finality — Duty of Court.

It is to the public interest that there should be an end of litigation even at the cost of occasional error. If this rule is strictly enforced the parties know where they are, but if a High Court, every time it differs from the view of the Court below on a question of fact, is to seek out flimsy pretext for treating the question as one of law, the whole policy of the law will be defeated. The parties will be encouraged to file second appeals on questions of fact on the ground that evidence has been ignored, that sufficient weight has not been given to a particular document or to an entry in patwari's papers and so forth. AIR (Vol 8) 1921 Oudh 98: 64 Ind Cas 223: 24 OC 221.

——S. 100 — Burden of proof — Allocation of.

On a question as to whether there was consideration for a Hundi the question of allocation of onus is the most vital question between the parties and it is the duty of a Court of second appeal to rectify a mistake made by the Lower Appellate Court in this respect. AIR (Vol 7) 1920 Lah 295: 1 Lah 429: 58 Ind Cas 982 (DB).

——S. 100 — Finding of fact — Not clear.

It is the duty of lower Courts on appeal to come to clear findings on facts as they are final and the High Court cannot go behind them. AIR (Vol 6) 1919 Cal 360: 23 CWN 1048: 53 Ind Cas 1007 (DB).

——S. 100 — Appreciation of evidence.

The High Court has nothing to do in second appeal, as to the importance of evidence but it has to accept the finding of the Lower Court as a question of fact, except where a special question e.g., credibility of witnesses apart from demeanour arises. AIR (Vol 4) 1917 All 35: 39 All 426: 15 ALJ 349: 39 Ind Cas 666 (DB).

——S. 100 — Finding of fact — Consideration of evidence — Duty of Appellate Court.

When the Appellate Court reverses a finding of fact it ought to apply its mind to the consideration of the whole evidence in the case. AIR (Vol 4) 1917 Mad 689: 31 MLJ 311: (1916) 2 MWN 133: 20 MLT 228: 35 Ind Cas 421 (DB).

——Ss. 100 and 107 — Finding of fact — Wrong application of Law — Duty of Appellate Court — Remand.

A Court of appeal must assume that a Judge knows the law which he is called upon to administer and that he applies it to the facts of the case before him; and if there is evidence to sustain the conclusion of fact at which he arrives, then his decision is unimpeachable. In cases where a Judge states and wrongly states what the Law is and applies wrong legal principles to the facts of the case so stated by him then in such cases the Appellate Court will intervene and correct the erroneous principles of Law which the Judge has applied and remand the case for a re-hearing with a correct exposition of the law. 35 Ind Cas 392: AIR (Vol 3) 1916 Pat 363 (DB).

——S. 100 — Finding of fact — Reasons for to be shown.

When questions of fact are involved in a case, the Appellate Court ought to give its reasons for dismissing the appeal and its judgment should at least show that the Court understood the case and did consider the ground of appeal in view of the provisions of S. 100, C. P. C., with regard to the binding nature of concurrent findings of fact on the High Court. (1915) II UBR 92: 33 Ind Cas 666 : AIR (Vol 3) 1916 Upp Bur 9.

——S. 100 — Presumption — Omission to raise by lower Court.

Where a presumption which a Court ought to raise is fixed by no rule of law, the privilege of raising it entirely rests with the Court of fact and the High Court cannot in second appeal interfere with it. 39 Mad 304 : 26 Ind Cas 723 : AIR (Vol 2) 1915 Mad 1113 (DB).

——S. 100 — Consideration of evidence — Duty of lower Court.

The High Court will in second appeal satisfy itself with regard to the Lower Appellate Court having applied its mind to the evidence on record and pronounced its finding upon a consideration of the evidence. (1912) MWN 175 : 15 Ind Cas 190.

——S. 100 — Finding of fact — Conclusive.

The High Court in second appeal is bound to accept a finding of fact and cannot come to a contrary finding. (1911) 9 Ind Cas 456 (All) (DB).

(p) Easement.

——S. 100 — No error of law committed — Interference.

The plaintiff as the upper riparian proprietor claimed to have a prior right to a supply of water from a river. He alleged that his village S had been irrigated by a channel taking off from a sluice A, and another village T by a channel taking off from a sluice B lower down; that irrigation through sluice B having become impracticable, a sulice C had been constructed higher up the river; that the sluice and channel had been constructed for the benefit of both villages and that village S had always enjoyed prior rights of supply when the water in the channel was low. He alleged that an order made by the Collector which prevented water flowing as usual into the S tank was illegal and a cause of damages, and prayed for a declaration of his right to have certain amount of water maintained as before for the supply of the S tank and damages. It was found by both the lower Courts that the plaintiff's S village had never had any share in the water of the old channel and that village T had acquired the exclusive right to the customary supply of water through the sluice C and the channel by long user:

Held, that the sluice C being situated higher up the river than both the villages, this amounted to a finding that the ryots of T had acquired an easement against all the lower riparian proprietors, including the plaintiff, to draw off their customary supply of water through this sluice and channel, a right in no way depending on their position as riparian proprietors lower down the river that the District Judge had found that the defendant had failed to prove that the Government had contracted with the plaintiff to give the S village a priority of supply and that far from being prejudiced by the project, the plaintiff's S village obtained thereby a supply of river water for the

S tank which it had been unable to obtain in the exercise of the plaintiff's riparian rights within the limits of the S village by the sluice A & the channel leading therefrom and that in arriving at these findings, no error of law had been committed and the High Court had no jurisdiction to modify the decree of the District Judge under S. 100, Civil P. C. AIR (Vol 21) 1934 PC 112 : (1934) MWN 433 : 66 MLJ 595 : 39 MLW 613 : 11 OWN 775 : 38 CWN 533 : 59 CLJ 262 : 36 PLR 93 : 36 Bom LR 539 : 57 Mad 652 : 3 AWR 713 : 16 PLT 7 : 61 IA 163 : 148 Ind Cas 778 (PC).

——S. 100 — The finding of a lower Court that the right of privacy possessed by a house-holder in respect of the house which he occupies has not been interfered with by his neighbour, is a finding of fact and cannot be disturbed in second appeal. 6 OWN 940 : AIR (Vol 16) 1929 Oudh 535 (DB).

——S. 100 — Finding as to privation of light not inconveniencing user so as to entitle him to injunction, is a finding of fact. 114 Ind Cas 698 : AIR (Vol 15) 1928 Lah 980.

——S. 100 — Customary right of way in agricultural tract set up — Whether custom is reasonable or not is a question of fact. 103 Ind Cas 331 : 25 MLW 773 : 38 MLT 395 : AIR (Vol 14) 1927 Mad 653 : 52 MLJ 674 (DB).

——S. 100 — A finding that no right of way was granted is a finding of fact. 6 Lah LJ 176 : AIR (Vol 11) 1924 Lah 488.

——S. 100 — Finding of fact — Not supported by reasons — Not binding on second appeal.

A finding of fact is binding on a Court of Second Appeal if it is a judicial decision reached on a consideration of the evidence. When no reasons are given for such a finding and no reference is made to the evidence the finding can be questioned in second appeal. (1920) UPLR (BR) 55 : 56 Ind Cas 529.

(q) Evidence.

See also Notes 6, 11 and 16.

(i) Absence of
(ii) Existence of.
(iii) Inadmissible.
(iv) Misdirection.
(v) Misreading.
(vi) Omission.
(vii) Sufficiency of.

——S. 100 — Finding that Magistrate took cognizance at particular time.

Taking cognizance of an offence is a mental act. Where a Magistrate himself deposes as to the time when he took cognizance of the offence and he is believed by the final Court of fact, the second Appellate Court will not interfere with this finding. AIR (Vol 31) 1944 Cal 4: 77 CLJ 93: 212 Ind Cas 421 (DB).

——S. 100 — Finding based on evidence — If can be set aside — Question of fact at issue — Case depends on evidence.

The fact that the lower Court has omitted to mention a certain piece of evidence does not show that it did not consider it and, in any case, where the finding is based on evidence, the finding is not liable to be set aside in second appeal, even if the High Court is inclined to come to a contrary conclusion.

Where a question of fact is at issue, each case must depend on its own merits and on the evidence led in that case. AIR (Vol 26) 1939 Lah 548: 41 PLR 826: 185 Ind Cas 395 (DB).

——S. 100 — Quantum of evidence, whether question of law.

The quantum of evidence required to prove an issue is not a question which can be agitated in second appeal. (1931) 134 Ind Cas 125 (126): 32 PLR 248 (1) (DB).

——S. 100 — Second appellate Court can set aside finding of fact not based on admissible or reasonable evidence. AIR (Vol 16) 1929 All 481: 118 Ind Cas 372: 1929 ALJ 873 (DB).

——S. 100 — Finding of fact based on admissible evidence cannot be impugned. There is no jurisdiction to entertain a second appeal on the ground of even an erroneous finding of fact, however gross or inexcusable the error may seem to be. AIR (Vol 16) 1929 Oudh 402: 6 OWN 652: 119 Ind Cas 866.

——S. 100 — A finding of fact based on legal evidence cannot be challenged in second appeal. AIR (Vol 14) 1927 All 377: 100 Ind Cas 626.

——S. 100 — Findings of facts based on admissible evidence are not challengeable in second appeal even though erroneous. (1927) 99 Ind Cas 183: 3 OWN Sup. 277 (DB).

——S. 100 — Where the lower appellate Court came to a finding of fact that there was no evidence which had been produced in the case by the plaintiff sufficient to justify him in shifting the burden of proof on to the other side, the finding of fact arrived at cannot be disturbed in second appeal. (1926) 92 Ind Cas 670 (Oudh) (DB).

——S. 100 — Oral evidence.

The weight to be attached to oral evidence is not a matter for second appeal. AIR (Vol 8) 1921 Oudh 256: 8 OLJ 629: 65 Ind Cas 370.

——S. 100 — Appreciation of evidence — Weight due to.

The value of the evidence is not a matter for consideration in second appeal. 46 Cal 152: 22 CWN 822: 46 Ind Cas 237: AIR (Vol 6) 1919 Cal 721.

——S. 100 — Finding of fact — No interference.

Where the Lower Appellate Court has arrived at a finding of fact on a consideration of the whole evidence, the Chief Court will not disturb such finding in second Appeal. AIR (Vol 2) 1915 Lah 297: 240 PLR 1915: 97 PWR 1915: 30 Ind Cas 505.

——S. 100 — Appreciation of evidence — Weight to be given to.

The weight or value to be given to evidence is not a subject for discussion in second appeal. AIR (Vol 2) 1915 Oudh 194: 18 OC 160: 2 OLJ 283: 30 Ind Cas 279.

——S. 100 — Appreciation of evidence — Credibility of witnesses.

The credibility of witnesses accepted by the Courts below cannot be considered in second appeal but the sufficiency of the evidence can be considered in second appeal. AIR (Vol 1) 1914 Oudh 336: 1 OLJ 470: 25 Ind Cas 869.

——S. 100 — Finding of fact — Consideration of evidence.

The Court must apply its mind to every piece of relevant evidence produced but need not refer to every portion of such evidence. AIR (Vol 6) 1919 Oudh 187: 1 UPLR (JC) 12: 52 Ind Cas 173.

(i) Absence of.

——S. 100 — Finding of fact — Finding not based on evidence — Finality.

A finding of fact which is arrived at on certain observations in an order which are not evidence, is a finding not based on evidence, and is not conclusive; and the High Court can therefore disregard it. AIR (Vol 37) 1950 Pat 302 (DB).

——S. 100 — Finding of fact — Finding based on no evidence — Finality.

A finding of fact which is really based on no evidence (e. g., finding of possession merely on

the presumption that possession follows title) cannot be accepted as binding in second appeal. AIR (Vol 37) 1950 Pat 293.

——S. 100 — Assumption.

A finding which is based on an assumption cannot be allowed to stand. AIR (Vol 30) 1943 Cal 211: 76 CLJ 203: 47 CWN 241: 207 Ind Cas 34.

——S. 100 — Finding of fact is open to consideration in second appeal unless there is evidence to justify such a finding by the lower Appellate Court. (1938) 1938 OWN 171: 1938 AWR 20: 1938 RD 256.

——S. 100 — A finding of fact not based on evidence is not a valid finding of fact and cannot be supported. AIR (Vol 25) 1938 Pat 622: 19 PLT 645: 5 BR 483: (1938) PWN 202: 180 Ind Cas 740 (DB).

——S. 100 — Finding of fact based purely on unwarranted assumptions and unjustified conjectures is not binding in second appeal upon the High Court. (1937) 39 PLR 361.

——S. 100 — Finding based on conjectures.

Findings based on conjectures and not based on evidence can be interfered with in second appeal. AIR (Vol 23) 1936 Lah 978: 38 PLR 416: 165 Ind Cas 997.

——S. 100 — A finding of fact not based on any evidence will be upset in second appeal. AIR (Vol 19) 1932 Lah 293: 32 PLR 861: 13 Lah 399: 137 Ind Cas 115 (DB).

——S. 100 — Finding based on conjectures.

A finding of fact which is based on conjectures rather than on circumstantial evience can be set aside on second appeal. AIR (Vol 18) 1931 Lah 213: 131 Ind Cas 301.

——S. 100 — High Court can interfere.

Where there is no evidence in support of a finding of fact, the High Court in second appeal can interfere with it. AIR (Vol 17) 1930 Cal 815: 52 CLJ 235 (DB).

——S. 100 — Question or finding of fact — Finality — Conjecture.

Findings of facts proceeding upon pure conjectures, unjustifiable assumptions and unwarranted inferences cannot be accepted as final in second appeal. AIR (Vol 17) 1930 Lah 238: 122 Ind Cas 109.

——S. 100 — Finding of fact not based on evidence is not final. AIR (Vol 14) 1927 Mad 1167: 39 MLT 633: 104 Ind Cas 781 (DB).

——S. 100 — Finding of fact arrived at upon an erroneous conjecture as to matters not on record can be interfered with in second appeal. AIR (Vol 12) 1925 Cal 452: 82 Ind Cas 974.

——S. 100 — Evidence entirely absent — Finding will be set aside. AIR (Vol 12) 1925 Oudh 525: 85 Ind Cas 338: 27 OC 331.

——S. 100 — Finding on mere conjecture can be upset in second appeal. AIR (Vol 11) 1924 Lah 465: 80 Ind Cas 329: 6 LLJ 127 (DB).

——S. 100 — A finding of fact on no evidence is liable to upset by High Court in second appeal. AIR (Vol 11) 1924 Mad 617: 80 Ind Cas 567: 19 MLW 560.

——S. 100 — Finding of fact — No evidence.

A finding of fact based not on the evidence but on surmise and conjecture is open to question in second appeal. AIR (Vol 6) 1919 Cal 1091: 27 CLJ 563: 22 CWN 826: 45 Ind Cas 660 (DB).

——S. 100 — Finding of fact- — Surmises — No evidence.

A Court cannot draw an inference from matters not on record. Where a Court held that interest had been paid merely because the obligor brought a suit on the last day of limitation, held the finding was not sustainable. AIR (Vol 5) 1918 Bom 161: 42 Bom 352: 20 Bom LR 354: 45 Ind Cas 555 (DB).

——S. 100 — Finding of fact — Surmises.

Findings of facts based on mere conjecture are not judicial findings and cannot be accepted as final even in second appeal. AIR (Vol 5) 1918 Lah 386: 102 PWR 1918: 45 Ind Cas 800.

——S. 100 — Finding of fact — Suspicions and presumptions.

A judgment based on mere conjectures and presumptions is liable to be set aside in second appeal. AIR (Vol 5) 1918 Lah 135: 55 PWR 1918: 33 PLR 1918: 44 Ind Cas 433.

——S. 100 — Finding of fact — Assumptions unwarranted.

A finding of fact based upon unwarranted assumptions and wrong principles is open to second appeal. AIR (Vol 5) 1918 Lah 104: 27 PWR 1918: 46 Ind Cas 511 (DB).

——S. 100 (S. 584 old Code) — Finding of fact — Not based upon evidence.

Mere expressions of opinion of a Judge of an appellate Court which are not shown to be based on any evidence are not in law findings sufficient to displace the findings of the 1st Court when the latter are based upon a careful review of the evidence. (1907) 34 C 456 (464) (DB).

——S. 100 (S. 584 (c) old Code) — Second appeal — Ground of — No evidence to justify finding of facts.

In a second appeal, the High Court can interfere where there is no evidence to justify the finding of facts arrived at by the lower appellate Court. (1906) 4 CLJ 566: 11 CWN 83 (85) (DB).

(ii) Existence of.

——S. 100 — Finding of fact — Finding that holding was held on cash rental — Finality.

A finding of fact that a holding was held on a cash rental and not on a bhasli basis arrived at on evidence, cannot be reopened in second appeal. AIR (Vol 33) 1946 Pat 298: 12 BR 385: 25 Pat 84: (1946) PWN 15 (DB).

——S. 100 — Whether case of mutual assault has been established by evidence is question of fact.

The question whether on the evidence on record the case of mutual assault has been established or not is a question of fact and the High Court has no jurisdiction in second appeal to reopen the finding of the lower Court on that question, however grossly erroneous it may be, unless the finding is vitiated by an error of law. AIR (Vol 31) 1944 Oudh 232: 1944 AWR (CC) 63: 1944 OWN 64: 217 Ind Cas 307 (DB).

——S. 100 — Whether channel is or is not a natural stream is question of fact.

The question whether a certain channel is or is not a natural stream is a pure question of fact and where there is evidence to support the Judge's finding, his conclusion cannot be challenged in second appeal. AIR (Vol 28) 1941 Pat 422: 7 BR 969: 20 Pat 497: 22 PLT 35: 195 Ind Cas 746 (DB).

——S. 100 — Finding based on evidence that party has not proved his case is finding of fact.

Judgment of the lower Appellate Court, based on evidence that a party has not been able to prove his case, amounts to a finding of fact and therefore, even if the finding is not in fact correct, it is not liable to be interfered with in second appeal. AIR (Vol 27) 1940 Lah 118: 41 PLR 308.

——S. 100 — In second appeal it is not open to the appellant to challenge the finding on a question of fact which is supported by evidence, however weak. AIR (Vol 25) 1938 All 100:

(1937) ALJ 1311: 1937 AWR 1223: 174 Ind Cas 82 (DB).

——S. 100 — A finding of fact after an examination of evidence on record cannot be challenged in second appeal. (1938) 40 PLR 531.

——**S. 100 — Finding of fact based on evidence.**

Where the finding of fact is based on evidence, which was considered and believed by the lower Court and no point of law arises, it cannot be disturbed in second appeal. AIR (Vol 23) 1936 Lah 678: 38 PLR 885: 165 Ind Cas 657.

——**S. 100 — Finding of fact supported by evidence, whether can be challenged in second appeal.**

A finding of fact, supported by evidence, cannot be challenged in second appeal. AIR (Vol 22) 1935 All 422: (1935) ALJ 427: 1935 RD 127: 1935 AWR 352: 157 Ind Cas 530.

——**S. 100 — Finding of fact based on evidence.**

A finding of fact arrived at by a Court of fact is final, if such finding is based on evidence. AIR (Vol 22) 1935 Cal 210: 60 CLJ 288: 155 Ind Cas 154 (DB).

——**S. 100 — Finding based on legal evidence.**

Where the finding of fact is based on legal evidence on record, it cannot be re-opened in second appeal. AIR (Vol 22) 1935 Lah 641: 17 Lah 280: 38 PLR 610: 159 Ind Cas 1053 (DB).

——S. 100 — Where the lower Court held that certain properties separately purchased by the members of a joint Hindu family had been thrown into the common stock and it appeared that the reasons were not sufficiently strong when taken separately but the judgment was justified if the reasons were to be taken cumulatively:

Held, that the finding of fact based on evidence could not be disturbed in second appeal. AIR (Vol 18) 1931 Cal 666: 53 CLJ 264: 134 Ind Cas 542 (DB).

——S. 100 — Where there is legal evidence to support the findings of fact, the findings cannot be challenged in second appeal. AIR (Vol 17) 1930 Lah 991: 11 Lah 410: 31 Pun LR 243 (DB).

——S. 100 — A finding of fact based on legal evidence cannot be disturbed in second appeal. AIR (Vol 17) 1930 Lah 677: 121 Ind Cas 377.

——S. 100 — Finding of fact based on some evidence cannot be disturbed. AIR (Vol 15) 1928 All 289: 50 All 754: 26 ALJ 696: 115 Ind Cas 771 (DB).

——S. 100 — Finding is binding unless there is no evidence to support it. AIR (Vol 14) 1927 PC 257: 53 MLJ 700: 32 CWN 3: 107 Ind Cas 449.

——S. 100 — Finding of fact based on evidence—High Court in second appeal cannot interfere. AIR (Vol 14) 1927 Lah 574: 103 Ind Cas 215.

——S. 100 — If there is evidence to be considered the decision of the second Court, however unsatisfactory it might be when examined, must stand final. AIR (Vol 13) 1926 Nag 192: 90 Ind Cas 209.

——S. 100 — Findings of fact, based on the evidence on record are unassailable and cannot be impugned in second appeal. AIR (Vol 13) 1926 Oudh 522: 96 Ind Cas 14.

——S. 100 — Unless it is shown that a finding of fact is not justified by the evidence in the case it cannot be challenged in second appeal. AIR (Vol 12) 1925 Cal 469: 82 Ind Cas 822 (DB).

——S. 100 — A finding of fact is final in second appeal if it is based on evidence. AIR (Vol 12) 1925 Lah 333: 7 Lah LJ 70: 26 PLR 451: 88 Ind Cas 588.

——S. 100 — Allegation in plaint not denied specifically in written statement and supported by evidence — Finding cannot be challenged. AIR (Vol 12) 1925 Pat 552: 85 Ind Cas 1024: 2 Pat LR Civ 284 (DB).

——S. 100 — A finding of fact upon the evidence cannot be questioned in second appeal. AIR (Vol 12) 1925 Pat 384: 86 Ind Cas 141: 6 PLT 67: 1925 PHCC 53 (DB).

——S. 100 — Where there is evidence upon which the lower court could come to a finding and no important evidence of any sort has been ignored, the finding of fact cannot be interfered with in second appeal. AIR (Vol 9) 1922 Lah 356: 70 Ind Cas 202: 3 Lah 389: 6 Lah LJ 513 (DB).

——**S. 100 — Finding of fact — No evidence but probabilities — Interference by High Court.**

The High Court cannot interfere on a finding of fact based upon no positive evidence but only probabilities. AIR (Vol 1) 1914 Mad 118: 1 LW 100: 24 Ind Cas 709 (DB).

(iii) Inadmissible.

——**S. 100 — Second appeal.**

The dictum that a finding of fact arrived at by a lower Appellate Court is binding on the High Court, however erroneous it might be, presupposes that the finding is honest, that it has been arrived at on the facts of the case uninfluenced by any extraneous considerations, that it is the result of a correct appreciation of material on the record and that it is based on evidence and not on surmises and conjectures. Any finding of fact which does not satisfy any of the requirements stated above will not be binding on the High Court. Every finding of fact is not sacrosanct and if findings of fact are arrived at on mere surmises and conjectures or on evidence that is inadmissible or otherwise legally insufficient, those findings can be disturbed. AIR (Vol 27) 1940 Lah 329 : 190 Ind Cas 846.

——**S. 100 — Inadmissible evidence.**

A finding of fact cannot be arrived at on inadmissible evidence and consequently, if a judgment of any High Court laid down that the evidence of a certain type and character was inadmissible, the lower Court cannot ignore it merely on the ground that he was called upon to decide a question of fact only and for that no authority was necessary. AIR (Vol 27) 1940 Lah 245 : 190 Ind Cas 597.

——S. 100 — A finding of fact will not be binding in second appeal where there is really no legally admissible evidence to support it. (1939) 41 PLR 672.

——**S. 100 — Finding of fact based on inadmissible evidence — Whether binding in second appeal.**

Where the findings of fact arrived at by the lower Appellate Court are vitiated by the fact that these findings rested upon inadmissible evidence, such findings of fact are not binding upon the High Court in second appeal. AIR (Vol 23) 1936 Oudh 189 : 1935 OWN 894 : 165 Ind Cas 132.

——S. 100 — Where the lower Court was not called upon to decide at all whether the loan had been taken by A alone or by him and others jointly and the Court entirely misdirected itself in considering that this was the principal point for determination:

Held, that the lower Appellate Court having made this initial error, its finding that the loan was taken by A alone, was not binding in second appeal. AIR (Vol 21) 1934 Pat 411 (2) : 148 Ind Cas 434 (DB).

——S. 100 — In a suit for recovery of money on the basis of accounts, the defendant applied that he may be allowed to inspect the plaintiff's accounts. The trial Court, believing the story of the plaintiffs that the defendant had robbed them of their

accounts, allowed them to adduce secondary evidence. In appeal, the District Judge held that the loss of the account books had not been proved and that the plaintiffs could not be allowed to produce secondary evidence of their contents. In second appeal, the High Court refused to go behind the District Judge's finding of fact:

Held, in Letters Patent Appeal, that the High Court was bound by the finding of fact arrived at by the District Judge. (1932) 140 Ind Cas 677 : 33 PLR 628.

——S. 100 — Although questions of law and fact are often difficult to disentangle, yet the following propositions are clearly established:— (1) There is no jurisdiction to entertain a second appeal on the ground of erroneous findings of fact, however gross the error may seem to be; (2) The proper legal effect of a proved fact is essentially a question of law, but the question whether a fact has been proved when evidence for and against has been properly admitted is necessarily a pure question of fact; (3) Where the question to be decided is one of fact, it does not involve an issue of law merely because documents which were not instruments of title or otherwise the direct foundations of rights, but were really historical materials, have to be construed for the purpose of deciding the question; (4) A second appeal would not lie when some portion of the evidence might be contained in a document or documents, and the first Appellate Court had made a mistake as to its meaning.

Where, therefore, the findings of fact arrived at by the lower Appellate Court have been based, not upon any admissible evidence, but upon a conclusion drawn from document which was rejected by the trial Court and which, therefore, did not form part of the judicial record of the case and further, the findings are vitiated by the fact that the conclusion drawn from this rejected document was arrived at by the lower Appellate Court in the absence of both the parties and their Counsel, a second appeal lies against the findings so arrived at. AIR (Vol 22) 1935 Oudh 41 : 11 OWN 1589 : 10 Luck 423 : 152 Ind Cas 1042 (DB).

——S. 100 — Finding based partly on inadmissible evidence.

If a finding of fact arrived at by the lower Appellate Court is based partly on inadmissible evidence, it is not binding on the Court of second appeal and the finding can be attacked in the second appeal. (1932) 138 Ind Cas 399 : 33 PLR 225 (DB).

——S. 100 — Finding on inadmissible evidence.

A finding based on inadmissible documents can be set aside in appeal. AIR (Vol 18) 1931 Oudh 411 : 8 OWN 1019 : 135 Ind Cas 889 (DB).

——S. 100 — Admissibility of evidence.

Findings of fact arrived at on inadmissible evidence though clear are not final. 31 PLR 198 : AIR (Vol 17) 1930 Lah 672 (DB).

——S. 100 — Consideration of evidence — Conjectures.

Decision arrived at by ignoring oral evidence entirely proceeding on conjectures & relying on inadmissible evidence can be reversed. 124 Ind Cas 337 : AIR (Vol 17) 1930 Lah 150.

——S. 100 — Finding of fact based partly on evidence which was legally inadmissible can be assailed in second appeal. (1928) 108 Ind Cas 264 (Lah).

——S. 100 — Finding based on inadmissible evidence is not binding. 89 Ind Cas 752 : AIR (Vol 13) 1926 Nag 99.

——S. 100 — Where certain evidence was held inadmissible by a second appellate Court, but there were other pieces of evidence relating to the finding by the lower Court, the second appellate Court remanded the case for decision on the other evidence, as it could not be sure that the lower Court was not influenced by the reception of the inadmissible evidence. 86 Ind Cas 734 : 41 CLJ 374 : AIR (Vol 12) 1925 Cal 1034 (DB).

——S. 100 — Finding of fact on inadmissible evidence can be attacked in Second Appeal. 71 Ind Cas 825 : AIR (Vol 10) 1923 Lah 150.

——S. 100 — Finding of fact based on inadmissible evidence is bad — Evidence on record sufficient — High Court will itself arrive at findings. 66 Ind Cas 313 : AIR (Vol 9) 1922 All 439.

——S. 100 — Finding of fact based partly on inadmissible evidence can be assailed in second appeal. 64 Ind Cas 929 : 2 Lah 271 : AIR (Vol 8) 1921 Lah 119 (DB).

——S. 100 — Where the finding of an Appellate Court is based on evidence which is inadmissible, the High Court will interfere. (1921) 63 Ind Cas 811 (All) (DB).

——S. 100 — Inadmissible evidence — Finding of fact based on no legal evidence — Whether can be set aside.

A finding of fact which is not based on legal evidence can be set aside even in second appeal. AIR (Vol 3) 1916 Lah 333 : 24 PWR 1916 : 33 Ind Cas 987.

——S. 100 — Finding of fact — No evidence.

A finding of fact based on no evidence or against express prima facie reliable evidence is liable to be set aside in second appeal. 103 PLR 1915 : 41 PWR 1915 : 28 Ind Cas 555 : AIR (Vol 2) 1915 Lah 401.

——S. 100 — Appreciation of evidence.

A Second Appellate Court cannot consider the credibility of any particular evidence. But where the lower Court has rejected admissible evidence or has acted upon inadmissible or inadequate evidence the second Appellate Court can interfere in second appeal. 17 OC 1 : 20 Ind Cas 894 : AIR (Vol 1) 1914 Oudh 123.

——S. 100 — Inadmissible evidence — Finding based on.

A finding of fact may be challenged in second appeal, when in coming to it, the Lower Court has proceeded illegally in relying upon evidence which is irrelevant and inadmissible. (1912) 15 Ind Cas 459 (Cal) (DB).

——S. 100 — Inadmissible evidence — Findings on — Power of High Court to interfere with finding.

The High Court has power in Second appeal to interfere with a finding of the lower Court on a question of fact, where the finding is based upon inadmissible evidence or evidence legally insufficient to prove it. (1911) 11 Ind Cas 536 (Oudh).

——S. 100 — Second appeal court — Finding of lower appellate court vitiated by admission of inadmissible evidence — Evidence Act, S. 167.

Where the lower appellate court admitted inadmissible evidence and it was not possible to say on the face of the judgment itself that independently of the evidence improperly admitted, the lower appellate court upon other evidence in the case can come to the conclusion at which it arrived their Lordships held that its finding was vitiated by the admission of inadmissible evidence. (1903) 31 C 380 (384) (DB).

(iv) Misdirection.

——S. 100 — Finding of fact can be set aside in the second appeal when the question involved in the case has not been approached from the proper point of view and the evidence on record has not been properly considered by the lower Court. (1934) 35 PLR 608.

——S. 100 — No proper discussion of evidence.

A finding arrived at by the final Court of fact

without proper discussion of the evidence is not binding in second appeal. AIR (Vol 21) 1934 Pat 66 : 14 PLT 699 : 148 Ind Cas 303.

——S. 100 — Where the lower Court has misdirected itself, its finding is not binding in second appeal. AIR (Vol 18) 1931 All 547 : (1931) ALJ 411 : 15 RD 439 : 132 Ind Cas 804 (DB).

——S. 100 — Second appeal lies where a Court misdirects itself on a question of fact. 121 Ind Cas 730 : 12 LLJ 21 : AIR (Vol 17) 1930 Lah 443.

——S. 100 — A Court in second appeal is not to question the conclusion of fact arrived at by both the lower Courts based on legal evidence when no question of misdirection or law arises with regard to it. 109 Ind Cas 771 : AIR (Vol 15) 1928 Mad 377 (DB).

——S. 100 — Unless it can be shown that the First Appellate Court has misdirected itself in point of law in dealing with the question of fact upon the evidence, there would be no ground for second appeal from its decision upon the question of fact, and for an appeal to the Privy Council from the judgment in second appeal to the High Court. 74 Ind Cas 482 : 40 CLJ 16 : 29 CWN 131 : 21 ALJ 723 : 25 Bom LR 1287 : 4 LRPC 184 : 33 MLT 291 : 1923 MWN 832 : 4 PLT 627 : AIR (Vol 10) 1923 PC 187 : 45 MLJ 663 .

——S. 100 — Misappreciation of the case.

Finding of fact — First appellate Court misunderstanding the whole case — Re-hearing may be directed. 73 Ind Cas 756 : AIR (Vol 10) 1923 Lah 206.

——S. 100 — Burden of proof — Error as to.

Where a District Munsif misdirected himself as to the burden of proof but the Subordinate Judge on appeal considered the evidence from the correct stand point and concurred in the Munsif's finding, Held, in second appeal that the finding of the Appellate Court must be accepted. 12 LW 170 : 59 Ind Cas 973 : AIR (Vol 7) 1920 Mad 789 (DB).

——S. 100 — Appreciation of evidence — Finding of fact when can be set aside in second appeal.

When the Court of first instance has not come to a definite finding of fact by not applying the judge's mind to a proper consideration of the evidence in the case the Court of second appeal can set aside his finding of fact. 28 PWR 1916: 33 Ind Cas 1002 : AIR (Vol 3) 1916 Lah 394.

——S. 100 — Misreading of evidence — Question of law.

Where the lower Appellate Court misdirected itself in regard to the most important part of the evidence, bearing upon a question and approached the consideration of that evidence from a wrong standpoint, it commits an error of law, and the High Court could interfere in second appeal. (1913) 17 CWN 224 : 16 Ind Cas 618 (DB).

(v) Misreading.

——S. 100 — Court giving weight to evidence not entitled to weight.

The fact that the Court had given weight to evidence to which it was not entitled, and has thus been led totally to misconceive the case, is not enough to justify interference in second appeal with a finding of fact if the Court had evidence before it proper for its consideration in support of the finding. AIR (Vol 21) 1934 Nag 124: 150 Ind Cas 306.

——S. 100 — Finding of fact based on misconception.

A finding of fact based on a misconception is not binding in second appeal.

Where the lower Courts dismissed the suit on the ground that the plaintiff's witnesses were interested but there was nothing on the record to show in what way the witnesses were interested: Held, that the decision was liable to be reversed in second appeal. AIR (Vol 19) 1932 Lah 128: 32 PLR 742: 135 Ind Cas 511 (1).

——S. 100 — The misreading or ignoring of important documentary evidence amounts to a substantial error or defect in the procedure within the meaning of Section 100 (1) (c), Civil P. C., and justifies the High Court in reversing the finding if such reversal is justified on the merits. AIR (Vol 18) 1931 All 499: (1931) ALJ 757: 54 All 6: 134 Ind Cas 21.

——S. 100 — Construction of document — Wrong interpretation.

C. P. Code, S. 100 — Finding based on wrong interpretation is not binding. AIR (Vol 16) 1929 Oudh 241: 113 Ind Cas 367 (DB).

——S. 100 — Misreading of documents not of title is no point of law. AIR (Vol 10) 1923 Pat 154: 67 Ind Cas 435.

——S. 100 — Finding based on evidence misread or misunderstood can be reversed. AIR (Vol 8) 1921 All 212: 61 Ind Cas 65: 19 ALJ 149 (DB).

——S. 100 — Evidence not properly construed by lower Court — Finding of fact cannot be challenged. AIR (Vol 8) 1921 Lah 284: 4 Lah LJ 426 (DB).

——S. 100 — Misreading of evidence.

Where the judgment of the Lower Court is based on misconception of the evidence and contains several mistakes, the High Court in second appeal will go into the evidence and come to a finding on the question in dispute. AIR (Vol 4) 1917 Lah 225: 92 PLR 1917: 42 Ind Cas 272.

——S. 100 — Misreading of evidence.

Where a finding of fact is arrived at as a result of a complete misreading of a document a second appeal is competent. AIR (Vol 4) 1917 Lah 193: 73 PR 1917: 42 Ind Cas 218.

——S. 100 — Misreading of evidence.

A second appeal is competent when the finding of the lower Appellate Court is vitiated by the misreading of the record on vital matters. AIR (Vol 2) 1915 Lah 189: 250 PWR 1915: 75 PLR 1915: 29 Ind Cas 167.

——S. 100 — Misreading of evidence.

Though the lower Appellate Court misapprehended the evidence on any point it is not a ground for second appeal. (1913) 21 Ind Cas 393 (Cal) (DB).

(vi) Omission.

——S. 100 — Finding of fact — Interference.

Where the lower Appellate Court fails to consider in a proper judicial manner a material piece of evidence, and applies to the case a standard of proof different from, and higher than, that applicable under the Evidence Act, the High Court in second appeal will not accept its findings of fact as final and will interfere. AIR (Vol 34) 1947 Sind 102: ILR (1946) Kar 246: 231 Ind Cas 413 (DB).

——S. 100 — Omission to consider evidence.

In order that the High Court should interfere in second appeal with the finding of fact on the ground of omission of lower Appellate Court to consider evidence, it must be shown that the evidence omitted to be considered by the Court was so important that, had it been considered, it would or should have led to a different result. AIR (Vol 30) 1943 Oudh 429: 1943 OWN 300: 208 Ind Cas 402 (DB).

——S. 100 — Omission to consider evidence produced — Interference.

Where the Judge omits to consider the evidence of possession produced by the parties in

the case, it is a good ground for interference in second appeal with the finding of fact. AIR (Vol 28) 1941 Oudh 615: 1941 OWN 1014: 1941 OLR 645: 196 Ind Cas 99.

——S. 100 — Omission of lower Appellate Court to mention certain piece of evidence.

No second appeal has any chance of success where the only ground of appeal is that the lower Appellate Court has omitted to mention this or that piece of evidence. The Legislature rightly or wrongly has decided that the first Appellate Court is to be trusted and it behoves first Appellate Judges to bear in mind the fact that their findings of fact are conclusive and that they therefore have a great responsibility and should be especially careful in such cases. If they are not, it may be a matter for administrative discipline, but a second Appellate Court cannot put the matter right in second appeal. AIR (Vol 26) 1939 Nag 221: 1939 NLJ 329: ILR (1939) Nag 510: 183 Ind Cas 492 (DB).

——S. 100 — The finding of the lower Appellate Court would ordinarily be a finding on a question of fact no longer open to question. But where it holds that certain circumstances are either inadmissible or irrelevant and refuses to consider them as evidence, then its judgment would be erroneous on a question of law and can be challenged in second appeal. (1938) 40 PLR 705.

——S. 100 — Piece of evidence not considered.

Mere omission to consider a particular piece of evidence will not alter the character of a finding of fact. AIR (Vol 23) 1936 Pat 243: 2 BR 408: 162 Ind Cas 21 (DB).

——S. 100 — Rejection of evidence on finding of fact — Finding of fact, whether can be interfered with.

In deciding a question of fact, the lower Appellate Court rejected certain evidence on a legal presumption:

Held, that the finding of the Court on the question of fact could not be interfered with in second appeal. AIR (Vol 22) 1935 Oudh 394: 1935 OWN 674: 11 Luck 209: 155 Ind Cas 1087 (DB).

——S. 100 — Finding of fact based on wrong assumption.

A finding of fact arrived at overlooking some material evidence and based on wrong assumptions is liable to be set aside in second appeal. (1933) 142 Ind Cas 673: 33 PLR 1013.

——S. 100 — Documentary evidence.

Where the lower Court, in arriving at a finding of fact, has left out of consideration an important piece of documentary evidence, its finding is not binding on the High Court in second appeal. AIR (Vol 19) 1932 Lah 54: 32 PLR 714: 135 Ind Cas 43 (DB).

——S. 100 — Where certain evidence was not relied upon before the lower Appellate Court and the same was not considered in arriving at the conclusion, held, that such omission did not vitiate the judgment. (1929) 11 Lah LJ 381 (DB).

——S. 100 — Consideration of evidence — Omission.

Finding based only on part of evidence legally on record is not legal and binding in appeal. AIR (Vol 16) 1929 Lah 145: 112 Ind Cas 385.

——S. 100 — Where a finding of fact has been arrived at by the lower appellate Court on the basis of only a portion of the evidence in the case and the most important evidence has been excluded from consideration, the High Court will interfere in second appeal. (1928) 112 Ind Cas 461 (Lah).

——S. 100 — Finding of fact is not binding in second appeal if lower Court ignores valuable evidence. AIR (Vol 13) 1926 Cal 603: 91 Ind Cas 1026 (DB).

——S. 100 — An erroneous omission to object to inadmissible evidence does not make it admissible. The omission to take objection to the admissibility of a document becomes fatal only in case where if the objection is taken in time, any defect in its admissibility can be cured and the document made admissible. In other cases objection as to inadmissibility can be raised even in second appeal though it was not raised in the lower Courts. AIR (Vol 12) 1925 Cal 1034: 86 Ind Cas 734: 41 CLJ 374 (DB).

——S. 100 — Although as ruled by the Judicial Committee in 23 I. A. 106 an erroneous omission in the Trial Court to object to an admission which was irrelevant did not make it relevant and admissible in evidence, still as explained in 1 C. W. N. 530, an objection that a document that per se is not admissible in evidence, has been improperly admitted in evidence cannot be entertained in the Court of appeal. If the objection had been taken in the Trial Court, it might have been met and the proceedings regularised. AIR (Vol 10) 1923 Cal 378: 72 Ind Cas 985 (DB).

——S. 100 — Failure of the appellate Court to consider evidence relied on by the trial Court is an error of law. AIR (Vol 9) 1922 Pat 562: 3 Pat LT 483 (DB).

——S. 100 — Lower Court not considering oral evidence at all and confining itself to documentary evidence — Findings of fact can be attacked. AIR (Vol 8) 1921 Pat 18: 61 Ind Cas 102: 6 PLJ 72: 2 PLT 17: 1921 PHCC 113 (DB).

——S. 100 — Finding of fact — Omission to consider evidence.

When the lower Appellate Court failed to consider the entire evidence on record a finding of fact can be questioned in second appeal. AIR (Vol 5) 1918 Oudh 105: 5 OLJ 179: 46 Ind Cas 52.

——S. 100 — Finding of fact — Evidence not considered — Second appeal.

A finding of fact not based in a reasonable consideration of evidence can be attached in second appeal. AIR (Vol 5) 1918 Pat 678: 2 Pat LW 183: 42 Ind Cas 397 (DB).

——S. 100 — Finding of fact — Omission to consider evidence.

The mere fact that the Court of first appeal has not made special mention of a document which is a piece of relevant evidence is not sufficient to show that he has not considered it at all. AIR (Vol 5) 1918 Pat 291: 43 Ind Cas 857: 3 PLW 213.

——S. 100 — Appreciation of evidence — Ignoring evidence.

The ignoring of an important plea of evidence by the Lower Appellate Court is a good ground for second appeal. AIR (Vol 4) 1917 Lah 29: 148 PWR 1917: 42 Ind Cas 76.

——S. 100 — Admissibility of evidence — Omission to objection in Court below.

Evidence admitted without objection in the Trial Court cannot be objected to being on record in the Appellate Court. An erroneous omission to object in the primary Court to the admissibility of a certain piece of irrelevant evidence does not make it relevant in the Appellate Court. AIR (Vol 3) 1916 Cal 278: 34 Ind Cas 534 (DB).

——S. 100 — Finding of fact — Omission to consider evidence.

Only a total omission to consider an impor-

tant part of the evidence and not an erroneous view of evidence is an error of law giving rise to second appeal. (1909) 3 Ind Cas 173 (Cal).

——S. 100 (S. 584 old Code) — Question of law — Failure to consider an important part of the evidence.

Failure by the lower Court to consider an important part of the evidence will be an error of law and therefore a ground of second appeal. (1908) 33 Cal 200 (202) (DB).

(vii) Sufficiency of.

——S. 100 — Finding of fact by lower Appellate Court not to be disturbed though it has not specially referred to every piece of evidence on record.

If, from a perusal of the judgment of the lower Appellate Court, the High Court is satisfied that all the relevant material was considered, though no specific reference in detail is made to every piece of evidence on record, it will not be right to interfere with the finding of the lower Appellate Court on a question of fact. AIR (Vol 33) 1946 Oudh 72: 1945 OWN (CC) 401: 1945 AWR (CC) 263.

——S. 100 — Finding of fact — Interference.

A finding of fact by the lower appellate Court for which there is sufficient material before it, cannot be disturbed in second appeal. AIR (Vol 33) 1946 Pat 298: 25 Pat 84: 12 BR 385: 223 Ind Cas 297 (DB).

——S. 100 — Finding that person incurred civil death in particular year supported by uncorroborated evidence.

A finding that a person incurred a civil death in a particular year when supported by even uncorroborated evidence cannot be interfered with in second appeal. AIR (Vol 29) 1942 Pat 429: 8 CLT 37: 9 BR 50: 203 Ind Cas 65.

——S. 100 — Findings based on consideration of inadmissible and also admissible evidence — Effect.

Though the omission to consider all the evidence coupled with the consideration of inadmissible evidence may not vitiate the findings where there is other evidence sufficient to support the findings, yet, where inadmissible evidence is mainly relied on to arrive at the findings, the findings would be interfered with in the second appeal. Where the findings can still be said to be possible and reasonable upon the evidence that is left after excluding the inadmissible evidence, the decision of the lower Courts cannot be interfered with by the High Court. AIR (Vol 28) 1941 Pat 118: 7 BR 153: 21 PLT 873: 191 Ind Cas 275.

——S. 100 — Power of Court.

While considering a finding of fact arrived at by the lower Appellate Court, it is necessary for the High Court in Letters Patent appeal to distinguish between evidence which would be sufficient and evidence which the High Court itself might think satisfactory. It is not allowable for the High Court in second appeal, or in Letters Patent appeal to say merely that it is not satisfied that matters of fact were proved within the meaning of S. 3, Evi. Act : it should have to go further in order to impugn the finding of fact of the first Appellate Court and say that there was no sufficient evidence. The High Court can adjudicate on the soundness of conclusions which have been derived from findings of fact. On the other hand, if there is evidence upon which a finding of fact has been arrived at, which could have been arrived at with propriety, function of the High Court is at an end. AIR (Vol 28) 1941 Rang 76: 1940 Rang LR 777: 193 Ind Cas 286 (DB).

——S. 100 — Judgment based on inadmissible evidence.

Per Noor Mohammad, J.— If the High Court finds in second appeal that the lower Appellate Court has based its judgment partially upon a piece of evidence which was not admissible, it cannot by that reason alone, reverse that finding or remand the case if it can come to the conclusion that there was sufficient evidence on the record to justify the finding. How the High Court is to satisfy itself about the sufficiency of evidence is a matter which must depend upon the facts of each case. AIR (Vol 22) 1935 Pat 167: 14 Pat 461: 16 PLT 199: 1 BR 455: 155 Ind Cas 470 (FB).

——S. 100 — A finding of fact based on legal evidence on the record cannot be agitated again. AIR (Vol 21) 1934 Lah 460: 35 PLR 402: 15 Lah 849: 150 Ind Cas 888.

——S. 100 — No proper evidence.

A finding of fact can be interfered with in second appeal if there is no evidence proper for the Court's consideration in support of the finding. AIR (Vol 18) 1931 Lah 139: 31 PLR 1024: 132 Ind Cas 397.

——S. 100 — A finding of fact based partly upon inadmissible evidence cannot be challenged in second appeal if it appears from the record that the Court would have arrived at the same conclusion even if such evidence had been excluded. AIR (Vol 17) 1930 Lah 1067: 31 Pun LR 214: 123 Ind Cas 285.

——S. 100 — The objection that a house being occupied by a person as an agriculturist was not liable to be attached was not raised at the earliest possible opportunity. The Court did not take into consideration that the delay threw a deal of doubt on the genuineness of the objection but found on other evidence on record that the house was so occupied.

Held, that the finding of fact based on other evidence on record is still good and binding on High Court in second appeal. AIR (Vol 17) 1930 Nag 11: 119 Ind Cas 677.

——S. 100 — Decision which proceeds not on legal evidence but on mere conjectures can be attacked in second appeal. AIR (Vol 15) 1928 Lah 737: 29 PLR 410: 112 Ind Cas 455.

——S. 100 — A finding of fact arrived at on the evidence produced by parties cannot be interfered with in second appeal. AIR (Vol 14) 1927 Lah 845: 99 Ind Cas 890.

——S. 100 — No evidence to support finding of fact — High Court will interfere. AIR (Vol 13) 1926 Oudh 37: 87 Ind Cas 959.

——S. 100 — Where a plaintiff bases his claim upon a title, the mere fact that the adjoining plot happened to be a court-yard or outer compound of a house and belongs to a certain person does not show that the plot on which the disputed house stands must also belong to that person. The finding to the effect being not based on legal evidence can be set aside in second appeal. AIR (Vol 12) 1925 Cal 302: 80 Ind Cas 903 (DB).

——S. 100 — Insufficient evidence — Finding of fact.

In a second appeal High Court will interfere with the decision of the first Appellate Court, which fails to give reasons for a finding and the judgment is based on legally insufficient evidence. AIR (Vol 7) 1920 Pat 829: 2 UP LR (Pat) 60: 58 Ind Cas 482.

——S. 100 — Negligence — Question of law.

The question whether there is any evidence at all to go to the jury on a case of negligence is a question of law. The question whether the evidence let in is sufficient to constitute wilful negligence is a question of fact with which the High Court will not interfere in second appeal. AIR (Vol 5) 1918 Pat 413: 4 Pat LW 369: (1918) Pat HCC 178: 45 Ind Cas 197 (DB).

——S. 100 — Finding of fact — No evidence — Interference in second appeal.

The High Court can interfere in second appeal with the finding of fact of the lower Appellate Court where there is no evidence on record to justify it. AIR (Vol 5) 1918 Upp Bur 40: (1917) 3 UBR 23: 11 Bur LT 229: 42 Ind Cas 68.

——S. 100 — Finding of fact — No evidence.

Even from a finding of fact a second appeal may be taken if the finding is not supported by any evidence on record. (1915) 2 OLJ 364: 30 Ind Cas 375.

——S. 100 — Effect of evidence — Second appeal — Finding of fact.

A High Court cannot in second appeal question a finding of fact merely because the evidence in the lower Court was not conclusive upon the issue of fact, if the evidence was otherwise legally admissible. 11 O. C. 264, Diss. AIR (Vol 1) 1914 Oudh 228: 24 Ind Cas 633.

——S. 100 — Finding of fact — No evidence.

Where a Court decides a question of fact without any evidence in support of its finding, there is a question of law. (1915) 29 Ind Cas 563 (UP BR).

——S. 100 — Finding of fact — No interference in second appeal.

The finding of fact of a Court of first appeal will not be interfered with in second appeal if there is evidence to support it. (1909) 5 NLR 85: 3 Ind Cas 59.

——S. 100 (S. 584, old Code) — Evidence improperly received — No remand if there is independent evidence to support findings. (1908) 12 CWN 657: 7 CLJ 563 (576): 35 Cal 701 (DB).

(1902) 29 C 343: 29 IA 62 (69): 4 Bom LR 372: 6 CWN 459 (PC).

——S. 100 (S. 584, old Code) — Finding of fact when cannot be interfered with in second appeal.

A finding of fact cannot be interfered with in second appeal, however erroneous, if there be some evidence in support of that finding. (1906) 5 CLJ 55 (58) (DB).

(r) Execution.

See also Note 57.

——S. 100 — Second appeal — Right of — Execution proceedings.

A second appeal does not lie in execution proceedings if no second appeal would lie in the suit itself. AIR (Vol 38) 1951 Punj 346: 52 PLR 13.

——S. 100 — Lower appellate Court's finding that the documents were properly executed is a finding of fact. AIR (Vol 16) 1929 All 419: 116 Ind Cas 740.

——S. 100 — The question whether there was suppression of sale processes can only be raised under Section 47, and therefore a second appeal lies. AIR (Vol 13) 1926 Cal 1219: 98 Ind Cas 206: 44 CLJ 167 (DB).

——S. 100 — Question or finding of fact — Attestation.

It cannot be said as a matter of law that a scribe cannot be an attesting witness. It is a question of fact which must be determined by a Court of fact. AIR (Vol 13) 1926 Cal 150: 90 Ind Cas 774 (DB).

——S. 100 — Question or finding of fact — Tender.

Finding as to tender being duly made cannot be contested. AIR (Vol 12) 1925 Lah 353: 7 LLJ 11: 86 Ind Cas 250.

——S. 100 — High Court has power to find that document was executed in witnesses' presence.

It is quite open to High Court to find that the execution was witnessed by the attesting witnesses even though they may not speak to the fact, if there is other and satisfactory evidence on record to show that the attesting witnesses did witness the execution. AIR (Vol 10) 1923 Mad 36: 71 Ind Cas 153: 46 Mad 64: 17 MLW 661: 32 MLT 9: 1922 MWN 708: 43 MLJ 745 (DB).

——S. 100 — Mahomedan Law — Whether an illness constitutes marz-ul-maut is primarily a question of fact. But it may sometimes be a mixed question of law and fact for instance, where the question arises whether the facts found as to the physical condition of the deceased at the date of execution of the deed constitute the essential elements of marz-ul-maut as formulated by Mahomedan Jurists. AIR (Vol 9) 1922 Cal 429: 67 Ind Cas 77: 49 Cal 477: 26 CWN 749: 34 CLJ 444 (DB).

——S. 100 — A second appeal will not lie in an execution matter, if a second appeal would not have laid in the suit itself. AIR (Vol 8) 1921 All 55: 60 Ind Cas 831: 43 All 403: 19 ALJ 72 (DB).

(s) Existence of things or facts.

——S. 100 — Finding of fact — Finding as to existence of transactions of account — Finality in second appeal.

A finding about the existence of certain transactions of account between parties is one of fact and cannot be challenged in second appeal. AIR (Vol 34) 1947 Pat 273: 227 Ind Cas 36: 12 BR 789.

——S. 100 — Question of fact — Whether can be re-opened in second appeal.

The decision of the lower Appellate Court on questions of fact is definite and it cannot be reopened in second appeal. AIR (Vol 23) 1936 Pat 7: 16 PLT 803: 2 BR 268: 15 Pat 96: 160 Ind Cas 984 (DB).

——S. 100 — Presumption from a certain state of facts.

Whether a presumption should be drawn from a certain state of facts proved before the Court is a question of fact. AIR (Vol 21) 1934 Cal 215: 58 CLJ 157: 149 Ind Cas 1146 (DB).

——S. 100 — Finding that a kotha had been built within twelve years of the suit is one of fact. AIR (Vol 21) 1934 Lah 529: 148 Ind Cas 820.

——S. 100 — Existence of antecedent debt is question of fact and cannot be disturbed in second appeal. AIR (Vol 13) 1926 Oudh 33: 90 Ind Cas 404.

——S. 100 — Implied grant — Existence of, is a question of fact. AIR (Vol 12) 1925 Pat 748: 90 Ind Cas 356: 7 PLT 260: 1925 PHCC 250 (DB).

——S. 100 — Presenting for registration.

Presentation is a question of fact requiring no formality. AIR (Vol 11) 1924 All 799: 92 Ind Cas 345: 46 All 743: 22 ALJ 700: 5 LRA Civ 524 (DB).

——S. 100 — A finding that a house was occupied by the defendant's father adversely to the plaintiff landlord for more than 12 years before suit is finding of fact. AIR (Vol 10) 1923 All 382: 75 Ind Cas 672 (DB).

(t) Finality.

See also Note 57.

——S. 100 — Finding of fact — Finding of lower appellate Court as against that of trial Court — Finality.

The High Court in second appeal is bound not by the finding of the trial Court but by that of the lower appellate Court on a question of fact, when there is nothing to show that that finding is vitiated in any way. AIR (Vol 34) 1947 Lah 172: 226 Ind Cas 425.

——S. 100 — Finding of fact.

It is not open to the High Court sitting in se-

cond appeal to set aside a decision on a pure question of fact. AIR (Vol 33) 1946 Pat 120 (DB).

——S. 100 — **Finding of fact after remand.**

A finding of fact by the lower Appellate Court after remand by the High Court for clearer finding on certain issues on which the findings of that Court were obscure is binding on the High Court. AIR (Vol 30) 1943 Nag 129: ILR (1943) Nag 42: 1943 NLJ 133: 206 Ind Cas 554 (DB).

——S. 100 — In an appeal from an order of remand findings of fact cannot be examined by High Court sitting as a Court of second appeal but where the finding of the lower Appellate Court is too vague, it is not binding upon the High Court. AIR (Vol 30) 1943 Oudh 274: 1943 OWN 165: 207 Ind Cas 532 (DB).

——S. 100 — A decision of the first Appellate Court on a question of fact is binding in second appeal. AIR (Vol 29) 1942 Mad 28: ILR (1942) Mad 225: 54 MLW 426: 1941 MWN 917: (1941) 2 MLJ 601: 201 Ind Cas 128 (DB).

——S. 100 — Per Rowland, J.— The rule in second appeal is that the findings of fact of the lower Appellate Court are conclusive and there is nothing in the Code to take out of the rule a case where an Appellate Court has recorded a finding of fact in dismissing an appeal under O. 41, R. 11. AIR (Vol 26) 1939 Pat 267: 5 BR 295: 179 Ind Cas 803

——S. 100 — Where the finding is a finding of fact and there is no ground on which it can be challenged in second appeal, it is binding on the High Court. AIR (Vol 25) 1938 Oudh 54: 1938 OWN 126: 1938 RD 219: 1938 AWR 18: 172 Ind Cas 647.

——S. 100 — **Findings of fact not vitiated by error of law or procedure and based on legal evidence.**

Where the finding is not vitiated by any error of law or procedure, which could justify interference therewith in second appeal, and is based on legal evidence, the finding must be accepted as conclusive. AIR (Vol 24) 1937 Oudh 165: 1936 OWN 1003: 1936 RD 514: 12 Luck 516: 164 Ind Cas 1003 (DB).

——S. 100 — It is not open to the High Court either in second appeal or upon further appeal to a Bench to permit issues of fact to be re-agitated. AIR (Vol 23) 1936 Rang 256: 14 Rang 242: 163 Ind Cas 211 (FB).

——S. 100 — In the absence of error or defect in the procedure, the finding of the first Appellate Court upon a question of fact is final, however gross or inexcusable the error may be. AIR (Vol 22) 1935 Pat 351: 1 BR 754: 16 PLT 666: 157 Ind Cas 470.

——S. 100 — The High Court has no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be. Where there is no error or defect in the procedure, the finding of the first Appellate Court on a question of fact is final if that Court had before it evidence proper for its consideration in respect of the finding. AIR (Vol 21) 1934 Oudh 261: 11 OWN 276: 147 Ind Cas 1224.

——S. 100 — The High Court cannot entertain a second appeal upon any question as to the soundness of a finding of fact and if there is evidence to be considered, the decision of the first Appellate Court, however unsatisfactory it might be if examined, must stand as final. The mere fact that the High Court would have come to a different conclusion is no ground for entertaining a second appeal. (1933) 143 Ind Cas 589: 34 PLR 671 (DB).

——S. 100 — A Court of second appeal is not competent to entertain any question as to the soundness of a finding of fact by the lower Court. When there is evidence to be considered, the decision of the Court of first appeal, however unsatisfactory it might be, if examined, must stand final.

Further, a second appeal would not lie, because some portion of the evidence might be contained in a document or documents and the first Appellate Court has made a mistake as to its meaning. AIR (Vol 18) 1931 Oudh 142: 8 OWN 152: 15 RD 112: 131 Ind Cas 395.

——S. 100 — No Court of second appeal can entertain an appeal upon any question as to the soundness of the findings of fact by the Court of first appeal; and if there is evidence to be considered, the decision of that Court, however unsatisfactory it might be, if examined, must stand final. (1931) 134 Ind Cas 1023 : 8 OWN 1005 (DB).

——S. 100 — No Court of second appeal can entertain a second appeal on the ground of even an erroneous finding of fact, however, gross or inexcusable the error may be. The soundness of a finding of fact is for the Court of first appeal to determine and if there is evidence to be considered, the decision of that Court, however unsatisfactory it might be, if examined, must stand final. (1931) 132 Ind Cas 791 : 8 OWN 185 (DB).

——S. 100 — The High Court is bound by a decision on facts, however unsatisfactory the reasoning may be. AIR (Vol 20) 1933 Pat 708 : 149 Ind Cas 734.

——S. 100 — When a lower Court comes to a finding on questions of fact, after balancing evidence on each side, such findings are to be respected and are binding in second appeal. AIR (Vol 17) 1930 Pat 564 (DB).

——S. 100 — If the first appellate Court has evidence proper for its findings notwithstanding the statutory presumptions, then its findings of fact are final and conclusive. 120 Ind Cas 56 : 30 MLW 600 : 56 IA 388 : 51 CLJ 1 : 34 CWN 1 : 32 Bom LR 114 : AIR (Vol 16) 1929 PC 286 : 57 MLJ 849.

——S. 100 — A finding of fact by lower appellate Court is binding on the Privy Council as on the High Court. 111 Ind Cas 240 : 28 MLW 204 : 32 OWN 1146 : 48 CLJ 415 : AIR (Vol 15) 1928 PC 219.

——S. 100 — A finding of fact cannot be gone into in second appeal. (1928) 111 Ind Cas 791 (Lah).

——S. 100 says nothing about the findings of fact, concurrent or otherwise, and, therefore, a finding of fact by the lower appellate Court, though not concurrent, is final and cannot be interfered with in second appeal. 114 Ind Cas 538 : 6 Rang 586 : AIR (Vol 15) 1928 Rang 303.

——S. 100 — Findings of first appellate Court are conclusive and the High Court and the Privy Council are bound to accept them without further enquiry. 54 Cal 586 : 54 IA 196 : 8 PLT 255 : 101 Ind Cas 359 : 1927 MWN 437 : 31 CWN 885 : 39 MLT 170 : 26 MLW 642 : AIR (Vol 14) 1927 PC 117 : 53 MLJ 117.

——S. 100 — **Question or finding of fact — Injunction.**

When an injunction is granted on a finding of fact it cannot be reversed in second appeal: 91 Ind Cas 480 : AIR (Vol 13) 1926 Cal 536 (DB).

——S. 100 — Findings of fact are conclusive in second appeal if nothing is urged to show that they are in any manner vitiated by any error of law or procedure. (1926) 95 Ind Cas 463 : 13 OLJ 146.

——S. 100 — Issues of facts cannot be agitated in second appeal. 70 Ind Cas 299 : AIR (Vol 10) 1923 Lah 11 (DB).

——S. 100 — A finding of fact which is not vitiated by any defect in procedure or by any wrong application of a principle of law cannot be interfered with in second appeal. 70 Ind Cas 74 : 9 OLJ 497 : AIR (Vol 10) 1923 Oudh 26.

——S. 100 — A finding on a question of fact not put in issue can be contested in second appeal. 85 Ind Cas 92 : 5 Lah LJ 49 : AIR (Vol 8) 1921 Lah 256 (DB).

——S. 100 — Findings of fact cannot be challenged in second appeal. 60 Ind Cas 705 : 3 LLJ 231 : AIR (Vol 8) 1921 Lah 211.

——S. 100 — Finding that suit is not collusive — High Court cannot go behind the finding. 139 PR 1894 held not good law. 59 Ind Cas 885 : 3 LLJ 86 : AIR (Vol 8) 1921 Lah 45.

——S. 100 — An erroneous finding of fact is different from an error in procedure. Where there is no error or defect in the procedure the finding of fact by the Court of First Appeal is final if that Court had before it evidence proper for its consideration in support of its finding. (1921) 63 Ind Cas 575 (Lah) (DB).

(u) Finding based on document.

See Note 17 (c).

(v) Fraud.

——S. 100 — The finding of the lower Appellate Court reversing the finding of the trial Court that the plaintiff had acted with due diligence in prosecuting another civil proceeding is 'prima facie' a finding of fact which is binding in second appeal. (1946) 1946 OA (CC) 10 (11) : AIR (Vol 33) 1946 Oudh 116.

——S. 100 — A finding that no fraud had been practised on the creditor is a finding of fact. AIR (Vol 32) 1945 Lah 309 : 47 PLR 339 : 222 Ind Cas 295 (FB).

——S. 100 — Question of fraud and collusion — Frist Appellate Court relying on circumstances forming evidence in case — Finding of first Appellate Court cannot be interfered with in second appeal.

Where, on the question of fraud and coliusion, the circumstances relied on by the first Appellate Court are also evidence in the case and the final Court of fact has relied on that evidence and come to its own conclusion based on the same, the second Appellate Court cannot interfere with that finding. It is not for the second Appellate Court to say whether the final Court of fact has attached any undue weight to the circumstances which are evidence in the case. AIR (Vol 29) 1942 Cal 394 : 46 CWN 355 : 207 Ind Cas 461 (DB).

——S. 100 — The question whether an alienation should be set aside under S. 53, T. P. Act as being in fraud of creditors is a pure issue of fact upon which the decision of first Appellate Court is conclusive in second appeal. AIR (Vol 29) 1942 Mad 522 : 55 MLW 274 : (1942) 1 MLJ 556 : 1942 MWN 412 : 202 Ind Cas 451.

——S. 100 — Bengal Tenancy Act, S. 153 — Fraud not established but only alleged — No second appeal lies unless fraud is established. 103 Ind Cas 705 : 54 Cal 1050 : AIR (Vol 14) 1927 Cal 845 (DB).

——S. 100 — The finding that a certain debt is a fictitious debt is a finding of fact and cannot be challenged in second appeal. (1927) 110 Ind Cas 432 (Lah).

——S. 100 — A finding that a transfer was intended to defraud, defeat or delay the creditors is one of fact. 60 Ind Cas 527 : AIR (Vol 7) 1920 Lah 24.

——S. 100 — Finding of fact — Jurisdiction of the High Court to interfere with.

The High Court is not entitled to go behind the findings of fact of the District Judge which did not result from the misconstruction of a document or the misapplication of law or procedure but upon the oral evidence in the case. A finding of the Lower Appellate Court that there was no fraud or collusion in a revenue sale between the purchaser and the defaulter is one of fact binding on the High Court in second appeal. 37 MLJ 199 : 17 ALJ 1004 : (1919) MWN 817 : 26 MLT 489 : 24 CWN 201 : 22 Bom LR 7 : 11 LW 371 : 52 Ind Cas 497 : AIR (Vol 6) 1919 PC 39.

[Reversing 19 CWN 270 : 20 CLJ 11 : 26 Ind Cas 182 : AIR (Vol 2) 1915 Cal 132].

——S. 100 — Finding of fact — No evidence — Reversal of finding on second appeal.

Where on second appeal the High Court set aside the decree of the lower Appellate Court in favour of the plaintiff on the ground that the evidence taken showed that the true question of fact which had not been considered and as to which no issue had been framed should be answered in favour of the defendant and that there was no evidence to support a finding of fraud arrived at by the lower Courts. Held, that the High Court had jurisdiction under S. 100, C. P. C., to set aside the decree and that the decision of the High Court on the evidence was correct. 47 Cal 107 : 46 IA 140 : 37 MLJ 36 : 24 CWN 81 : 21 Bom LR 920 : 15 NLR 97 : 10 LW 310 : (1919) MWN 505 : 17 ALJ 700 : 51 Ind Cas 177 : AIR (Vol 6) 1919 PC 29.

(w) Fraudulent Transfer.

——S. 100 — Finding that transaction is bogus and liable to be set aside under T. P. Act, S. 53, is not proper finding of fact — High Court Judge in second appeal can, in such case, record his own conclusion.

(Per Bose, J.).—A bogus transaction is one which is not intended to have legal effect. It is a pretence and has no actual legal existence. Consequently, there is nothing to set aside. Only real transactions intended to have effect can be set aside. Section 53, T. P. Act, speaks of fraudulent transfers and so indicates that it is dealing with real transactions and not sham ones.

Where, therefore, the Judge of the lower Appellate Court in one and the same breath holds that the transaction is bogus and at the same time says it can be avoided under Section 53, T. P. Act, either he is not clear in his mind as to what bogus means or he is mistaken in thinking that bogus transactions either can or are required to be set aside; or he did not realise that Section 53 does not apply to sham transfers. Under such circumstances, the High Court in second appeal is justified in declining to accept the finding as a proper finding of fact and that, in turn, empowers it to record its own conclusion. AIR (Vol 31) 1944 Nag 44: 1944 NLJ 1: ILR (1944) Nag 342: 213 Ind Cas 241 (FB).

——S. 100 — A question as to whether a certain transfer was entered into with a view to defeat creditors is a mixed question of fact and law and could legally be decided in a Court of Second Appeal but it is undesirable to do so in the absence of findings of fact whatever on the part of the lower appellate Court. In second appeal it is for High Court to decide whether a right conclusion has been drawn on the facts found. AIR (Vol 10) 1923 Nag 124: 69 Ind Cas 193.

(x) Good faith.

See Note 57 (e).

(y) Grove.

——S. 100 — Finding based upon wrong inference — Court not applying decisions of its own High Court.

Questions of the existence of an ancient custom are generally questions of mixed law and fact. What has to be seen in second appeal is not merely whether the decision arrived at by a Court is one of fact but whether in arriving at that decision the Court has committed an error in law or not. Where a Court relying upon certain instances of transfer of groves by groveholders draws a conclusion as to the existence of custom of allowing the transfer, which in law could not be drawn and fails to apply the decisions of its own High Court, the finding can be interfered with in second appeal. AIR (Vol 26) 1939 Oudh 210: 1939 OWN 372: 1939 RD 250: 14 Luck 515: 181 Ind Cas 70.

——S. 100 — The finding that a grove was planted by the defendant's father after the plaintiff had separated from him is a finding of fact. AIR (Vol 24) 1937 Oudh 370: 1937 OWN 544: 1937 RD 258: 168 Ind Cas 302 (DB).

——S. 100 — Transfer of Property Act, S. 63 — Redemption suit — Mortgagee claiming compensation for guava grove of 75 trees from 7 to 11 years old — Lower Court finding it impracticable to remove trees with roots and allowing neither compensation nor removal of trees — Question as to removal of trees, being one of fact, High Court did not interfere. AIR (Vol 16) 1929 All 330: 113 Ind Cas 405.

——S. 100 — Whether a particular property still retains the character of a grove is a finding of fact. AIR (Vol 11) 1924 Oudh 306: 79 Ind Cas 663: 27 OC 26: 11 OLJ 565.

(z) Guardianship.

——S. 100 — De facto guardian — Finding as to, is one of fact.

The question whether a person was the de facto guardian of the minors is one of fact and if no error of law or procedure vitiating the finding is pointed out, the finding is binding in second appeal. AIR (Vol 30) 1943 Cal 203: 47 CWN 288: 206 Ind Cas 599 (DB).

——S. 100 — Per Mackney, J.— The question whether the interest of a guardian is adverse to that of the minor is a question of fact and if it has not been considered by the lower Courts and there is sufficient material before the High Court on which to form an opinion on the matter, the High Court is entitled to decide the matter in second appeal. AIR (Vol 25) 1938 Rang 468: 180 Ind Cas 489.

——S. 100 — Negligence of guardian.

Although negligence of a guardian ad litem of a minor may or may not be a question of fact according to the circumstances of each case, where the Court has considered all the relevant facts and come to the conclusion that negligence was not proved, the finding is one of fact. AIR (Vol 20) 1933 Lah 337: 34 PLR 110: 142 Ind Cas 629.

(z-1) Inference.

——S. 100 — Finding of fact — Finding not supported by facts but based on conjectures and surmises — Finality. See (1949) ILR (1949) Cut 534.

——S. 100 — Finding based on probabilities and inference from documents.

A finding that no cash consideration passed in a transaction based on the probabilities and inferences from the documents produced in evidence is a finding of fact which is unassailable in second appeal. AIR (Vol 30) 1943 Bom 447: 45 Bom LR 837: 211 Ind Cas 421.

——S. 100 — Where the question whether a member of a joint Hindu family had in fact brought his self-acquired property into the joint property and made it part of the whole was answered affirmatively by both the lower Courts, the answer is essentially an inference of fact which, even if erroneous, will not be open to challenge in second appeal. (1942) 1942 NLJ 21.

——S. 100 — Gross finding.

In a second appeal under the provisions of S. 100, the findings of fact of the first Appellate Court are binding upon the High Court, however gross the appellant may assert those findings to be. AIR (Vol 27) 1940 Rang 8: 1940 Rang LR 172: 187 Ind Cas 212.

——S. 100 — Findings based on inference drawn from documents exhibited in evidence.

Under S 100, the High Court has no jurisdiction to reverse the findings of fact arrived at by the lower Appellate Court, however erroneous, unless they are vitiated by some error of law. This rule is equally applicable to cases in which the findings of the lower Appellate Court are based on inference drawn from the documents exhibited in evidence. AIR (Vol 21) 1934 PC 112: (1934) MWN 433: 66 MLJ 595: 39 MLW 613: 11 OWN 775: 38 CWN 533: 59 CLJ 262: 36 PLR 93: 36 Bom LR 539: 57 Mad 652: 16 PLT 7: 3 AWR 713: 61 IA 163: 148 Ind Cas 778.

——S. 100 — Finding of fact when the inference invited is not drawn can be revised. (1934) MWN 390.

——S. 100 — A finding of fact is conclusive in second appeal where it is not vitiated by any error of law or procedure. AIR (Vol 21) 1934 Oudh 449: 11 OWN 1165: 18 RD 490: 152 Ind Cas 180 (DB).

——S. 100 — A second appeal lies on a question of adverse possession where the contention raised on behalf of the appellant is that legal conclusion drawn by the lower Court from the facts is erroneous. AIR (Vol 19) 1932 Lah 72: 32 PLR 727: 134 Ind Cas 1037.

——S. 100 — Inference from proved facts is question of law. AIR (Vol 14) 1927 All 601: 8 LRA Rev 229: 106 Ind Cas 49.

——S. 100 — Where the conclusion of the lower appellate Court was arrived at, partly on a series or theories and assumptions, and partly due to his failure to realize the evidential value of certain document, the findings of fact are open to challenge in second appeal. AIR (Vol 14) 1927 Nag 392: 99 Ind Cas 1046.

——S. 100 — Finding of fact inconsistent with facts accepted as established — Erroneous view of law — High Court will interfere. AIR (Vol 9) 1922 All 188: 67 Ind Cas 67: 44 All 602: 20 ALJ 473 (DB)

——S. 100 — High Court — Second appeal — finding of fact.

The High Court in second appeal is bound by the findings of facts arrived at by the lower appellate Court: yet it is open to the High Court to consider the propriety of the inference drawn by the lower appellate Court from those facts. Their Lordships held in the particular case that the lower court was wrong in not inferring that possession was adverse. (1904) 6 Bom LR 312 (313) (DB).

——S. 100 (S. 584 old Code) — Second appeal — Inference of law from findings of fact — Res judicata — Gross negligence — Minor-guardian — Withdrawal from suit — Compromise of doubtful claims.

The High Court can, on second appeal, interfere with incorrect inferences of law as to the legal consequences regarded as following from facts found by the lower Courts. To withdraw from an uncertain defence which may or may not have been sustainable, is not in itself such gross ne-

gligence as in the eye of the law to be tantamount in its consequences to fraud on the part of the guardian ad litem. The mere withdrawal by a guardian 'ad litem' from a suit, even though there may be a good cause, is not in itself gross negligence which would prevent the bar of "res judicata' (1903) 5 Bom LR 174 (176) (DB).

(z-2) Intention.

See also Note 33.

——S. 100 — Intention of parties to be gathered from evidence — Whether question of law.

In second appeal the Court has no jurisdiction to question the findings of fact, however gross or inexcusable the error may seem to be.

Per Rupchand, A. J. C., (Haveliwala, A. J. C., contra.) — Intention of parties is the inference to be drawn from proved facts. That is a question of law.

Per Haveliwala, A. J. C.— Whether the intention of the parties to be gathered from evidence was to claim damages in case of breach of agreement to sell or any specific performance, is a question of fact. AIR (Vol 24) 1937 Sind 263 : 172 Ind Cas 322 (DB).

——S. 100 — Question or finding of fact — Finality — Evidence.

The question whether the parties intended the sale to include Shamilat is one of fact not of law. The finding of the lower Court on that point cannot be challenged in second appeal. 31 Pun LR 195 : 123 Ind Cas 81 : AIR (Vol 18) 1931 Lah 220 (DB).

——S. 100 — The question of intention or knowledge of intention is a question of fact and cannot be raised for the first time in second appeal. AIR (Vol 18) 1931 Pat 72 : 13 PLT 38 : 130 Ind Cas 165 (DB).

——S. 100 — The finding that the parties intended and effected a sale and not a mortgage by way of conditional sale is a finding of fact. 119 Ind Cas 767 : 11 LLJ 151 : AIR (Vol 16) 1929 Lah 530.

——S. 100 — Intention of the executant of power-of attorney not depending on interpretation of legal phraseology is a question of fact. 109 Ind Cas 380 : 30 PLR 168 : AIR (Vol 16) 1929 Lah 90.

——S. 100 — Intention is a matter of fact and not of law: 107 Ind Cas 33 : 50 All 208 : 25 ALJ 970 : AIR (Vol 15) 1928 All 61 (DB).

——S. 100 — Abandonment of a particular design of trademark depends on intention and is a question of fact. 9 Lah 487 : 29 PLR 615 : 113 Ind Cas 228 : AIR (Vol 15) 1928 Lah 924 (DB).

——S. 100 — The question as to whether a person made a transfer of his property a few days before application for adjudication with intent to defeat or delay his creditors is not one of law but merely of fact: (1928) 107 Ind Cas 490 (Lah) (DB).

——S. 100 — Question of intention to create joint tenancy is one of fact, and so long as the Judge makes no inferences which are not justified in law, the finding of intention is one which cannot be interfered with in second appeal. 90 Ind Cas 880 22 MLW 511 : AIR (Vol 13) 1926 Mad 33 : 49 MLJ 358.

——S. 100 — Whether there was intention to partition is a question of fact. 96 Ind Cas 357 : AIR (Vol 13) 1926 Oudh 614.

——S. 100 — The presumption is that the person paying on a mortgage intends to keep it alive if it is for his benefit to do so: But the presumption of law as to intention is not irrebuttable. The question of intention is a question of fact. The inference in all cases has to be drawn from the circumstances of the cases themselves and the question cannot be re-agitated in second appeal. 90 Ind Cas 767 : 1925 MWN 608 : AIR (Vol 12) 1925 Mad 1217 : 49 MLJ 361.

——S. 100 — Intention to transfer shamilat land is question of fact. 63 Ind Cas 746: 3 LLJ 569 : AIR (Vol 8) 1921 Lah 263 (DB).

——S. 100 — Intention — Finding of facts.

The question whether a particular person did a certain act with a particular intention or not is a question of fact and not a mixed question of law and fact. 45 Ind Cas 303 : AIR (Vol 5) 1918 Pat 593 (DB).

(z-3) Interference.

——S. 100 —Finding of fact — Finding that no wall raised — Finality.

A finding by the lower appellate Court that no wall had been raised is one of fact and cannot be assailed in second appeal. AIR (Vol 34) 1947 Lah 172: 226 Ind Cas 425.

——S. 100 — Second Appellate Court does not lightly interfere with finding of fact.

Where the trial Court held that a party was not an agriculturist within the meaning of the Dekkhan Agriculturists' Relief Act, 1879, but the lower Appellate Court, accepting the evidence of the party, found that the party was an agriculturist :

Held, that in second appeal the Court would not lightly interfere with the findings of fact recorded by the first Appellate Court. AIR (Vol 33) 1946 Sind 89: ILR (1945) Kar 475.

——S. 100 — Unsatisfactory finding of fact, if can be challenged.

A finding of fact, however unsatisfactory, cannot be successfully assailed in second appeal. AIR (Vol 30) 1943 Pat 180: 22 Pat 99: 9 BR 333: 206 Ind Cas 547 (DB).

——S. 100 — The findings of the lower Appellate Court of fact cannot be properly challenged in second appeal. AIR (Vol 28) 1941 Pat 90: 7 BR 425 21 PLT 854: 20 Pat 162: 192 Ind Cas 456 (DB).

——S. 100 — A finding of fact whether right or wrong cannot be interfered with in second appeal. (1940) 42 PLR 246.

——S. 100 — In second appeal, a finding of fact cannot be interfered with although a particular piece of evidence has not been relied upon in the lower Court. (1940) 42 PLR 142.

——S. 100 — A finding of fact cannot be challenged in second appeal although certain inconclusive documents are not referred to in the judgment. (1940) 42 PLR 94.

——S. 100 — Interference, when justified.

Interference in second appeal with a finding of fact is justified where the lower Appellate Court has not correctly regarded the pleadings, burden of proof or the relevancy of evidence used in arriving at the conclusion on fact. AIR (Vol 23) 1936 Nag 177: 165 Ind Cas 29.

——S. 100 — Credibility of witnesses.

Generally speaking, it is undesirable to interfere with the findings of fact of the trial Judge who sees and hears the witnesses and has an opportunity of noting their demeanour and especially in cases where the issue is a simple one and depends on the credit which attaches to one or other of conflicting witnesses. AIR (Vol 21) 1934 Cal 824: 38 CWN 977: 153 Ind Cas 1055.

——S. 100 — A finding of fact arrived at by the lower Appellate Court, cannot be interfered with in second appeal. AIR (Vol 21) 1934 Cal 703: 38 CWN 743: 59 CLJ 362: 61 Cal 879: 154 Ind Cas 147 (DB).

——S. 100 — Although on appeal, the whole case, including the facts, is within the jurisdiction of the Appellate Court, generally speaking, it is undesirable to interfere with the findings of fact of the trial Judge who sees and hears the witnesses,

and has the opportunity of noting their demeanour specially in cases where the issue is simple, and depends on the credit which attached to one or other set of conflicting witnesses. Where the issue is simple and straightforward and the only question is which set of witnesses is to be believed, the verdict of the Judge trying the case should not be lightly disregarded. AIR (Vol 20) 1933 Oudh 242: 10 OWN 412: 143 Ind Cas 568.

——S. 100 — Question or Finding of fact — Finality — Miscellaneous.

Finding of fact cannot be disturbed in second appeal. AIR (Vol 17) 1930 Lah 142: 120 Ind Cas 170 (DB).

——S. 100 — The High Court ought not to interfere in second appeal with a finding of fact so long as there is some evidence to support it, but where the lower Court has arrived at its findings without evidence and the trial is bad and the High Court will interfere. AIR (Vol 13) 1926 Pat 187: 7 PLT 547: 94 Ind Cas 929 (DB).

——S. 100 — Finding of fact based on evidence cannot be contested. AIR (Vol 12) 1925 Lah 377: 88 Ind Cas 1019: 7 Lah LJ 129: 26 PLR 167 (DB).

——S. 100 — Finding of fact cannot be attacked. AIR (Vol 12) 1925 Nag 271: 86 Ind Cas 847: 8 NLJ 29.

—S. 100—Quaint reasoning of lower Court — Finding can be reversed. AIR (Vol 12) 1925 Oudh 386: 86 Ind Cas 686: 12 OLJ 105.

——S. 100 — A simple finding of fact arrived at by the lower appellate Court could not be disturbed on second appeal. AIR (Vol 10) 1923 Lah 236: 73 Ind Cas 232: 7 PWR 1923 (DB).

——S. 100 — Finding of fact cannot be disputed in second appeal. AIR (Vol 9) 1922 Oudh 96: 67 Ind Cas 803: 9 OLJ 127.

——S. 100 — Where a second appeal was decided on questions of fact only,

Held, in L. P. Appeal that the judgment in the second appeal should be set aside. AIR (Vol 8) 1921 Lah 341: 4 LLJ 464 (DB).

——S. 100 — Finding of fact — Vague and indefinite — Vague finding questioned in second appeal.

Vague finding of fact may be subject to question in second appeal. AIR (Vol 4) 1917 Oudh 194 3 OLJ 468: 37 Ind Cas 27.

——S. 100 — Finding of fact — No jurisdiction to High Court to interfere — C. P. Code, (1882), S. 584 Old Code.

Under S. 584 of the C. P. Code of 1882 (S. 100 of the C. P. Code (1908), the High Court is bound by the findings of fact of the District Judge (on appeal) when he had considered the evidence "and saw no reason for differing from the conclusions at which the Sub-ordinate Judge (first Court) had arrived". The District Judge need not give independent reasons for the finding to be one of fact. AIR (Vol 3) 1916 PC 126: 43 Cal 1104: 43 IA 172: 20 MLT 235: 20 CWN 1245: (1916) 2 MWN 175: 4 LW 251: 14 ALJ 1009: 18 Bom LR 838: 24 CLJ 296: 31 MLJ 745: 37 Ind Cas 223.

——S. 100 — Finding of fact — Binding in — Second appeal.

The High Court is bound in second appeal by the findings of fact of the lower Appellate Court. AIR (Vol 1) 1914 All 232: 36 All 308: 12 ALJ 411: 25 Ind Cas 158 (DB).

——S. 100 — Finding of fact — Finality of.

A question of fact cannot be either raised or argued in second appeal. AIR (Vol 1) 1914 Lah 377: 50 PWR 1914: 145 PLR 1914: 25 Ind Cas 43.

——S. 100 — Finding of fact — When Binding.

A finding of fact is binding on a second Appellate Court, if the lower Appellate Court committed no error of law in arriving at the finding. (1913) 21 Ind Cas 251 (Oudh).

——S. 100 — Finding of fact — High Court bound by.

The High Court is bound in second appeal, by a finding of the lower appellate Court on a substantial question of fact. (1913) 17 CWN 1073: 20 Ind Cas 363 (DB).

——S. 100 — Finding of fact — Whether binding upon the High Court.

A judgment upon a pure question of fact is binding upon the High Court in Second appeal. (1909) 33 Bom 311: 11 Bom LR 26: 5 MLT 228: 1 Ind Cas 106 (DB).

(z-4) Knowledge.

——S. 100 — Knowledge of other trustees is finding of fact.

A finding that the other trustees were aware of the transactions and accepted them is a finding of fact. AIR (Vol 29) 1942 Mad 468: 55 MLW 258: (1942) 1 MLJ 535: 1942 MWN 345: 201 Ind Cas 607.

——S. 100 — Estoppel — Finding that plaintiff was aware of true facts and was not misled by representation is one of fact.

A finding that the plaintiffs have their own land near the disputed land and they were, therefore, aware as to the person in whose possession the disputed land was and hence were not misled by the representation made by the defendant as regards the person in possession of the disputed land, is a finding of fact and cannot be ignored in second appeal. AIR (Vol 29) 1942 Pat 317: 23 PLT 213: 8 BR 806: 201 Ind Cas 560 (DB).

——S. 100 — A finding that the plaintiff or his local agents came to know of the rent-free claim of the tenants in a particular year is one of fact. AIR (Vol 21) 1934 Pat 167: 148 Ind Cas 740.

(z-5) Legal effect.

——S. 100 — Finding of fact and law — Second appeal.

The question whether a particular section of an Act does or does not apply to the facts as found is a question of law. The finding as to what the transferee did or did not do to ascertain the power of the transferor to effect the transfer is one of fact, but whether from the finding it can be said that reasonable and sufficient enquiry was made by the transferee so as to attract the application of S. 41, T. P. Act, is a question of law. It is, therefore, open to the High Court to accept, in second appeal, the finding of the lower Appellate Court as to what the transferee did to enquire into the title of the transferor and then proceed to see whether that enquiry is sufficient to attract the application of S. 41, T. P. Act. AIR (Vol 34) 1947 Bom 49: 48 Bom LR 586.

——S. 100 — Interference in second appeal.

In two regular settlements, the plaintiffs were described as 'Jat Dadds'. This was continued for many years. But in some unexplained way and at some unknown time, the entries were changed and they were described as 'Sheikh Dadds'. The District Judge considered the effect of all these entries and the documents and held that it had been established that the persons were 'Jat Dadds':

Held, that this was a finding of fact and could not, therefore, be disturbed in second appeal. AIR (Vol 25) 1938 Lah 445: 40 PLR 655: 180 Ind Cas 969 (DB).

[AIR (Vol 24) 1937 Lah 410 Reversed.]

——S. 100 — Where the case comes before the High Court on second appeal, their Lordships are bound by the District Judge's findings of fact, but where the matters in contest are questions as to the proper legal effect of proved facts they are questions of law. AIR (Vol 23) 1936 PC 77: 1936 AWR 169:

70 MLJ 190: (1936) ALJ 145: 40 CWN 417: 43 MLW 289: 2 BR 299: (1936) RD 63: (1936) MWN 314: 38 Bom LR 353: 63 CLJ 160: 63 IA 140: 160 Ind Cas 837.

[Reversing AIR (Vol 17) 1930 Bom 70: 124 Ind Cas 97.]

——S. 100 — Legal effect of proved or admitted facts not properly appreciated by lower Appellate Court.

Where the lower Appellate Court has not properly appreciated the legal effect of certain proved or admitted facts, there is a question of law involved and a second appeal is competent. AIR (Vol 23) 1936 Lah 104: 163 Ind Cas 81 (DB).

——S. 100 — Inam lands.

The question whether the 'sanadi inam' lands were 'kadim inam' or 'jajid inam' is one, the determination of which depends on the legal effect of certain facts which have been proved by the evidence in the case. Consequently, it is a question of law into which the High Court is entitled to go in second appeal. AIR (Vol 22) 1935 Bom 47: 36 Bom LR 1055: 155 Ind Cas 763 (DB).

——S. 100 — The question whether a particular fact has been proved when evidence for or against has been properly admitted is necessarily a pure question of fact but the proper legal effect of a proved fact is essentially a question of law. A finding that the enjoyment of an easement was not as of right, peaceful and without interruption is not one of fact and can be challenged in second appeal. AIR (Vol 18) 1931 Lah 395: 33 PLR 139: 12 Lah 741: 135 Ind Cas 51 (DB).

——S. 100 — The decision on a question of fact based on a consideration of the facts proved and admitted cannot be said to be a decision regarding the legal effect of facts proved and admitted and cannot be interfered with in second appeal. AIR (Vol 18) 1931 Nag 67: 27 NLR 8: 131 Ind Cas 662.

——S. 100 — The proper legal effect of a proved fact is a question of law. AIR (Vol 18) 1931 Oudh 19: 7 OWN 1091: 6 Luck 403: 129 Ind Cas 835 (DB).

——S. 100 — Proper effect of proved fact is question of law — Appellate Court can draw inference from facts admittedly proved. AIR (Vol 16) 1929 All 861 (DB).

——S. 100 — Finding whether agreement is intended to settle immediate trouble or is binding for future is not one of fact as the legal effect of the agreement is involved. AIR (Vol 16) 1929 All 519: 116 Ind Cas 302: 1929 ALJ 1083: (DB).

——S. 100 — Inference as to.

The decision of adverse or exclusive possession based on an inference of facts is open to second appeal as a legal conclusion to be drawn or not. In fact the proper legal effect of a proved fact is essentially a question of law. AIR (Vol 16) 1929 Pat 590: 117 Ind Cas 644 (DB).

——S. 100 — The proper effect of a proved fact is a question of law. AIR (Vol 15) 1928 All 39: 50 All 180: 25 ALJ 1014: 108 Ind Cas 721 (DB).

——S. 100 — The proper effect of a proved fact is a question of law, and the question, whether a tenancy is permanent or precarious seems to be a legal inference from facts and not itself a question of fact and, therefore, a second appeal lies from it. AIR (Vol 15) 1928 Cal 315: 55 Cal 355: 32 CWN 184: 107 Ind Cas 81 (DB).

——S. 100 — The proper legal effect of proved facts is a question of law. AIR (Vol 15) 1928 Lah 774: 10 Lah 360: 30 PLR 541: 112 Ind Cas 736 (DB).

——S. 100 — The proper effect of a proved fact is a question of law, and, therefore, the question whether a tenancy is permanent or precarious, is a legal inference from facts and not itself a question of fact. AIR 1927 PC 102, Foll. AIR (Vol 15) 1928 Nag 153: 11 NLJ 21: 111 Ind Cas 488.

——S. 100 — Questions of law and facts sometimes are very difficult to disentangle but as the proper legal effect of proved facts is essentially a question of law, the High Court in Second Appeal is justified in interfering with them especially where the decision of the lower appellate Court reverses the judgment of the lower Court and does not show marks of having come into close quarters with it and met the reasoning therein. AIR (Vol 14) 1927 Nag 166: 10 NLJ 12: 103 Ind Cas 486.

——S. 100 — While the District Court's decision as to the effect of the evidence must stand final as to the facts the soundness of the conclusions from those facts may involve matters of law and may be questioned by a Court of second appeal. The proper legal effect of a proved fact is essentially a question of law. AIR (Vol 10) 1923 Lah 216: 73 Ind Cas 795.

——S. 100 — Questions of law and of fact are sometimes difficult to disentangle. The proper legal effect of a proved fact is essentially a question of law, so also is the question of admissibility of evidence and the question whether any evidence has been offered on one side or the other. AIR (Vol 9) 1922 Oudh 98: 65 Ind Cas 398: 8 OLJ 609.

——S. 100 — Question of law — Legal result of facts.

The question as to what is the legal result of certain facts is a question of law and can therefore be raised in second appeal. (1913) 11 ALJ 713: 20 Ind Cas 951.

(z-6) Legitimacy.

——S. 100—A finding on the question whether a person was the son of B, the son of C, arrived at by the lower Courts is one of fact and must be accepted as conclusive in second appeal. AIR (Vol 22) 1935 All 351: (1934) ALJ 597: 4 AWR 780: 150 Ind Cas 868.

——S. 100 — Finding that a person is not the legitimate son of another is one of fact.

A finding that a person is not legitimate son and heir of another is a finding of fact and cannot be challenged in second appeal. AIR (Vol 22) 1935 Oudh 80: 1935 OWN 25: 10 Luck 499: 153 Ind Cas 349 (DB).

——S. 100 — Where the plaintiff comes into Court with the allegation that A, the son of B, is dead and C who posed as the son of B was an entirely different person, it is for the plaintiff to establish these facts and he cannot succeed merely by showing that the witnesses who deposed to a contradictory negative proposition on behalf of the opposite party were not reliable and in such a case, the shortcoming in the evidence and pleadings of the defendants will not prove the contention of the plaintiff.

The decisions of the trial Judge upon a question of paternity based on similarity of features could not be received or acted on by a Court of appeal. AIR (Vol 20) 1933 Oudh 242: 10 OWN 412: 143 Ind Cas 568 (DB).

——S. 100 — Finding as to legitimacy is one of fact. AIR (Vol 14) 1927 All 410: 100 Ind Cas 650.

——S. 100 — Legitimacy — Finding of fact.

Question of legitimacy is a question of fact and cannot be gone into in second appeal. AIR (Vol 7) 1920 Lah 480: 2 Lah LJ 505 (DB).

——S. 100 — Failure to draw.

Though the finding on the question of legitimacy is one of fact, it would not be upheld in second appeal where the lower Appellate Court has ignored important pieces of evidence and the strong presumption of law in favour of legitimacy. AIR (Vol 7) 1920 Lah 476: 60 Ind Cas 375 (1) (DB).

(z-7) Liability.

——S. 100 — **Finding that lessee admitted liability to pay rent from a certain date is one of fact.**

The finding that the lessee admitted his liability to pay rent from a certain date is a finding of fact and cannot be challenged in second appeal. AIR (Vol 33) 1946 Oudh 144: 1946 OWN 100: 222 Ind Cas 630 (DB).

——S. 100 — **Finding that mortgage-money was satisfied out of usufruct.**

The finding that the mortgage-money was satisfied out of the usufruct of the property is a finding of fact. AIR (Vol 33) 1946 Oudh 88: 1945 OWN 416 (DB).

——S. 100 — **Finding as to share of party's liability.**

Finding as to the actual share of a party's liability is a pure question of fact and the High Court cannot interfere with the finding of fact of the lower Appellate Court if there was material before that Court upon which such findings could be based. AIR (Vol 27) 1940 Pat 324: 6 BR 743: 21 PLT 587: 19 Pat 739: 188 Ind Cas 772 (FB).

(z-8) Limitation.

——S. 100 — **Finding of fact — Point of limitation — Finding that cause of action arose at particular time and that suit is within time — Interference.**

A finding in a suit for ejectment on the ground of misuse of the land, that the land had been transformed from agricultural land into a 'bhika' at a particular time and that the suit having been brought within two years of that date, is within time, is one of fact which cannot be interfered with in second appeal. AIR (Vol 34) 1947 Cal 139: 225 Ind Cas 337.

——S. 100 — **Finding that plaintiff did not act with due diligence is one of fact — Limitation Act (1908), S. 14.**

The finding of the lower Appellate Court that the plaintiff did not act with due diligence in representing the plaint to the proper Court is 'prima facie' a finding of fact and is binding in second appeal. AIR (Vol 33) 1946 Oudh 116: 1946 OWN 24: 222 Ind Cas 355.

——S. 100 — Order refusing to excuse delay under S. 5, Lim. Act — No second appeal lies. AIR (Vol 29) 1942 Mad 604: 55 MLW 426: (1942) 2 MLJ 104: 1942 MWN 503: ILR (1942) Mad 868: 203 Ind Cas 5.

——S. 100 — **Question of law — Order refusing to extend time under S. 5, Limitation Act — Interference.**

Where the Court below, upon a consideration of the facts before it and surrounding circumstances, comes to the conclusion that no proper case has been made out for exercising its discretion for extending the period of limitation under S. 5 of the Limitation Act and dismissed the appeal on that ground, there is no point of law involved in the appeal so as to call for interference in second appeal. AIR (Vol 18) 1931 All 28: 1930 ALJ 1256 (DB).

——S. 100 — Whether the facts found attracted the operation of S. 14 of the Limitation Act is a mixed question of law and fact. AIR (Vol 14) 1927 Pat 256: 101 Ind Cas 674: 8 PLT 561 (DB).

——S. 100 — Limitation Act, S. 12 — Time between date when ready and when delivered cannot be excluded — The finding as to is one of fact. AIR (Vol 10) 1923 Lah 696: 73 Ind Cas 447.

——S. 100 — Finding as to the time required for obtaining the copies is one of fact and cannot be attacked in second appeal. AIR (Vol 9) 1922 Lah 423: 67 Ind Cas 478.

——S. 100 — The question whether time is or is not of the essence of a contract is one of fact and a finding thereon cannot be assailed on second appeal. (1922) 67 Ind Cas 157 (Lah) (DB).

(z-9) Lunacy.

——S. 100 — Whether a person is a lunatic is a question of fact. AIR (V 31) 1944 Nag 232 : 1942 NLJ 212 : ILR (1944) Nag 698 : 219 Ind Cas 113.

(z-10) Market value.

——S. 100 — **Whether building had added to value of holding is question of fact.**

The question whether the erection of the building by the tenant has added to the value of the holding is a question of fact. AIR (V 31) 1944 Mad 262 : (1944) 1 MLJ 117 : 1944 MWN 84 : 57 MLW 239.

——S. 100 — The finding as to the market value is a finding of fact. AIR (V 17) 1930 All 363 : 1930 ALJ 561 (DB).

——S. 100 — The question of market value is one of fact and cannot be challenged in second appeal. AIR (V 16) 1929 Lah 137 : 111 Ind Cas 814.

——S. 100 — Market value of a property is a question of fact unless an error of law in determining the market value is pointed out. AIR (V 16) 1929 Oudh 244 : 118 Ind Cas 85 : 6 OWN 264 : 4 Luck 643 (DB).

——S. 100 — Decision as to the market value of property is a question of fact and cannot be interfered with in second appeal. AIR (V 13) 1926 Oudh 68 : 90 Ind Cas 679.

(z-11) Meaning of words.

——S. 100 — **Finding of fact — Interference — Mistake as to meaning of document.**

A second appeal does not lie because some portion of the evidence is contained in a document and the first appellate Court has made a mistake as to its meaning. AIR (V 37) 1950 EP 90 : 51 PLR 401 (DB).

——S. 100 — **Finding as to meaning of the words — Whether one of fact.**

A finding as to the meaning of the words "bila intigal" in a compromise must be regarded as a finding of fact. It is very doubtful if the interpretation is open to question in second appeal. AIR (V 24) 1937 Oudh 295 : 1937 OWN 356 : 167 Ind Cas 295 (DB).

——S. 100 — **What witnesses meant by use of a particular word is a question of fact.**

It is a question of fact as to what was meant by the witnesses by the use of a particular word and it is not for a Court of second appeal to reverse the finding on the meaning of this word of the lower Appellate Court. AIR (V 22) 1935 All 586 : 1935 AWR 703 : (1935) ALJ 772 : 157 Ind Cas 526.

——S. 100— Finding of the lower Appellate Court on the meaning of the word "maujudgi" (continuance as wedded wife) as used in the agreement is final and cannot be disturbed in second appeal. AIR (V 22) 1935 Lah 902 : 160 Ind Cas 365.

——S. 100—Question whether language used in an entry in an account does or does not contain a promise to pay is purely a question of fact. AIR (V 22) 1935 Lah 877 : 37 PLR 126 : 159 Ind Cas 677 (DB).

——S. 100 — **Question or Finding of fact — Evidence — Existence of.**

In a case of disputed trade mark, the question whether or not a particular word has acquired a secondary meaning is a question of fact and the finding of the appellate Court which is supported by evidence cannot be interfered with in second appeal. AIR (Vol 17) 1930 Lah 999 (DB).

——S. 100 — Meaning of a particular word in a particular place is question of fact. AIR (V 12) 1925 Cal 1209 : 88 Ind Cas 377 (DB).

——S. 100 — Question of law — Word — Meaning of.

The meaning of a word is a question of fact not of law. (1918) 46 Ind Cas 794 (Nag).

——S. 100 — Finding of fact — Manufacture — Meaning of.

The High Court on second appeal will not go behind a finding of fact arrived at by two Courts. The question whether silk is manufactured or not within the meaning of Sch. II of the Railways Act is one of fact. AIR (V 3) 1916 Cal 554 : 42 Cal 888 : 19 CWN 1034 : 22 CLJ 212 : 28 Ind Cas 245 (DB).

——S. 100 — Finding of fact — Meaning of word in common use.

A decision of an Appellate Court upon the ordinary meaning of a word in common use is final in second appeal. AIR (V 3) 1916 Cal 77 : 20 CWN 584 : 32 Ind Cas 240 (DB).

(z-12) Mistake of Law.

——S. 100 — Finding of fact — Finding based on erroneous principle of law — Interference.

A finding of fact based on an erroneous principle of law and arrived at in disregard of material evidence is not a finding immune from interference in second appeal. (1948) 52 CWN 72: ILR (1948) 1 Cal 455 (DB).

——S. 100 — If a decision on facts is reached at by disregarding the provisions of law such as for instance by saying that certain papers on the record are something which they obviously are not, there is an obvious mistake of law just as there is a mistake of law if a decision on facts has been arrived at on evidence which was inadmissible. This being so, a second appeal is competent. AIR (Vol 30) 1943 All 82: (1942) ALJ 671: 1942 AWR 386: 205 Ind Cas 76 (DB).

——S. 100 — Finding of fact based on untenable view of law is not binding in second appeal.

The finding of fact based on a view of law which is manifestly untenable is not binding in second appeal. AIR (Vol 28) 1941 Cal 88: 72 CLJ 123: 194 Ind Cas 172.

——S. 100 — The finding based on a wrong legal view of what constitutes a natural channel is not binding in second appeal. AIR (Vol 28) 1941 Pat 118: 21 PLT 873: 7 BR 153: 191 Ind Cas 275 (DB).

——S. 100 — Finding of fact arrived at in complete disregard of legal questions involved — Whether can be interfered with.

Where the finding of the lower Appellate Court is so worded as to amount to a finding of fact but it has been arrived at in complete disregard of the legal propositions involved in the consideration of the question, the finding is vitiated by errors of law and can be interfered with in second appeal. AIR (Vol 22) 1935 All 774: (1935) ALJ 828: 1935 RD 267: 1935 AWR 728: 155 Ind Cas 824.

——S. 100 — Finding supported by evidence.

If there is any evidence from which misconduct can be inferred, the decision of the lower Appellate Court is final. If on the other hand, there is no such evidence, the appeal must succeed, as a finding based upon no evidence is wrong in law. AIR (Vol 24) 1937 Pat 289: (1937) PWN 71: 3 BR 554: 169 Ind Cas 354.

——S. 100 — Question or finding of fact — Mistake or error — Legal.

High Court can interfere with a finding of fact when it proceeds on an erroneous presumption of law. AIR (Vol 16) 1929 Lah 772.

——S. 100 — Finding of fact not vitiated by error of law or procedure is conclusive. AIR (Vol 16) 1929 Oudh 524: 6 OWN 921 (DB).

——S. 100 — Finding of fact cannot be interfered with unless vitiated by error of law. AIR (Vol 16) 1929 Pat 28: 7 Pat 832: 10 PLT 36: 119 Ind Cas 894 (DB).

——S. 100 — Consideration of evidence — Interference.

Where the lower Courts arrive at a finding when there is no evidence on the point, there is an obvious error of law which vitiates the judgment. The High Court can admit an appeal and is not confined to a consideration of the particular error which vitiates the judgment but the whole case is open for consideration. AIR (Vol 16) 1929 Rang 257: 7 Rang 751.

——S. 100 — Result arrived at by the lower Appellate Court on a wrong interpretation of law cannot be accepted as a finding of fact. (1929) 117 Ind Cas 368 (Oudh).

——S. 100 — A finding based upon an erroneous view of law is not binding in second appeal. AIR (Vol 15) 1928 Lah 122: 9 Lah 324: 106 Ind Cas 877: 29 PLR 697 (DB).

——S. 100 — Question or finding of fact — Mistake or error — Grounds for interference.

If it can be shown that the finding of the Court below is so based on an erroneous proposition of law that if the proposition be corrected the finding disappears, then in that case it is no finding at all. (1928) 112 Ind Cas 166 : 13 RD 90.

——S. 100 — Lower Court making vital mistake on simple question of law in arriving at finding — Finding can be disturbed. AIR (Vol 12) 1925 Mad 973: 22 MLW 352: 85 Ind Cas 958.

——S. 100 — Whether the evidence in a case has not been viewed as required by law, a point of law is raised and the question can be gone into in second appeal. AIR (Vol 12) 1925 Oudh 384: 86 Ind Cas 101: 12 OLJ 130: 2 OWN 10.

——S. 100 — A finding of fact can be challenged in second appeal where the lower appellate Court has held that there is no evidence at all concerning a point while in fact there is such evidence AIR (Vol 8) 1921 Cal 71: 25 CWN 881: 62 Ind Cas 647 (DB).

——S. 100 — Second Appeal — Findings of fact — Interference.

When the summary of conclusion from findings of fact could not be arrived at without a misdirection in law, the High Court can review it. AIR (Vol 3) 1916 All 310: 36 Ind Cas 996 (DB).

——S. 100 — Findings of fact — When High Court can interfere.

The High Court will not interfere with findings of fact of a lower Appellate Court, unless they have been arrived at on an erroneous view of the law. AIR (Vol 1) 1914 Cal 503: 23 Ind Cas 796 (DB).

(z-13) Mistake or Error.

——S. 100 — Question raised and evidence given — Mere omission to frame specific issue — Decision cannot be assailed in second appeal.

When evidence was given on certain point and the question was raised in both the Courts below, the decision cannot be assailed merely because there was an omission to frame a specific issue on the point. AIR (Vol 29) 1942 Pat 366: 8 BR 475: 198 Ind Cas 899 (DB).

——S. 100 — The conclusions of a Court of fact however erroneous, are binding on the High Court in second appeal. (1941) 22 PLT 196.

——S 100 — Finding of fact based on misapprehension as regards real point at issue cannot be upheld in second appeal. AIR (Vol 26) 1939 Lah 301: 42 PLR 273.

——S. 100 — There is no jurisdiction to entertain a second appeal on the ground of erroneous findings of fact, however gross the error may seem to be. AIR (Vol 25) 1938 Oudh 186: 1938 OWN 706: 14 Luck 138: 177 Ind Cas 48 (DB).

——S. 100 — A finding of fact based on an elaborate consideration of the evidence, oral and documentary, produced by both the parties, must be accepted as conclusive in second appeal and even if the view taken by the lower Appellate Court on the question of admissibility of this piece of evidence is technically erroneous, it is not vitiated. AIR (Vol 24) 1937 All 262: (1937) ALJ 122: 1937 RD 63: 1937 AWR 24: 167 Ind Cas 915.

——S. 100 — No second appeal lies on fact even though there is gross and inexcusable error.

There is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be.

(Attempts to argue in second appeal questions of fact deprecated). (1936) 163 Ind Cas 93: (1936) MWN 348: 43 MLW 369 (DB).

——S. 100 — A finding of fact which, even if mistaken, could be drawn from the circumstances, should not be interfered with in appeal. AIR (Vol 23) 1936 Nag 254: 165 Ind Cas 957.

——S. 100 — Gross finding.

A finding of fact in second appeal is binding upon the High Court, however gross or inexcusable that finding may be. AIR (Vol 23) 1936 Pat 140: 2 BR 342: 161 Ind Cas 516 (DB).

——S. 100 — There is no jurisdiction to entertain a second appeal on the ground of erroneous finding of fact, however gross or inexcusable the error may be. AIR (Vol 22) 1935 Lah 172.

——S. 100 — A second appeal should not be entertained on the ground of an erroneous finding of fact, however gross or inexcusable the error may appear to be. AIR (Vol 20) 1933 Oudh 102: 9 OWN 1063: 142 Ind Cas 303 (DB).

——S. 100 — There is no jurisdiction to entertain a second appeal on the ground of even an erroneous finding of fact, however gross or inexcusable the error may seem to be. (1932) 9 OWN 1015 (DB).

——S. 100 — The decision of the first Appellate Court may or may not be correct on the merits, but the High Court has no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact however gross or inexcusable the error may seem to be. Nor can the High Court in second appeal consider the question of the quantum of evidence required to prove a fact. AIR (Vol 18) 1931 Lah 144: 31 Pun LR 381 (DB).

——S. 100 — Question or finding of fact -- Mistake or error — Procedure.

Under the Code of Civil Procedure no second appeal will lie except on the grounds specified in S. 100. An erroneous finding of fact is a different thing from an error or defect in procedure and there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact however gross or inexcusable the error may seem to be. AIR (Vol 16) 1929 PC 152: 57 MLJ 64: 117 Ind Cas 481: 1929 ALJ 702: 33 CWN 725: 31 Bom LR 866: 30 MLW 9: 1929 MWN 442: 6 OWN 503: 56 IA 223: 52 Mad 538: 50 CLJ 30.

——S. 100 — Finding of fact — High Court cannot interfere however erroneous the finding may be. AIR (Vol 14) 1927 Mad 217: 98 Ind Cas 869.

——S. 100 — Second appeal cannot be entertained even on erroneous findings of fact. AIR (Vol 14) 1927 Oudh 89: 99 Ind Cas 199.

——S. 100 — Question of fact — Even erroneous decision on facts will not be interfered with. AIR (Vol 14) 1927 Oudh 66: 3 OWN (Sup) 282: 99 Ind Cas 255.

——S. 100 — Finding of fact even grossly erroneous cannot be interfered with. (1926) 98 Ind Cas 1072: 3 OWN 299 (DB).

——S. 100 — Finding of fact though erroneous is not appealable. (1926) 98 Ind Cas 1035 (Oudh).

——S. 100 — Even a finding of fact which is altogether erroneous will not be disturbed in second appeal. AIR (Vol 12) 1925 Mad 823: 88 Ind Cas 646: 22 MLW 73: 1925 MWN 117: 48 MLJ 467.

——S. 100 — Finding of fact based on mistake of fact is not binding. AIR (Vol 11) 1924 All 270: 71 Ind Cas 1017: 4 LRA Rev. 133 (DB).

——S. 100 — Question or Finding of fact — Mistake or error — Omission of evidence.

Even grossly wrong finding can't be upset — — Even main evidence need not be mentioned by first Appellate Court. AIR 1923 Nag 107; 9 Cal 309; 7 All 649 Diss. AIR (Vol 11) 1924 Nag 91: 92 Ind Cas 327: 20 NLR 17.

——S. 100 — Misreading of judgment.

A finding can be contested in second appeal, if it is based on a misreading of the first Court's judgment. AIR (Vol 10) 1923 Lah 502: 77 Ind Cas 475 (DB).

——S. 100 — Grossly erroneous finding of fact — — Evidence considered by Lower Court — Finding cannot be upset. (1921) 3 LLJ 409: 67 Ind Cas 436 (DB).

——S. 100 — Pre-emption suit -- First Appellate court deciding question of sale price on evidence on record — Second appeal does not lie. There is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be. (1921) 64 Ind Cas 297: 3 LLJ 103 (DB).

——S. 100 — Inadmissible evidence — Finding of fact — Evidence not existing in record.

Where a finding of a Lower Appellate Court is based mainly upon evidence which is explicitly referred to and avowedly reproduced in the judgment, but it is not to be found any where in the record, the mistake vitiates the decision and renders it contrary to law within S. 100 of the C. P. C. of 1908. (1913) 17 CWN 37: 15 Ind Cas 515 (DB).

(z-14) Nature of property.

See also Note 10.

——S. 100 — Question of fact — Question whether sale in favour of plaintiff was real or nominal — Concurrent findings in lower Courts — Interference.

The question whether the sale by the original owner in favour of the plaintiff's father was real and operative or nominal and fraudulent is in root analysis a question of fact and a concurrent finding of the Courts below will not be interfered with in second appeal unless the conclusion is so far vitiated by material error as to merit reversal or reconsideration. AIR (Vol 36) 1949 Mad 689: (1949) 1 MLJ 434: 62 LW 256.

——S. 100 — "Agricultural" land.

The question whether land is or is not "agricultural" is largely a question of fact. AIR (Vol 32) 1945 Mad 148: (1945) 1 MLJ 2: 58 MLW 87 (1): 1945 MWN 41 (1) (DB).

——S. 100 — The finding that the seven houses in dispute are, as a matter of fact, separate properties is one of fact. AIR (Vol 31) 1944 Pesh 16: 1944 Pesh LJ 16: 212 Ind Cas 560.

——S. 100 — Mortgage, whether for purposes binding on mortgagor's son is question of fact.

A finding on the question whether the mortgage was executed for debts incurred for purposes binding on the mortgagor's son being a finding of fact cannot be interfered with in second appeal. AIR (Vol 30) 1943 Mad 57: (1942) 2 MLJ 624: 55 MLW 727: 1942 MWN 691: 207 Ind Cas 276.

——S 100 — Suit properties, whether identical with certain other properties is question of fact. AIR (Vol 28) 1941 Lah 195: 43 PLR 75: 195 Ind Cas 291.

——S. 100 — **Finding that house formed part of joint family property is one of fact.**

A finding that the house was no part of the assets of the firm but formed part of the joint family property is a clear finding of fact and cannot be disturbed in second appeal. AIR (Vol 27) 1940 Lah 205: 190 Ind Cas 648.

——S. 100 — **Question whether property is payin or lettetpwa, whether one of fact.**

The question whether the character of the building in suit has undergone a change from that of 'payin' to that of lettetpwa', because of some alterations and extensions made thereto, is not purely one of fact and the High Court is not debarred from considering it in second appeal. AIR (Vol 22) 1935 Rang 129: 158 Ind Cas 1092.

——S. 100 — **Finding that property was purchased out of fund of a person.**

A finding that funds with which the properties in dispute were purchased belonged to a person is one of fact and cannot be questioned in second appeal. AIR (Vol 21) 1934 All 866: 150 Ind Cas 1041.

——S. 100 — **Mortgage-deed.**

The question what portion of a property was mortgaged is substantially a question of fact. AIR (Vol 21) 1934 All 152: (1934) ALJ 371: 4 AWR 1535: 56 All 496: 151 Ind Cas 900 (DB).

——S. 100 — Whether a home is appurtenant to a holding or not is a question of fact. AIR (Vol 19) 1932 All 252: (1932) ALJ 142: 16 RD 222: 54 All 379: 141 Ind Cas 800 (DB).

——S. 100 — The question whether land has been proved to be communal is one of mixed fact and law. 1930 MWN 515.

——S. 100 — **Mixed question of law and fact — Stridhan — Hindu Family.**

The question whether certain property is sulka stridhan or not is not a question of law, pure & simple. Unless evidence is led to show the circumstances under which the gift was made and that it was intended to be the price of the bride or given to the girl for services mentioned in the texts, the property cannot answer the description of sulka. AIR (Vol 16) 1929 All 25: 111 Ind Cas 165: 26 ALJ 1203 (DB).

——S. 100 — Land whether parjaut — Finding is one of fact. AIR (Vol 13) 1926 All 83: 87 Ind Cas 368 (DB).

——S. 100 — The question whether a certain property is a private or public property, held in trust for religious or charitable purposes, is a mixed question of law and fact. If the Court of first appeal has drawn wrong inferences from the facts established in the case, or has applied the law wrongly, the High Court would be competent to interfere with such finding in second appeal. AIR (Vol 13) 1926 Oudh 578: 97 Ind Cas 853: 1 Luck 489: 13 OLJ 696: 3 OWN 645.

——S. 100 — Whether properties are sufficiently specified, is a question of fact. AIR (Vol 12) 1925 Cal 1195: 89 Ind Cas 207: 29 CWN 861 (DB).

——S. 100 — Finding as to character of a property is one of fact. AIR (Vol 10) 1923 Lah 532: 79 Ind Cas 543.

——S. 100 — A finding that a certain Dharmsala is private property is a finding of fact. AIR (Vol 8) 1921 Lah 343: 3 LLJ 514 (DB).

——S. 100 — **Finding of fact — Consideration of evidence.**

Where the lower Appellate Court has after full consideration of all the evidence including the terms of the sale-deed, found that defendant did not acquire a right to a proportionate share in the 'shamilat', such finding is one of fact. AIR (Vol 6) 1919 Lah 93: 35 PR 1919: 78 PLR 1919: 51 Ind Cas 378 (DB).

——S. 100 — **Finding of fact — Grant by Government of grazing land — Question of fact — Second appeal.**

Where the question was whether the grant of a certain grazing land was inconsistent with the wishes of the village community and the first Appellate Court 'held' that no second appeal lay as the point decided was one of fact. AIR (Vol 1) 1914 All 370: 36 All 256: 12 ALJ 378: 24 Ind Cas 111 (DB).

——S. 100 — **Dedication — Proof of.**

Whether a certain land is really 'debutter' or only nominally so, and whether the 'shebaits' put an end to its 'debutter' character by consent are questions of fact and therefore the High Court will not interfere in second appeal with them. (1914) 20 CLJ 315: 9 Ind Cas 650.

——S. 100 — **Impartible estate — Question of law — Affidavit on question of law — Weight of.**

Whether a property is a 'Taluqdari property' is a question of law and the non-filing of a counter affidavit in reply to an affidavit stating it to be 'Taluqdari property' is of no weight. AIR (Vol 1) 1914 Oudh 206: 25 Ind Cas 9 (DB).

(z-15) Nature of Transaction.

See also Note 17.

——S. 100 — **Finding of fact — Interference — Finding that transaction by guardian is an act of good management.**

A finding as to whether a particular transaction by a guardian is or is not an act of good management is a finding of fact which cannot be contested in second appeal. AIR (Vol 38) 1951 Simla 297.

——Ss. 100, 115 — The question whether a transaction was fictitious or not is a question of fact. AIR (Vol 32) 1945 Pesh 28: 220 Ind Cas 258.

——S. 100 — **Transaction whether mortgage by conditional sale or out and out sale.**

No doubt a finding on a question whether the transaction evidenced by a document is a mortgage by conditional sale or an out and out sale would be a finding of fact because that question depends on the intention of the parties as evidenced by the document and the surrounding circumstances but when in deciding that question, the lower Court has failed to consider all the essential terms of the document as a whole and has failed to consider the document in the light of the definition of mortgage by conditional sale in S. 58, T. P. Act, its finding is not binding in second appeal. AIR (Vol 31) 1944 Lah 175: 46 PLR 101: 214 Ind Cas 105.

——S. 100 — **Finding that transaction was sham.**

A finding that the transaction was sham and entered into with the object of defeating the creditors, is a finding of fact and would be binding in second appeal if the lower Court has taken into consideration all the material evidence. But where the lower Court has dealt with the question of the validity of the mortgage in a very perfunctory manner and has ignored evidence which clearly shows the genuineness of the mortgage, the finding that the mortgage was a sham transaction cannot be allowed to stand in second appeal. AIR (Vol 31) 1944 Mad 121: (1944) 1 MLJ 28: 57 MLW 7: 1944 MWN 33: 212 Ind Cas 379 (FB).

——S. 100 — **Whether mortgage subsists and mortgagee is holding property under mortgage or sale set up by him is question of fact.**

Whether the mortgage which is sought to be redeemed subsists and whether the mortgagees are holding the property under the mortgage or under sale deeds set up by them is a pure question of fact. AIR (Vol 29) 1942 All 425: (1942) ALJ 449: 1942 AWR 297: 204 Ind Cas 540 (DB).

——S. 100 — The findings of the lower Court with regard to the nature of the transaction are conclusive in second appeal. AIR (Vol 29) 1942 Mad 483: ILR (1942) Mad 862: (1942) 1 MLJ 588: 1942 MWN 430: 55 MLW 301: 202 Ind Cas 490 (DB).

——S. 100 — Finding that deed has not been executed as guardian of minor, is one of fact.

The finding arrived at by the Court below to the effect that a certain document had not been executed by the executant as guardian, is a finding of fact and is not open to challenge in second appeal. AIR (Vol 28) 1941 Oudh 226: 1941 OWN 204: 1941 AWR (CC) 54: 192 Ind Cas 712 (DB).

——S. 100 — The finding that a book of account was kept in the ordinary course of business is a finding of fact. AIR (Vol 26) 1939 Pat 264: 5 BR 296: 179 Ind Cas 828.

——S. 100 — Lease — Question whether it is of whole or part of land, whether one of fact.

A question whether a certain lease granted was of the whole piece of land or of a part of it is one of pure fact, and cannot be agitated again in second appeal. AIR (Vol 24) 1937 Nag 139: ILR (1937) Nag 214: 170 Ind Cas 790.

——S. 100 — Collusive transaction.

That transaction is collusive and intended to defeat and delay the creditors is a finding of fact. (1936) 38 PLR 577.

——S. 100 — Finding as to immoral nature of debt.

A finding that the debt borrowed by a Hindu father was tainted with immoraiity must be accepted in second appeal. AIR (Vol 22) 1935 All 278 : 4 AWR 1483 : 153 Ind Cas 502 (DB).

——S. 100 — If there was some legal evidence on which the lower Courts could properly have acted, the High Court cannot interfere with a finding of fact however much it might regret the finding. But if the case is not one of insufficient or meagre evidence, but of no evidence at all, the High Court can interfere, a decision that there is no evidence to support a finding being a decision of law.

No Court should be too ready to lightly pronounce against a transaction impeached long after its date; the tendency to set aside or invalidate ancient transactions on inadequate or meagre grounds must be strongly deprecated. AIR (Vol 22) 1935 Mad 26: (1934) MWN 1082: 40 MLW 749: 154 Ind Cas 572.

——S. 100 — Nature of gift.

A finding as to the nature of a gift cannot be assailed in appeal. AIR (Vol 22) 1935 Oudh 30: 11 O WN 1359 : 10 Luck 250 : 152 Ind Cas 419 (DB).

——S. 100 — Loan or deposit.

It is no doubt true that the legal effect of proved facts is a question of law, but a decision on a question of fact based on consideration of the facts proved and admitted cannot be said to be a decision regarding the legal effect of facts proved and admitted. The finding that the money was received as a loan is a finding of fact and cannot be challenged in second appeal. AIR (Vol 21) 1934 Nag 219 : 17 NLJ 68 : 152 Ind Cas 319(2).

——S. 100 — Where the lower Court has not taken any evidence but has arrived at a finding on the question whether a certain document was in reality a deed of sale or mortgage, merely on the construction of the document and the surrounding circumstances, it is a legal inference, the correctness of which can be considered in second appeal. AIR (Vol 18) 1931 Bom 371: 33 Bom LR 633: 134 Ind Cas 337.

——S. 100 — A finding that a transfer was a genuine one and was not made with intent to defeat or delay other creditors is a finding of fact and not a matter of legal inference from proved facts. AIR (Vol 18) 1931 Nag 67 : 27 NLR 8 : 131 Ind Cas 662.

——S. 100 — Where once a mortgage is admitted whether there is a subsequent sale or not is a question of fact. and that being so, the decision of the lower Appellate Court is final. AIR (Vol 17) 1930 PC 91 : 59 MLJ 53 : 122 Ind Cas 316 : 1930 ALJ 292 : 32 Bom LR 380 : 31 PLR 145 : 31 MLW 321 : 11 Lah 199: 57 IA 86.

——S. 100 — Question of law.

Whether a transfer of occupancy right is a sale within the meaning of the term as used in the Punjab Pre-emption Act is a question of law. AIR (Vol 17) 1930 Lah 141 : 120 Ind Cas 683 : 31 PLR 338.

——S. 100 — Partnership — Question whether certain property is thrown into partnership assets is of fact. AIR (Vol 15) 1928 PC 135 : 107 Ind Cas 453 : 47 CLJ 292 : 30 Bom LR 762.

——S. 100 — Particular transaction is mortgage or sale is a question of fact. (1926) 92 Ind Cas 42 : 26 PLR 799.

——S. 100 — Question as to whether a transaction amounts to mortgage by conditional sale or to an absolute sale is not a pure question of fact. AIR (Vol 12) 1925 Mad 37 : 47 MLJ 385 : 84 Ind Cas 505 : 20 MLW 338 : 35 MLT 87 : 1924 MWN 643.

——S. 100 — Question or finding of fact — Fraudulent transfer.

Whether a transaction e.g. heba is executed, is breach of S. 53 of the T. P. Act, with intent to defeat or delay creditors is a question of a fact and cannot be interfered with in second appeal. (1921) 63 Ind Cas 169 (Cal) (DB).

(z-16) Omission.

——S. 100 — Ordinarily a finding of fact arrived at by the first Appellate Court is binding on the High Court but where the first Appellate Court has not applied its mind to the evidence in the case in a judicial manner and has omitted to take into consideration some important evidence and has thereby come to a very wrong conclusion in the case, the High Court not only can but should interfere in the interests of justice. Where, therefore, when there is a dispute as to the consideration for a sale deed and the lower Court has not considered the endorsement of the Registering Officer on the sale deed, the High Court should go through the evidence and interfere with its findings. AIR (Vol 22) 1935 Oudh 86: 1935 OWN 11: 153 Ind Cas 373.

——S. 100 — Omission to consider important evidence — Application of erroneous presumption of law.

Ordinarily, the High Court does not interfere with findings of fact in second appeal, but if the lower Court has omitted to consider evidence which is important and in considering the evidence which it has examined, it has applied erroneous presumption of law, then the finding may be called in question in second appeal and the lower Court may be asked to furnish a finding. AIR (Vol 20) 1933 Mad 163: 145 Ind Cas 407.

——S. 100 — Question regarding a person being a Karnavan — Previous judgment mentioning him as such — Failure of trial Court to take that judgment into consideration — Decision is vitiated and can be interfered with in second appeal. AIR (Vol 15) 1928 Mad 826: 54 MLJ 600: 27 MLW 827: 110 Ind Cas 593.

——S. 100 — Where the first appeliate Court has omitted to notice material circumstances and the evidence in the case and has misdirected itself.

Held, that the High Court in second appeal can direct the case to be re-heard. AIR (Vol 14) 1927 Mad 493: 100 Ind Cas 306.

——S. 100 — Findings of fact arrived at by the Court of first appeal should not be interfered with by the Court of second appeal merely on the ground that, on the evidence adduced in the case, it would have taken a different view from that taken by the Court of first appeal. They can, however, be held to be not binding as valid find-

ings of fact if the Court of first appeal has omitted to take into consideration the most important evidence in the case or has taken an erroneous view of law in deciding the case, or has looked at the case from an erroneous point of view or where it has not arrived at that finding of fact after a fair, honest and full consideration of the evidence on the record. AIR (Vol 13) 1926 Oudh 578: 1 Luck 489: 3 OWN 645: 13 OLJ 696: 97 Ind Cas 853.

——S. 100 — The weight to be given to one particular piece of evidence is a question for the Court which deals with the facts, and the omission to refer to a particular piece of evidence in the judgment is not a sufficient ground for setting aside a finding. AIR (Vol 12) 1925 Oudh 691: 88 Ind Cas 490.

——S. 100 — Where the first appellate Court omitted to note a very important document on record, its finding cannot be considered final. AIR (Vol 10) 1923 All 401: 71 Ind Cas 992.

——S. 100 — Where the judgment of the Court below is not satisfactory and the Court has not come to a finding on a consideration of the whole evidence on the point, the case should be remanded for a re-hearing. (1922) 65 Ind Cas 504 (Cal) (DB).

——S. 100 — Consideration of evidence — Remand.

Where an Appellate Court fails to come into close quarters with the evidence, the findings must be held to be vitiated and there must be a re-hearing of the appeal. AIR (Vol 7) 1920 Mad 688: (1920) MWN 163: 10 LW 525: 53 Ind Cas 308 (DB).

——S. 100 — Consideration of evidence — Comment on evidence — Omission of.

The mere fact that a Court has not made any observation on a particular piece of evidence is not enough to show that the Court wholly ignored it and cannot form a ground of second appeal. AIR (Vol 5) 1918 All 244: 43 Ind Cas 525.

——S. 100 — Consideration of evidence — Omission of important evidence.

If the lower Appellate Court, in arriving at a finding of fact has ignored important evidence on the record bearing on the question, the High Court can set aside the findings. AIR (Vol 4) 1917 Lah 196: 17 PWR 1917: 38 Ind Cas 586 (DB).

——S. 100 and O. 41, R. 31 — Finding of fact — Omission to record reasons for findings — Power of High Court.

Even if the judgment of the Appellate Court was meagre and not in conformity with the rule, unless a substantial error affecting the merits of the case is shown, High Court will not interfere. AIR (Vol 5) 1918 Mad 811: 20 MLT 520: 31 MLJ 870: (1917) MWN 143: 38 Ind Cas 26 (DB).

——S. 100 — Finding of fact — No evidence.

Although a finding of fact in first appeal is of course sufficient to preclude the second Appellate Court from coming to a contrary finding yet, when there is no finding upon the evidence legally sufficient to support it, the finding cannot operate as a finding of fact. (1912) 16 Ind Cas 887 (Oudh).

——S. 100 — Finding of fact — Omission to consider evidence — Misconstruction of a document.

There is a conflict of opinion as to whether a second appeal will lie where the lower Court omits to consider evidence or misreads or misconstrues evidence. But the omission of the Court to make mention of a particular document is not a substantial error or defect within the meaning of S. 100. (1912) 13 Ind Cas 495 (Cal) (DB).

——S. 100 — Finding of fact — Suspicion — Not a valid ground.

Where a District Judge considers the evidence in support of a will with strong pre-possession against authenticity based on suspicious circumstances connected with its appearance and the tenor of its contents and rejects that evidence mainly on pre-conceived ideas regarding the general credibility of witnesses of a certain class, the method of the District Judge in the case is clearly wrong. 11 MLT 38: (1911) 2 MWN 495: 12 Ind Cas 751 (DB).

——S. 100 — Consideration of evidence.

The Lower Appellate Court's finding cannot be accepted if it is arrived at without considering the evidence and if no reasons are given for differing from the finding of the first Court. (1910) 5 Ind Cas 160 (Cal) (DB).

——S. 100 — Finding of fact — Evidence not considered.

Ordinarily a High Court will not interfere lightly with the considered judgment of the Court of first instance but where it finds out that the lower Appellate Court has not considered the evidence dealt with by the Court of first instance, it will interfere in second appeal. (1909) 1 Ind Cas 205 (Cal) (DB).

(z-17) Ownership.

——S. 100 — Question of title.

The finding that a certain party had the title over a certain plot is a finding of fact and cannot be questioned in second appeal. AIR (Vol 32) 1945 All 197: ILR (1945) All 109: 1945 OWN (HC) 32: (1945) ALJ 136: (1945) AWR (HC) 36.

——S. 100 — Finding that materials of house belonged to occupiers is one of fact.

A finding that the materials of houses were the property of the occupiers is a finding of fact. AIR (Vol 29) 1942 All 186: 1942 OWN 131: (1942) ALJ 141: 1942 AWR 79: 200 Ind Cas 634.

——S. 100 — Whether jote lands purchased by proprietor become his khas lands under S. 22, Ben. Ten. Act, is question of fact.

Where jote lands which were originally raiyati holdings within the estate, have been purchased by a proprietor, the question whether these jote lands were held by him as khas lands in his capacity as proprietor under S. 22, Beng. Ten. Act, is a question of fact. AIR (Vol 26) 1939 Cal 593 (DB).

——S. 100 — Jointness.

The question whether a wall erected by one of the owners of a joint wall on the top of the joint wall, acquires the character of the joint wall, is one of law and can be raised in second appeal. AIR (Vol 26) 1939 Lah 28: 41 PLR 267: 182 Ind Cas 498.

——S. 100 — The question as to who is the owner of a particular site is one of fact. (1929) 113 Ind Cas 886 (Nag).

——S. 100 — Highway — Blind alley — Court may presume that the ownership vests in the owners of the adjacent houses — That presumption is an inference of fact. AIR (Vol 15) 1928 Lah 709: 108 Ind Cas 610.

——S. 100 — The question as to ownership is a question of fact which must be decided upon the evidence adduced. AIR (Vol 13) 1926 Mad 1052: 96 Ind Cas 915 (DB).

——S. 100 — A finding that two houses have a common entrance from the street is a finding of fact not liable to be disturbed in second appeal. AIR (Vol 12) 1925 Lah 257: 6 LLJ 284 (DB).

——S. 100 — The conclusion that the plaintiff was a full owner and not merely a dohlidar is clearly a finding of fact and cannot be impugned in second appeal. AIR (Vol 10) 1923 Lah 611.

——S. 100 — Findings as to who is owner and nature of defendant's possession are one of fact. AIR (Vol 8) 1921 Lah 117: 62 Ind Cas 809 (DB).

(z-18) Partnership.

See Note 50.

(z-19) Payment.

——S. 100 — Finding of fact — Finding as to payment.

The finding that the plaintiff has not repaid his dues is a finding of fact conclusive in second appeal. AIR (Vol 33) 1946 Pat 440: 12 BR 392: 223 Ind Cas 324.

——S. 100 — Finding that judgment-debtor cannot pay the debt or substantial portion thereof is conclusive in second appeal.

The finding that the judgment-debtor cannot pay the debt or a substantial portion thereof is a finding of fact and is conclusive in second appeal. AIR (Vol 29) 1942 Pat 242: 8 BR 222 (1): 197 Ind Cas 470 (DB).

——S. 100 — Finding that full amount shown in receipt was paid is one of fact.

A finding that the full amount shown in the receipt was paid is one of fact and is not open to challenge on second appeal. AIR (Vol 28) 1941 Lah 212: 43 PLR 88: 195 Ind Cas 157.

——S. 100 — True construction of receipt.

It is true that the question whether or not the money was paid is a question of fact. Also, in a sense, it is a question of fact whether it was paid in satisfaction of the debt or not. But the true construction of the receipt, upon which the whole matter depends, is not a question of fact, but is a question of law. AIR (Vol 27) 1940 All 441: 1940 AWR 372: 190 Ind Cas 604.

——S. 100 — Finding that certain amounts paid were amounts of revenue and abwab.

Findings of lower Courts that certain amounts paid by defendants to plaintiffs were amounts of land revenue and abwab are pure findings of fact and cannot be questioned in the Court of second appeal. AIR (Vol 26) 1939 Oudh 57: 1938 AWR 145: 1938 OWN 1368: 1939 RD 50: 14 Luck 467: 179 Ind Cas 1 (DB).

——S. 100 — Re-payment.

The question whether a certain re-payment has been made or not being a question of fact, a finding on it cannot be challenged in second appeal. AIR (Vol 24) 1937 Lah 387: 39 PLR 714: 173 Ind Cas 379.

——S. 100 — Question whether payment set up is proved or not.

The question whether a payment set up by a person is proved or not is purely one of fact. AIR (Vol 23) 1936 Sind 184 (184): 30 Sind LR 146: 9 RS 100: 165 Ind Cas 369 (DB).

——S. 100 — A finding on the question as to whether payment was made in good faith by the tenant is one of fact and cannot be disturbed in second appeal. AIR (Vol 21) 1934 Pat 121: 148 Ind Cas 757 (DB).

——S. 100 — Omission by judgment-debtor to certify payment under O. 21, R. 2 is not always a pure question of law. AIR (Vol 13) 1926 Nag 164: 89 Ind Cas 1009.

(z-20) Possession.

——S. 100 — Question of.

The finding that a party had been in possession for a certain period is a finding of fact and cannot be questioned in second appeal. AIR (Vol 32) 1945 All 197: 1945 OWN (HC) 32: (1945) ALJ 136: 1945 AWR (HC) 36: ILR (1945) All 109.

——S. 100 — Finding as to, is one of fact.

A finding that the defendants had not established that they had been in possession for more than twelve years from the date of the suit, is a finding of fact which is not open to question in second appeal. AIR (Vol 31) 1944 Pat 109: 10 BR 486: 9 CLT 57: 212 Ind Cas 273.

——S. 100 — Question as to plaintiff's possession raised in trial Court but not in first appeal nor in grounds of second appeal.

The question whether the plaintiff was in possession was raised in the trial Court and decided in the plaintiff's favour but the defendant did not raise that question either in the first appeal or in the grounds of second appeal:

Held, that the finding of the trial Court on the question of possession could not be disturbed in second appeal. AIR (Vol 30) 1943 Pesh 47: 207 Ind Cas 515 (DB).

——S. 100 — Whether particular building has remained vacant and owner is entitled to remission on account of vacancy are questions of fact to be determined in each case on evidence. AIR (Vol 29) 1942 All 446: (1942) ALJ 611: ILR (1942) All 924: 1942 AWR 306: 203 Ind Cas 599 (DB).

——S. 100 — Findings that vendee purchased with open eyes and his allegation of not being given possession is untrue.

Findings that the vendor made his purchase with open eyes and that his allegation that he was not given possession of all the property is untrue are findings of fact. AIR (Vol 29) 1942 Sind 81: ILR (1942) Kar 32: 202 Ind Cas 584 (DB).

——S. 100 — Finding of fact — Finding that defendant failed to prove dispossession.

The finding of the lower Appellate Court on a consideration of the entire evidence on the record that the defendants failed to prove dispossession with regard to the suit lands is a finding of fact and conclusive in second appeal. AIR (Vol 28) 1941 Cal 556: 45 CWN 761: 76 CLJ 29: 196 Ind Cas 639 (DB).

——S. 100 — A finding that a certain narrow strip of land was in the possession of the plaintiffs through their mukarraridars, is to a very large extent a finding of fact and cannot be challenged in second appeal. AIR (Vol 28) 1941 Pat 422: 20 Pat 497: 22 PLT 35: 7 BR 969: 195 Ind Cas 746 (DB).

——S. 100 — Finding that party was never in possession.

Finding that a party never came into possession of the suit property, being a finding of fact, cannot be disturbed in second appeal. AIR (Vol 27) 1940 Lah 225: 42 PLR 194: 189 Ind Cas 418.

——S. 100 — Appellate Court neither considering evidence nor giving party benefit of statutory presumption.

Where, in a case, the Appellate Court, while dealing with the question of possession of the disputed lands, did not at all take into consideration all the evidence in the case on which the lower Court relied in support of its finding that the defendants were in possession of the disputed lands at the time of the final publication of the Record of Rights and had not also given the defendants the benefit of the statutory presumption under S. 103-B, Ben. Ten. Act:

Held, that the finding of the Appellate Court regarding the possession of the disputed lands was not binding in second appeal. AIR (Vol 25) 1938 Cal 31: 41 CWN 1332: ILR (1938) 1 Cal 413: 174 Ind Cas 113 (DB).

——S. 100 — Finding appearing unsatisfactory at first sight — Interference.

Finding on the point of possession is a finding of fact which is binding on the High Court in second appeal, however unsatisfactory that finding may at first sight appear to be.

(In this case the High Court was not satisfied with the finding of the lower Court but after itself going through the evidence, it refused to interfere on the grounds stated above). AIR (Vol 25) 1938 Pat 10: 4 BR 224: 173 Ind Cas 228.

——S. 100 — Mixed question of law and fact.

The question of adverse possession is a mixed question of law and fact and, therefore, it is for the High Court in second appeal to decide whether, on the facts found by the lower Appellate Court, the possession of the plaintiff has been such as would constitute adverse possession in law. AIR (Vol 24) 1937 All 429: (1937) ALJ 384: 1937 AWR 391: 1937 RD 220: 169 Ind Cas 962.

——S. 100 — Question "whether plaintiffs have been in cultivating possession of suit land and whether they have been "dispossessed" is one of fact.

Where the question is whether the plaintiffs have been in cultivating possession of the suit land and whether they have been dispossessed by the defendants and the decision involves the discussion of a lease deed in favour of the plaintiffs, executed by tenants, third parties, and not by the defendants, and of the khasra girdawaris, these not being documents of title and interpretation of these documents being, therefore, a question of fact, it is a question, prima facie, one of fact. AIR (Vol 24) 1937 Lah 656: 39 PLR 482: 168 Ind Cas 638.

——S. 100 — User.

Finding as to length of user is one of fact and conclusive. AIR (Vol 22) 1935 Lah 346: 158 Ind Cas 361 (1).

——S. 100 — Finding that possession is permissive.

A finding that possession is not adverse but only permissive is a finding of fact which cannot be reagitated in second appeal. AIR (Vol 20) 1933 Lah 721: 14 Lah 302: 33 PLR 494: 135 Ind Cas 680.

——S. 100 — A finding on evidence by the lower Appellate Court that tnere was no actual delivery of possession by removal of the judgment-debtor cannot be interfered with in second appeal. (1931) 130 Ind Cas 706: (1931) ALJ 12 (DB).

——S. 100 — Disragard of.

Where the presumption of possession by an entry in the record of rights in favour of a certain person is entirely disregarded, such a finding of fact can be set aside in second appeal. AIR (Vol 15) 1928 Cal 751: 110 Ind Cas 445 (DB).

——S. 100 — Where defendant does not allege dispossession but that plaintiff had never been in possession, and plaintiff proves obtaining possession under a deed of birt, the finding that it must be presumed that the plaintiff has continued in possession even since, cannot be disturbed in second appeal. AIR (Vol 12) 1925 Oudh 170: 81 Ind Cas 588.

——S. 100 — The finding of the lower appellate Court that a mortgagee has never been in actual possession of the land, being one of fact cannot be contested in second appeal. (1922) 67 Ind Cas 152 (Lah) (DB).

——S. 100 — Finding of fact — No evidence.

Defendants not having pleaded that R was in possession at the time of the settlements and there being no evidence in support thereof the finding arrived at by the lower Court as to R's possession was not a legal finding of fact it being based on a mere surmise. AIR (Vol 7) 1920 Pat 264: 1 Pat LT 184: 57 Ind Cas 323 (DB).

——S. 100 — Finding of fact — Possession — Reversal of decree.

In a suit for declaration of title and retaining possession of certain lands, the Lower Appellate Court found that the lands in suit belonged to the defendants, and were in their possession for more than twelve years, that the plaintiffs did not prove their possession within the period of limitation and therefore dismissed the suit. Held, that the findings of fact arrived at by the Lower Appellate Court were binding in second appeal. AIR (Vol 3) 1916 All 181: 14 ALJ 1066: 36 Ind Cas 427 (DB).

——S. 100 — Dispossession — Finding of fact.

Where the lower Appellate Court finds on the facts that there has been no dispossession, the High Court in second appeal would not interfere with that finding. AIR (Vol 1) 1914 Cal 50: 41 Cal 52: 18 CLJ 89: 18 CWN 353: 21 Ind Cas 431 (DB).

(z-21) Proof.

——S. 100 — Finding of fact — Fraud and misrepresentation — Finding that allegation of fraud and misrepresentation is not proved — Interference.

A finding that the plaintiff has failed to prove the fraud and misrepresentation alleged by him as a ground for setting aside a consent decree, is a finding of fact, which must be accepted as binding in second appeal. AIR (Vol 34) 1947 Bom 133: 48 Bom LR 786.

——S. 100 — Proof of easementary right is question of fact.

The question whether the plaintiff has proved an easementary right is one of fact. AIR (Vol 33) 1946 Mad 168: (1945) 2 MLJ 349: 1945 MWN 633.

——S. 100 — Pedigree.

The finding that pedigree as set up has been proved is one of fact behind which the High Court cannot go in second appeal. AIR (Vol 31) 1944 All 61: (1944) ALJ 7: 1944 OWN 21: ILR (1944) All 186: 1944 AWR 4: 211 Ind Cas 629.

——S. 100(1)(c) — Date of publication of book is question of fact.

Where a lower Appellate Court requires a standard of proof higher than that laid down by the Evidence Act, it is an error of law or procedure which would justify interference under S. 100 (1) (c), Civil P. C. A Court is not entitled to require from any party conclusive proof of any facts. Where the lower Appellate Court requires such proof, its finding of fact can be interfered with under S. 100 (1) (c), even though it is against the appellant. AIR (Vol 30) 1943 Mad 38 (2): (1942) 2 MLJ 427: 55 MLW 772: 207 Ind Cas 163.

——S. 100 — Ouster — Finding that co-sharer failed to prove exclusive possession to the knowledge of others is one of fact.

A finding that the co-sharer had failed to prove that he had been treating the property as though it belonged to him exclusively to the knowledge of the other co-sharers is a finding of fact and cannot be interfered with in second appeal. AIR (Vol 29) 1942 Lah 135: 44 PLR 133: 201 Ind Cas 159.

——S. 100 — Questions of law and of fact are sometimes difficult to disentangle. The proper legal effect of a proved fact is essentially a question of law, so also is the question of admissibility of evidence and the question whether any evidence has been offered on one side or the other, but the question whether the fact has been proved, when evidence for and against has been properly admitted, is necessarily a pure question of fact. AIR (Vol 24) 1937 Rang 225: 171 Ind Cas 718 (DB).

——S. 100 — Genuineness of document.

The question as to genuineness of a document is purely one of fact. But when the lower Appellate Court requires too high a standard of proof, a standard of proof higher than that laid down by the Evidence Act, it commits an error of law or procedure justifying interference in second appeal. (1937) MWN 188.

——S. 100 — Mortgage.

Where both the lower Courts have held that the plaintiffs have not proved the mortgage deed they sought to redeem and there is no evidence on the record to prove the existence of the mortgage deed which has not been produced and no attesting witness thereto has been produced, the find-

ing that the deed is not proved is a finding of fact and cannot be challenged in second appeal:

Held, that there were no circumstances to justify the Court in granting the plaintiffs permission to withdraw the suit with liberty to file fresh suit. (1937) 167 Ind Cas 724: 1937 OWN 266.

——S. 100 — Question whether entry in Record of Rights is rebutted is one of fact.

The question whether an entry in the Record of Rights had been rebutted by the evidence produced before the lower Court is entirely one of fact and cannot be disturbed in second appeal and what weight is to be attached to the evidence produced to rebut it, is not a matter for Court sitting in appeal. (1936) 165 Ind Cas 763: 3 BR 79 (DB).

——S. 100 — Proof of handwriting.

A finding of the trial Court to the effect that a person unable to read and write certain characters could prove the handwriting of another person in those characters, because he had the occasion to see the latter write, cannot be questioned in second appeal because, though such a thing is rare, it is not impossible. AIR (Vol 21) 1934 All 990: 4 AWR 676.

——S. 100 — The question whether a fact has been proved when evidence for and against has been properly admitted is necessarily a pure question of fact though the proper legal effect of a proved fact is a question of law. AIR (Vol 18) 1931 Oudh 142: 8 OWN 152: 15 RD 112: 131 Ind Cas 395.

——S. 100 — Mixed question of law and fact — Reasonable cause — Malicious prosecution.

In malicious prosecution the existence of reasonable and probable cause is a question for the Judge and not for the jury. In India the balance of authorities is in favour of the view that the question is a mixed one of law and fact and the inference deducible from proved facts may be examined by the High Court on second appeal. AIR (Vol 17) 1930 Cal 392: 57 Cal 25.

——S. 100 — Whether alleged mortgage is not proved is a finding of fact. AIR (Vol 13) 1926 Oudh 546: 96 Ind Cas 253.

——S. 100 — Question of law and of fact are sometimes difficult to disentangle, but the question whether a fact has been proved, when evidence for and against has been properly admitted is necessarily a pure question of fact. AIR (Vol 11) 1924 Oudh 349: 27 OC 89: 11 OLJ 77: 5 LR Oudh 78: 80 Ind Cas 327.

——S. 100 — Question of law — Test of — Finding of fact — No jurisdiction to interfere.

Questions of law and of fact are sometimes difficult to disentangle. The proper legal effect of a proved fact is essentially a question of law; so also is the question of admissibility of evidence and the question whether any evidence has been offered on one side or the other; but the question whether the fact has been proved, when evidence for and against has been properly admitted, is necessarily a pure question of fact. The High Court has no jurisdiction in second appeal to revise the evidence and set aside the decree of the Lower Appellate Court on the ground that it had applied the wrong standard of measurement to land of which the rent was in question. AIR (Vol 5) 1918 PC 92: 46 Cal 189: 23 CWN 345: 9 LW 552: 45 IA 183: 51 Ind Cas 760.

(z-22) Reasonable and probable cause.

——S. 100 — Suit for malicious prosecution — Finding on question of want of reasonable and probable cause vitiated in law — Not binding.

Where, in a suit for damages for malicious prosecution, the finding of the lower Appellate Court on the question of want of reasonable and probable cause is entirely vitiated in law, it is not binding in second appeal. AIR (Vol 33) 1946 All 204: ILR (1945) All 685: 1946 ALJ 53 (DB).

——S. 100 — Finding of fact — Reasonable and probable cause.

In an action for malicious prosecution, the existence or otherwise of a reasonable and probable cause or of malice is a question of fact. The High Court in second appeal is bound by the concurrent findings of fact arrived at by the Courts below, unless they are vitiated by an error of law or procedure. AIR (Vol 33) 1946 Nag 46: ILR (1946) Nag 358: 221 Ind Cas 666: 1946 NLJ 113.

——S. 100 — Malicious prosecution — Suit for — Finding as to existence of reasonable and probable cause, whether one of law or fact.

Per Akram, J.—In a suit for malicious prosecution, the finding that the plaintiff has completely failed to prove that the defendant was the real prosecutor, that the prosecution was instituted against him without any reasonable or probable cause and that the prosecution was instituted with a malicious intention, are all findings of fact which will not be interfered with in second appeal, however erroneous they may be, when there is no error or defect in the procedure and the lower Appellate Court had before it evidence in support of the findings.

Per Pal, J.—In an action for compensation for malicious prosecution, the question whether or not there was a reasonable or probable cause for the prosecution is a question of law to be inferred from certain facts. AIR (Vol 31) 1944 Cal 4: 77 CLJ 93: 212 Ind Cas 421 (DB).

——S. 100 — Malicious arrest.

The High Court has jurisdiction in second appeal to interfere with the findings of the Courts below as to the absence of reasonable and probable cause and to the existence of malice in a suit for damages for malicious arrest. AIR (Vol 26) 1939 Pat 13: (1938) PWN 783: 5 BR 286: 20 PLT 367: 179 Ind Cas 790.

——S. 100 — Suit for compensation for malicious prosecution — High Court, in second appeal, is bound by the facts found by the lower Courts — But it is entitled to examine whether the inference drawn therefrom is legitimate, i.e., whether the facts found did or did not amount to absence of "reasonable and probable cause". AIR (Vol 22) 1935 Lah 765: 17 Lah 190: 38 PLR 440: 160 Ind Cas 779 (DB).

——S. 100 — Reasonable and probable cause.

The question whether an injunction was obtained without reasonable and probable cause is purely one of fact in India. AIR (Vol 20) 1933 Lah 263: 14 Lah 46: 34 PLR 281: 143 Ind Cas 583.

——S. 100 — Suit for damages for malicious prosecution — Whether there was reasonable and probable cause is question of fact — If lower Courts after judicially considering evidence find against plaintiff, High Court cannot disturb finding nor can it certify case for Letters Patent Appeal — Letters Patent (Allahabad) Cl. 10. AIR (Vol 16) 1929 All 429: 117 Ind Cas 619.

——S. 100 — Whether vendee has acted with reasonable care under S. 41, T. P. Act, is a mixed question of law and fact. High Court will interfere only where strong reasons exist. AIR (Vol 14) 1927 All 158: 99 Ind Cas 1.

——S. 100 — Malicious prosecution — Suit for — Absence of reasonable or probable cause for prosecution is question of fact — Tort. AIR (Vol 12) 1925 Oudh 359: 86 Ind Cas 596: 12 OLJ 88: 2 OWN 62: 28 OC 387.

——S. 100 — Suit for damages for malicious prosecution — Plaintiff's innocence and defendant's having no reasonable cause for complaint is a question of fact and cannot be questioned in second appeal. (1925) 91 Ind Cas 112 (Oudh).

(z-23) Reasonable care.

See also Note 45.

——S. 100 — Finding based on evidence as to absence of good faith on part of legal adviser cannot be upset in second appeal.

Whether an Advocate has shown due care and attention is a question of fact to be decided on the evidence adduced in any particular case. No absolute rule of law can be laid down, and whether a Judge's decision on this point be right or wrong, it cannot be upset in second appeal when it is based on evidence, on the ground that he has transgressed such a rule of law. AIR (Vol 31) 1944 Mad 47: (1943) 2 MLJ 375: 56 MLW 580: 1943 MWN 703: 211 Ind Cas 480.

——S. 100 — The finding as to absence of reasonable care and good faith is a finding of fact. AIR (Vol 14) 1927 Nag 41: 97 Ind Cas 988.

(z-24) Relationship.

See Note 58.

(z-25) Rent, rate of.

——S. 100 — Question whether holding is on cash rent or on bhaoli basis is one of fact.

The question whether the rent of a holding is on cash basis or bhaoli basis is a question of fact and a finding on the question cannot be disturbed in second appeal. AIR (Vol 33) 1946 Pat 298.

——S. 100 — The suit was remanded by the Appellate Court for further investigation on question of fair and equitable rent and on remand, the trial Court assessed the fair rent. The defendant appealed and the Appellate Court found that the defendant was liable to pay rent at the original rate found by the trial Court to have already been fixed and declined to consider the question of assessment of fair rent. The plaintiff filed a second appeal :

Held, that the remand was one under S. 151. It was open to the first Appellate Court to decide the point of fair rent and the point could also be pressed by either side in second appeal. AIR (Vol 28) 1941 Cal 446: 74 CLJ 535: 195 Ind Cas 864.

——S. 100 — Finding of lower Courts that plaintiff was unable to prove rate of rent.

The High Court cannot interfere in second appeal with the conclusion which has been arrived at by the Courts of fact, that the plaintiff in the rent suit has been unable to prove the rate of rent which is payable by the defendants, although the reasonings of such Courts in rejecting the documents filed by the plaintiff are not quite satisfactory. AIR (Vol 28) 1941 Pat 371: 7 BR 639: 193 Ind Cas 780.

——S. 100 — Suit for rent of agricultural land of value more than Rs. 500 and not coming under S. 13(1), Burma Laws Act.

A suit for rent of agricultural land is not of a nature cognizable by Small Cause Court and a second appeal in such a suit which does not come under S. 13(1), Burma Laws Act, and is not of a value more than Rs. 500, lies under S. 100, Civil P. C. and not under S. 11, Burma Laws Act. AIR (Vol 26) 1939 Rang 350: 1939 Rang LR 472: 184 Ind Cas 492.

——S. 100 — Decision of the question whether a stipulation as to payment of rent at the rate mentioned in a contract between the landlord and the tenant was enforceable or not under S. 29, Ben. Ten. Act is a question of fact. AIR (Vol 24) 1937 Cal 8: 41 CWN 169: 167 Ind Cas 170 (DB).

——S. 100 — Question whether tenancy was fixed rate, and also whether presumption arises from tenant paying uniform rate of rent are questions of fact.

The question whether a tenant has held at a uniform rate for number of years is a question of fact, and not of law, and not an inference of law drawn from facts; on such a question, the finding of the Court of first appeal is conclusive.

The question whether a presumption could or could not arise, from a tenant having held at uniform rate for a very long period and from other circumstances, that the tenancy was one of which the rent was fixed, must be a question of fact and the decision of the final Court of fact must be taken to be conclusive between parties concerned. AIR (Vol 23) 1936 Cal 582: 167 Ind Cas 596 (DB).

——S. 100 — A question as to the amount of rent which is fair and equitable is not one of law to be agitated in second appeal. AIR (Vol 21) 1934 Pat 31: 146 Ind Cas 811.

——S. 100 — Proceedings under S. 180-A, Ben. Ten. Act — Decision involves a fundamental question in connection with tenancy, e.g., extent of area with reference to which rent is to be assessed — The decision is not merely for settling the rent and the second appeal lies. AIR (Vol 18) 1931 Cal 550: 35 CWN 19: 132 Ind Cas 249 (DB).

——S. 100 — Lower Courts coming to a finding on question of possession, rate of rent and that the nature of tenancy is a Kyamgani tenure — No interference in second appeal. AIR (Vol 18) 1931 Mad 577: (1930) MWN 874: 35 MLW 400: 133 Ind Cas 369.

——S. 100 — The finding that the settlement rent at the higher figure claimed is not binding on the defendant cannot be questioned in second appeal. AIR (Vol 16) 1929 Mad 673: 118 Ind Cas 497.

——S. 100 — The question generally, whether the tenant has held at a uniform rate of rent for more than 20 years or back to the time of the Permanent Settlement, is a question of fact and not a question of law. AIR (Vol 13) 1926 Cal 359: 90 Ind Cas 564 (DB).

——S. 100 — B. T. Act, S. 50 — Proof of uniform rent for 20 years is a question of fact. AIR (Vol 12) 1925 Cal 632: 86 Ind Cas 316: 29 CWN 500: 41 CLJ 135 (DB).

——S. 100 — Where, in defence to a suit for rent, it is pleaded by the tenant that the rent claimed by a landlord in respect of fruit trees is not payable, the question is one relating to the amount of rent payable and second appeal is allowable. AIR (Vol 12) 1925 Pat 294: 78 Ind Cas 463 (DB).

——S. 100 — Where the lower appellate Court found as a fact that the evidence established that there had been no change of rent for 48 years and then inferred that fixity of rent could be presumed.

Held, that it was an inference of law and could be questioned in second appeal. AIR (Vol 11) 1924 Pat 373: 71 Ind Cas 15: 1 Pat LR 32 (DB).

——S. 100 — Rent — Amount of — Finding of fact.

A finding of fact cannot be interfered with in second appeal. A finding as to whether certain charges are parts of rent or not is a finding of fact. 15 Cal 828. overruded. AIR (Vol 2) 1915 Cal 17 : 25 Ind Cas 540 (DB).

——S. 100 — Findings of fact — No jurisdiction to High Court to interfere with — Permanent arrangement regarding rent.

Where the Collector and the District Judge on appeal finds that a commutation of produce rent into cash in a particular year represented a permanent arrangement to hold good thereafter as between the landlord and tenant. Held, that the finding was one of fact and as that finding was based not merely on the construction of the muchilikas executed by the tenants, but on other evidence as well, the High Court has no jurisdiction in second appeal to interfere with the finding. AIR (Vol 1) 1914 PC 87: 37 Mad 443: 41 IA 258: 16 MLT 262: (1914) MWN 695: 1 LW 779: 27 MLJ 451: 20

CLJ 375: 19 CWN 97: 16 Bom LR 853: 25 Ind Cas 305.

(z-26) Signature.

——S. 100 — Genuineness of signature.

A finding on a question as to genuineness of a signature is a finding of fact. (1937) 166 Ind Cas 531: 3 BR 177: 38 Cr LJ 235.

——S. 100 — Per Buckland and Lort-Williams, JJ. (M. C. Ghose, J., Contra).— A second appeal ought not to be admitted merely on a question of the genuineness of a signature which is a pure question of fact. AIR (Vol 21) 1934 Cal 633: 61 Cal 365: 152 Ind Cas 597.

——S. 100 — Signature — Genuineness of.

Genuineness of signature — Evidence Act, S. 45 — Comparison of handwriting — A finding based on comparison of signatures alone cannot be set aside in second appeal. AIR (Vol 10) 1923 Lah 695: 77 Ind Cas 872: 5 LLJ 530 (DB).

(z-27) Site.

——S. 100 — Mixed question of law and fact — Question if disputed area is cremation ground — Inference of dedication or lost grant from facts.

The question whether the disputed land is a Sarbasadharan cremation ground, is essentially a mixed question of law and fact. The conclusion of the Court that there had been a dedication or lost grant of the disputed area for the purposes claimed, must more properly be regarded as a proposition of law derived from facts found than as a finding of fact itself. AIR (Vol 37) 1950 PC 56: 76 IA 271: 63 LW 1: 29 (Pat) 1: 16 Cut LT 1: 1950 ALJ 318: 1950 AWR 308: 52 Bom LR 458: 54 CWN 143: (1950) 1 MLJ 100.

——S. 100 — Finding that village has grown into a town is a finding of fact.

The finding that a village has grown into a town is a finding of fact and cannot be questioned either in second appeal or in Letters Patent appeal. AIR (Vol 32) 1945 Lah 256: 47 PLR 212 (DB).

——S. 100 — Finding that reservoir gets water from vari of Government.

It is a pure finding of fact that a tank or the reservoir from which the water is used by a person for irrigating his lands gets its water from a vari which belongs to the Govt. and it is not open to the High Court to go behind it. AIR (Vol 30) 1943 Mad 132: (1942) 2 MLJ 781: 1943 MWN 74: 206 Ind Cas 74.

——S. 100 — Question whether place is town or village is of fact — But finding on such question, if not based on evidence on record can be interfered with in second appeal.

The question whether a particular place is a town or a village is one of fact and the finding on such question cannot be disturbed in second appeal. But if the lower Court, while basing its finding upon such question, completely ignores the entire oral and documentary evidence, then such a finding is not binding on the High Court and can be interfered with in second appeal. (Sohna, held to be a large village). AIR (Vol 26) 1939 Lah 88: 41 PLR 227.

——S. 100 — Wrong interpretation of document — Plea of estoppel wrongly upheld — Finding, if binding in second appeal.

A finding that a site is the joint property of the parties is one of fact and binding in second appeal. Where, however, the lower Court had not correctly interpreted some of the documents on which the parties founded their title to the adjoining houses, and had based its decision partly on the plea of estoppel which did not really arise in the case, the finding is not binding in second appeal. AIR (Vol 21) 1934 Lah 662: 35 PLR 578: 153 Ind Cas 393.

——S. 100 — Finding that a Mohalla is not a separate sub-division.

A finding that a certain mohalla is not a separate sub-division is one of fact and cannot be challenged in second appeal. AIR (Vol 21) 1934 Lah 424: 154 Ind Cas 1047.

——S. 100 — Question or finding of fact — Accretion.

Whether a certain land is accretion or formation in situ is question of fact. AIR (Vol 17) 1930 Cal 764 (DB).

——S. 100 — The question whether a particular site belonged to a private individual or to the Mahomedan public is a question of fact, and the lower appellate Court's finding on it cannot be questioned by High Court. (1929) 113 Ind Cas 886 (Nag).

——S. 100 — The issue on the point of the customary power of the Kamins to alienate abadi sites covers the question whether the village is a town or village, and can be agitated in second appeal. (1928) 112 Ind Cas 402: 10 LLJ 360.

——S. 100 — Record of rights — Permanent Settlement of 1793 — Question if lands are included in Permanent Settlement is one of fact. AIR (Vol 14) 1927 Cal 457: 100 Ind Cas 507 (DB).

——S. 100 — Whether a place is a town or a village is a question of fact. AIR (Vol 13) 1926 Lah 542: 8 LLJ 66: 27 PLR 73: 94 Ind Cas 127.

——S. 100 — Punjab Pre-emption Act — Whether a place is a town is a question of fact. It is to be decided upon the evidence and the particular circumstances of each case. It is not necessary that a custom prevailing in the town should apply to the mohallas or suburbs. AIR (Vol 10) 1923 Lah 443: 75 Ind Cas 610.

——S. 100 — Whether certain place is a town or village is a question of law. A very important test to determine whether a place is a town or village is the presence or absence of a substantial bazar and the avocations of the majority of the inhabitants. AIR (Vol 8) 1921 Lah 121: 62 Ind Cas 808.

(z-28) Subject-matter of suit.

——S. 100 — Whether particular matter is subject-matter of or relates to suit, is question of fact.

Whether a particular matter is the subject-matter of or relates to the suit, is primarily a question of fact depending upon the circumstances of each case; although a matter not strictly the subject-matter of a suit, may relate to or have reference to the suit if it forms part of the consideration. AIR (Vol 24) 1937 Pat 232: 3 BR 611: (1937) PWN 51: 169 Ind Cas 741 (DB).

(z-29) Undue influence.

See also Note 57.

——S. 100 — Finding of fact — Interference — Finding on question whether contract was caused to be made under undue influence.

Ordinarily, a finding of the lower appellate Court on the question whether a contract was caused to be made under undue influence is a finding of fact which is binding in second appeal. But where such finding is based on misconception of the evidence on a vital matter and has been reached by adopting a procedure which has resulted in an erroneous finding, it is vitiated and is not binding in second appeal. AIR (Vol 37) 1950 Nag 71: ILR (1950) Nag 105: 1950 NLJ 297.

——S. 100 — Finding that bond was executed owing to undue influence.

A finding that a bond was executed owing to undue influence is not a pure finding of fact but is rather a legal inference from the facts of the case. AIR (Vol 24) 1937 Oudh 254: 1937 OWN 277: 167 Ind Cas 424 (DB).

——S. 100 — Question whether instrument is obtained by undue influence, is one of fact.

The question as to whether an instrument was obtained from a person by undue influence and

misrepresentation is and must be a question of fact. AIR (Vol 22) 1935 Bom 326: 37 Bom LR 471: 59 Bom 502: 159 Ind Cas 213.

——S. 100 — **'Undue influence' — Finding of fact.**

Finding of undue influence is a finding on the merits when there is some evidence that pressure was brought to bear on one party and the other party had an unfair advantage. AIR (Vol 5) 1918 Cal 590: 40 Ind Cas 215 (DB).

——S. 100 (S. 584 old Code) — **Second appeal — Finding of fact.**

The question whether there was undue influence or not is one of fact, and the finding of the lower Court can be interfered with in second appeal only if there were no evidence to support it. (1900) 25 B 126 (128): 2 Bom LR 703 (DB).

(Z-30) Waqf.

See also Note 59.

——S. 100 — The question whether a particular property has been dedicated for religious and charitable purposes and is wakf is one of fact and cannot be raised in second appeal. (1932) 138 Ind Cas 215 (1): 33 PLR 288.

——S. 100 — Whether particular property is wakf and is dedicated to public or charitable user is question of fact. When no error of law is shown to have been committed by the lower appellate Court its finding cannot be set aside in second appeal. AIR (Vol 17) 1930 Lah 744: 31 PLR 372 (DB).

——S. 100 — **Dedication — Question of law.**

The question whether certain property is wakf property is a question of law or at any rate a mixed question of law and fact. (1913) 16 OC 76: 17 Ind Cas 303 (DB).

(z-31) Will.

——S. 100 — **Question whether property was dedicated to charity by testator during his lifetime is not a pure question of law — It cannot be raised for first time in second appeal.**

Where the only claim put forward in the Courts below was that the property was given to charity by and under the will of the testator, the question that there was dedication of the property to charity by the testator during his lifetime cannot be raised for first time in second appeal as it is not a pure question of law. AIR (Vol 33) 1946 Mad 209 : (1945) 2 MLJ 525.

——S. 100 — **Condition precedent.**

The finding that the condition laid down in the will before the property could develop upon the legatee has not been fulfilled is a finding of fact which cannot be challenged in second appeal. AIR (Vol 31) 1944 Bom 196 : 46 Bom LR 356.

——S. 100 — A finding of fact at which a lower Appellate Court arrived is binding on the High Court. The Privy Council decision to the effect that a party setting up a nuncupative will should be required to prove "with precision the words on which he relies with every circumstance of time and place" must be read subject to their own subsequent decisions requiring a strict interpretation of the provisions precluding a second appeal to the High Court in this country on a question of fact. AIR (Vol 9) 1922 Nag 46: 66 Ind Cas 413 : 5 NLJ 183.

58. Relationship.

——S. 100 — **Orissa Money-Lenders' Act (III of 1939), Ss. 2, 10 and 16 — Finding that person is money-lender is one of fact. (Per Sinha and Das, JJ. in Order of Reference.)**

The finding that a person is a money-lender is essentially a question of fact and, therefore, binding on the Court in second appeal. AIR (Vol 33) 1946 Pat 110 : 25 Pat 134 (FB).

——S. 100 — **Whether person is or is not father of another is question of fact.**

Whether a person was or was not the father of B is a pure question of fact and cannot be disturbed in second appeal unless the finding is vitiated by some error of law. AIR (Vol 29) 1942 Pat 230 : 20 Pat 855 : 8 BR 716 : 200 Ind Cas 546 (DB).

——S. 100 — The question whether the plaintiff in a pre-emption suit is collaterally related to the vendor or not, is one of fact. AIR (Vol 27) 1940 Lah 278: 42 PLR 216: 189 Ind Cas 676.

——S. 100 — **Finding that plaintiff is not nearest reversioner.**

The lower Appellate Court's finding on the evidence before it, that the defendants are nearer reversioners than the plaintiff, is a finding of fact and is binding in second appeal. AIR (Vol 27) 1940 Pat 585: 7 BR 138: 190 Ind Cas 797.

——S. 100 — **Finding that plaintiff is half-sister.**

The finding of the lower Court that the plaintiffs are half-sisters, is a finding of fact binding in second appeal. AIR (Vol 27) 1940 Pat 310: 19 Pat 382: 21 PLT 660: 6 BR 884: 189 Ind Cas 883 (DB).

——S. 100 — **Finding that person is not reversioner.**

The finding that certain persons are not proved to be the reversioners of another person is a finding of fact and cannot be attacked in second appeal. AIR (Vol 26) 1939 Lah 309: 41 PLR 133: 182 Ind Cas 990.

——S. 100 — Finding on the question whether the collateral had shared in cultivation at material times is one of fact and must be accepted in second appeal. AIR (Vol 22) 1935 All 636: 1935 RD 314: (1935) ALJ 957: 1935 AWR 763: 158 Ind Cas 47.

——S. 100 — **Relationship of landlord and tenant.**

The question whether the relationship of landlord and tenant existed between the defendants and the plaintiffs is one of law and not of fact. AIR (Vol 22) 1935 Mad 268: 40 MLW 810: 154 Ind Cas 753.

——S. 100 — **Question whether relation of parties was sufficiently near to entitle Court to conclude that consideration was love and affection — Whether one of fact.**

The question whether or not the relation of the parties was sufficiently near to entitle the Court to come to the conclusion that the consideration for a transaction was the love and affection of the parties, is a question of fact which should not be disturbed in second appeal. AIR (Vol 21) 1934 Pat 44: 154 Ind Cas 1043.

——S. 100 — The finding that at the time of the sale the vendees were the only reversioners of the vendors then living, so that the plaintiff, the son of one vendor, if born after the sale would have no 'locus standi' was held to be one of fact. AIR (Vol 12) 1925 Lah 275: 6 LLJ 566 (DB).

——S. 100 — Where on a consideration of the entire evidence in the case, the lower Appellate Court has come to the conclusion that the relationship of landlord and tenant exists between the parties and that the presumption raised by an entry in the record-of-rights has been rebutted, the finding is one of fact with which the High Court cannot interfere in second appeal. (1921) 64 Ind Cas 190 (Cal).

——S. 100 — **Relief — Discretion exercised in favour of plaintiff, remote reversioner, by first court — Appeal Court, functions of.**

See (1904) 1 ALJ 380 (382).

59. Religious endowment.

See also N. 57 (z-30).

——S. 100 — **Whether a building is public or private mosque.**

The question whether the building is a private mosque or a public mosque is not a question of fact, but a question of law, that is, a question of inference from the proved facts. AIR (Vol 25) 1938 Oudh 238: 1938 OWN 937: 177 Ind Cas 718 (DB).

——S. 100 — Existence of wakf is a question of fact. AIR (Vol 11) 1924 Lah 382: 69 Ind Cas 415.

——S. 100 — Dedication — Finding of fact.
Where the lower Appellate Court finds that a house in dispute has been dedicated to religious or charitable uses, the finding is one of fact which won't be disturbed in second appeal. AIR (Vol 6) 1919 Lah 130: 1 PR 1919: 49 Ind Cas 138.

60. Representation.

——S. 100 — Finding of fact — Question whether a tenant represents the whole body of tenants in rent reduction proceedings.
The question whether in rent reduction proceedings a tenant represented the whole body of tenants is rather a mixed question of fact and law and it cannot be said to be one which is purely of fact. AIR (Vol 35) 1948 Pat 153: 26 Pat 592 (DB).
——S. 100 — Decree in suit against karta of joint Hindu family alone — Whether binding upon family or karta alone is a question of fact.
It is a question of fact to a large extent whether a decree passed in a suit against a 'karta' of a joint Hindu family alone is binding only upon the named defendant or is binding upon the family. Which conclusion is arrived at depends on whether it is a fair inference that though sued alone, he is sued in his representative as well as in his personal capacity or whether he is sued only in his personal capacity. In the former case the decree will be binding upon those he represents as well as upon himself; in the latter case it will be binding upon him only. In matters of this kind, it is very much the better course to take, to join the members of the family and avoid the disputes which may arise subsequently. AIR (Vol 25) 1938 Nag 431: 178 Ind Cas 865 (DB).
——S. 100 — Whether tenancy was properly represented is a question of fact. AIR (Vol 16) 1929 Cal 28: 115 Ind Cas 180: 49 CLJ 83.
——S. 100 — Whether certain persons are representatives is a question of fact. AIR (Vol 14) 1927 Cal 81: 97 Ind Cas 489 (DB).
——S. 100 — The question whether son was effectively represented in a former suit is really a question of law and not one of fact. AIR (Vol 14) 1927 Mad 406: 38 MLT 107: 99 Ind Cas 539.
——S. 100 — Whether certain persons acted as heirs or administrators in contracting a certain debt, is a question of fact. AIR (Vol 14) 1927 Mad 185: 24 MLW 842: 97 Ind Cas 570 (DB).
——S. 100 — Whether one heir of deceased tenant represents whole tenancy — Question is one of fact. AIR (Vol 13) 1926 Cal 517: 91 Ind Cas 748.
——S 100 — Whether a person by any representation or by conduct amounting to representation induced another to do a certain act is a question of fact and the finding must be accepted in second appeal. AIR (Vol 13) 1926 Mad 39: 49 MLJ 396 1925 MWN 596: 90 Ind Cas 875.
——S. 100 — Finding as to representation — Must be accepted in second appeal. AIR (Vol 10) 1923 Cal 165: 68 Ind Cas 203 (DB).
——S. 100 — Whether particular misrepresentation affected one's mind or not is question of fact — Contract Act, S. 19. AIR (Vol 8) 1921 Mad 198: 13 MLW 525: 1921 MWN 340: 62 Ind Cas 764 (DB).
——S. 100 — Representation — Co-heirs — Finding of fact.
Whether one heir of a tenant represents other heirs is a question of fact. (1911) 14 CLJ 180: 10 Ind Cas 116. (DB).

61. Scope.

——S. 100 — Section must be read subject to O. 47, R. 7 — Order granting review by 1st appellate Court — Order cannot be challenged in second appeal on grounds not mentioned in O. 47, R. 7 — Civil P. C. (1908), O. 47, R. 7.
It is true that S. 100 mentions certain grounds in language of a very general character; but, in the first place, those grounds relate to the decision itself and not to any interlocutory orders which are dealt with in S. 105 and, in the second place, the general provision contained in S. 100 must be read as subject to the specific provision contained in O. 47, R. 7 in the sense that what is an error of law or defect of procedure in an order granting an application for review is defined there. Therefore, it cannot be said that by reason of the provisions of S. 100, an order granting an application for review, made by a first appellate Court, can be challenged in a second appeal from the final decision on grounds other than those mentioned in O. 47, R. 7. AIR (Vol 33) 1946 Mad 530 (DB).
——S. 100 — Right of second appeal — Effect of other provisions.
The provision that deals with the subject of second appeals is S. 100. A right so given by S. 100 can never be held to have been taken away by implication or by analogies drawn from other provisions or by any alleged illogical reasonings of Legislature. AIR (Vol 32) 1945 Lah 127: 47 PLR 114: ILR (1945) Lah 335: 220 Ind Cas 107 (FB).
——S. 100 — Whether a party had lost his right to a share by reason of another's advere possession, is a question of fact but where the law has not been appreciated aright in the lower Court, the point can be agitated in the High Court. AIR (Vol 28) 1941 Nag 243: 1941 NLJ 467: ILR (1942) Nag 608: 198 Ind Cas 653.
——S. 100 — Right of appeal from decree of a Single Judge to High Court is not governed by S. 100 but by Letters Patent. AIR (Vol 27) 1940 Nag 39: 1940 Nag LJ 37: ILR (1940) N 141: 186 Ind Cas 129 (FB).
——S. 100 — Section 100 must be read with O. 41, R. 33. AIR (Vol 27) 1940 Pat 300: 6 BR 229: 21 PLT 165: 185 Ind Cas 638 (DB).
——S. 100 — Scope of S. 100 and purpose of O. 41, R. 22 (1) discussed. AIR (Vol 26) 1939 Rang 59: 179 Ind Cas 946 (DB).
——S. 100 — Quaere:— Whether second appeal or only revision lies from an order of dismissal of an appeal under O. 41, R. 11 (1). AIR (Vol 25) 1938 Pat 603: 19 PLT 210: 5 BR 208: 179 Ind Cas 292.
——S. 100 — Interpretation.
The word 'fact' in S. 100 must bear the meaning given to it in S. 3, Evi. Act. AIR (Vol 23) 1936 Nag 186: 165 Ind Cas 217.
——S. 100 — The words "appeals from appellate decrees" as used in O. 41, R. 1, Civil P. C., have reference only to second appeals filed under S. 100, Civil P. C. AIR (Vol 22) 1935 Oudh 88: 1935 OWN 8: 1935 RD 12: 10 Luck 513: 153 Ind Cas 371 (DB).
——S. 100 — Order refusing to grant temporary injunction to restrain decree-holder-purchaser from obtaining possession — Order falls under S. 151 — No appeal lies from the order — Lower Court, however, hearing appeal — It is doubtful if second appeal lies. But the second appeal may be treated as revision. AIR (Vol 21) 1934 Lah 79(2): 36 PLR 142: 150 Ind Cas 15.
——S. 100 — An application for the ascertainment of the mesne profits is neither an application for execution of the decree, nor is it an application which is required by law to be made by the plaintiff as a condition precedent to the ascertainment of the mesne profits. In so far as the Court declines to ascertain the mesne profits and holds that the plaintiff's claim is beyond time under Art. 181 it is the formal expression of an adjudication conclusively determining the rights of the parties with regard to a matter in controversy in the suit within the meaning of S. 2, cl. (2), C. P. Code. In such a case the decision of the lower Court operates as a decision and, therefore, a se-

cond appeal lies. AIR (Vol 15) 1928 Bom 236: 30 Bom LR 503: 52 Bom 360: 109 Ind Cas 734 (DB).

——S. 100 — The Commissioner of Kumaun cannot go into a question of fact as an appellate Court in a second appeal in face of the provisions of Ss. 100, 101 and 102 of the C. P. Code. AIR (Vol 14) 1927 All 524: 101 Ind Cas 695 (DB).

——S. 100 — An order on petition of appeal was as under: "The appeal being time-barred is not admitted".

Held, that the appeal should be held as dismisssed and the order is appealable as a decree. AIR (Vol 13) 1926 Cal 1105: 44 CLJ 44: 30 CWN 926: 98 Ind Cas 749 (DB).

——S. 100 — An appeal to the High Court under S. 142(3) is not a second appeal as contemplated by S. 100, C. P. Code, and the appeal is not restricted to questions of law only. AIR 1928 Cal 450: 47 CLJ 315: 32 CWN 378: 109 Ind Cas 618 (DB).

——S. 100 — No second appeal lies to the High Court from a decision of the District Judge under S. 16 of the Act (Bom Act VI of 1888) 16 Bom 408, Overruled. AIR (Vol 12) 1925 Bom 241: 49 Bom 442: 27 Bom LR 345: 87 Ind Cas 588 (FB).

——S. 100 — Where a case is decided ex parte the remedy open to the party affected by the decision is threefold; first he may apply for restoration of the case; secondly, he may apply for a review of judgment, and thirdly, he may appeal from the decree. Even though other remedies are available against an ex parte decision to the aggrieved party second appeal can be preferred against that decision under S. 100(2). AIR (Vol 12) 1925 Cal 497: 80 Ind Cas 14 (DB).

——S. 100 — On second appeal, though the High Court has, generally speaking, no right to look at the evidence to decide whether the remaining evidence, after exclusion of evidence erroneously admitted, is sufficient to warrant the finding of the Court below, the case may be disposed of by the Court without a remand where the lower Court has arrived as its conclusions upon other grounds. AIR (Vol 11) 1924 Cal 1042: 40 CLJ 39: 78 Ind Cas 219 (DB).

——S. 100 — Finding of fact of the High Court subject to limits prescribed by S. 100 of the C. P. Code.

The right of appeal to the High Court under S. 109-A of the B. T. Act is subject to S. 524 old Code of the C. P. Code of 1882 and can only be exercised upon the grounds therein mentioned. The High Court has therefore no jurisdiction under the sub-section to set aside the decree of the Dt. Judge upon the ground that he had applied the wrong standard of measurement to land of which the rent was in question. AIR (Vol 5) 1918 PC 92: 46 Cal 189: 23 CWN 345: 9 LW 552: 45 IA 188: 51 Ind Cas 760.

——S. 100 — Custom — Usage having the force of law.

The expression "usage having the force of law" in S. 100 (a) should ordinarily be confined to the usages of the country or of the community, the law merchant and usages referred to in S. 11 of Act (VIII of 1865). It is doubtful whether question as to private rights fall within the section AIR (Vol 5) 1918 Mad 1166: 40 Mad 1108: 5 LW 346: 32 MLJ 237: 21 MLT 411: 40 Ind Cas 516 (DB).

——S. 100 — Custom — Usage — Second appeal.

Under the section the usage must be in derogation of the law, and the question at issue should be not only whether such a usage exists but also whether it is a usage having the force of law. A decision about parties belonging to one system of law and not to another is not decision with regard to a "usage having the force of law" so as to be questioned in second apppeal under S. 100 of the Code, as a matter of law. AIR (Vol 4) 1917 Mad 255: (1917) MWN 98: 37 Ind Cas 879 (DB).

——S. 100 — Right of second appeal — Decision of District Court on appeal from Forest officer — Madras Forest Act (V of 1882), Ss. 10 and 16 — Second appeal to High Court if competent.

An objector to certain attestation proceeding put in a claim before the Forest Settlement Officer who registered the claim. There was an appeal to the District Court from the decision of the Forest Officer as provided by S. 10 of the Madras Forest Act. The claimant preferred a second appeal to the High Court. Held, that when the proceedings reached the Dt. Court, that court was appealed to as one of the ordinary courts of the country with regard to whose procedure, orders and decrees, the ordinary rules of the C. P. Code apply and that the appeal to the High Court was competent. The claim in such proceedings being the assertion of a legal right to possession of, and property in, land, it would require a specific statutory limitation to exclude the ordinary incidents of litigation such as the right of appeal. AIR (Vol 3) 1916 PC 21: 39 Mad 617: 43 IA 192: 31 MLJ 324: 20 CWN 1311: (1916) 2 MWN 224: 14 ALJ 1114: 20 MLT 435: 4 Lw 486: 18 Bom LR 1007: 25 CLJ 69: 35 Ind Cas 902.

(On appeal from (1910) 33 Mad 1: 20 MLJ 66: 7 MLT 128: 5 Ind Cas 882.)

——S. 100 — Second appeal — Maintainability of — Decision of revenue court — Madras Rent Recovery Act (VIII of 1865), Ss. 9, 69 and 76 — C. P. Code (VIII of 1859), S. 372 old Code.

Though there is no provision in the Rent Recovery Act (now Madras Estates Land Act) for appeals to the High Court from the decree of the District Judge on appeal from the Collector, still having regard to the general right of appeal from the decrees of the zilla and District Court given by S. 372 of the old C. P. Code of 1859 and S. 584 of the C. P. Code of 1882, a second appeal lies to the High Court. AIR (Vol 1) 1914 PC 87: 37 Mad 443: 41 IA 258: 16 MLT 262: (1914) MWN 695: 1 LW 779: 27 MLJ 451: 20 CLJ 375: 19 CWN 97: 16 Bom LR 853: 25 Ind Cas 305.

——S. 100 — Second appeal — Maintainability of — Madras Estates Land Act, S. 213 — Decree of a Deputy Collector under.

A decree of a Dy. Collector in a suit under S. 213 of the Act is open to second appeal in accordance with the provisions of the C. P. C. AIR (Vol 1) 1914 Mad 135: 38 Mad 655: 1 LW 89: 24 Ind Cas 754 (DB).

——S. 100 (S. 584 old Code) — Second appeal — Powers of a second appellate Court to deal with inference of fact or law.

In second appeal the High Court has power to consider whether the procedure adopted by an appellate Court in dealing with facts is proper or not, and whether the inference of fact or law derived by the Court from established facts is well founded or not. (1902) 6 CWN 185 (188) (DB).

62. Second appeal.

——S. 100 — Second appeal — Order of remand.

A second appeal is competent from an order remanding a case for rehearing. (1948) 52 CWN 671.

——S. 100 — Wrongful assumption of appellate jurisdiction — Decree not interfered with — No second appeal lies.

It cannot be said that when the lower Appellate Court has wrongly assumed an appellate jurisdiction but has declined to interfere with the trial Court's decree, any right of second appeal is conferred by that wrongful assumption of jurisdiction. AIR (Vol 30) 1943 Mad 185: 55 MLW 668:

(1942) 2 MLJ 568: 1942 MWN 824: ILR (1943) Mad 297: 207 Ind Cas 169 (DB).

——S. 100 — Suit by co-mortagagee for possession of half of mortgage land — Suit for jurisdiction valued at Rs. 15-3-6 — Second appeal by plaintiff sought to be justified on ground that value of property involved was Rs. 1,000.

A co-mortgagee instituted a suit for possession of half of the mortgaged land. The value of the suit for purposes of jurisdiction was Rs. 15-3-6 but the second appeal by the plaintiff was sought to be justified on the ground that the value of the property involved was Rs. 1,000, i. e., the amount of the original mortgage-money:

Held, that even if the mortagage-money was taken into consideration, the amount of the mortgage money in dispute was only Rs. 500 as the plaintiff was only claiming half interest in the mortgage. Hence no second appeal was maintainable. (The suit being a land suit involving an important question of law, the appeal was treated as an application for revision.) AIR (Vol 30) 1943 Pesh 1: 210 Ind Cas 198 (DB).

——S. 100 — Filing of incompetent cross-objection in first appeal — Effect of.

A party, who having a right of appeal from the decree of the trial Court does not prefer an appeal, cannot, by filing incompetent cross-objections in the first appeal by the other party, have a right of second appeal. AIR (Vol 30) 1943 Pesh 3: 206 Ind Cas 35 (DB).

——S. 100 — Competency — Lower Appellate Court entertaining incompetent appeal and modifying trial Court's order — Second appeal, if lies.

When a lower Appellate Court entertains an appeal which is not competent and modifies the decision of the trial Court, a second appeal will lie.

Quaere.— Whether a second appeal lies where the lower Appellate Court entertained an incompetent appeal and dismissed it. AIR (Vol 29) 1942 Mad 741: (1942) MWN 632: (1942) 2 MLJ 450: 206 Ind Cas 359.

——S. 100 — Second appeal lies where District Judge entertains incompetent appeal.

Per Dhavle, J.— If a District Judge entertains an appeal which does not lie to his Court, a second appeal lies against his decision. The reason for this is that the principle that a decree made without jurisdiction is reversible on appeal is involved by implication in S. 99, Civil P. C. AIR (Vol 29) 1942 Pat 1 (25): 8 CLT 53: 8 BR 361: 21 Pat 1: 198 Ind Cas 353 (FB); AIR (Vol 29) 1942 Pat 369: 23 PLT 342: 8 BR 838: 201 Ind Cas 786; AIR (Vol 28) 1941 Cal 441: 45 CWN 930: 197 Ind Cas 15 (Remedy is by way of second appeal and not by way of revision); AIR (Vol 26) 1939 All 22: (1938) ALJ 988: 1938 AWR 682: 179 Ind Cas 39; AIR (Vol 22) 1935 Lah 319 (1): 36 PLR 482; AIR (Vol 18) 1931 Lah 344 (1): 12 Lah 602: 32 PLR 863 : 33 PLR 224 : 134 Ind Cas 292 (DB). (Judgment of lower appellate court is 'coram non judice'); AIR (Vol 18) 1931 Lah 96: 32 PLR 293: 131 Ind Cas 141; AIR (Vol 12) 1925 Cal 1032: 85 Ind Cas 576: 30 CWN 63 (DB).

See however 63 Ind Cas 730 : 14 MLW 35 : AIR (Vol 8) 1921 Mad 612 : 41 MLJ 54 (DB). (Remedy is by way of revision and not appeal);

But see AIR (Vol 8) 1921 Lah 156: 62 Ind Cas 986: 3 LLJ 463.

——S. 100 — High Court in second appeal is entitled to come to a finding of fact where the lower Appellate Court has omitted to arrive at such a finding. AIR (Vol 27) 1940 All 349: (1940) ALJ 366: 1940 AWR (HC) 276: 189 Ind Cas 712 (DB).

——S. 100 —No second appeal lies from the order of the Appellate Court from the dismissal of an application to set aside a sale under O. 21, R. 89, Civil P. C. AIR (Vol 24) 1937 Rang 537: 174 Ind Cas 691.

——S. 100 — Distinction between second appeal and revision.

One distinction between a second appeal and a revision is that an error of law can form a ground for a second appeal, but in general an error of law cannot form a ground for a revision. AIR (Vol 23) 1936 All 868: (1936) ALJ 1235: 1936 AWR 984: 1936 RD 492: 166 Ind Cas 229.

——S. 100 — Per Curiam.— The High Court in second appeal cannot interfere with findings of fact unless they are based on a misconception of evidence or some mistake which has arisen in consideration of the evidence in the lower Court. The provisions of the Civil P. C. with regard to admission of second appeal in the High Court ought to be strictly enforced. AIR (Vol 21) 1934 Cal 633: 61 Cal 365: 152 Ind Cas 597.

——S. 100 — Appellate Court assuming jurisdiction.

Where the holder of a decree passed in a suit instituted in the Court of the Assistant Collector of Almora, Kumaon, applied for execution of the decree and the Assistant Collector rejected it, and he appealed to the District Judge and on the dismissal of the appeal, filed a second appeal in the High Court:

Held, that an application for execution of a decree passed in a suit instituted before April 1, 1926, was subject, as regards forum of appeal, to the rules in force before the Govt. Notification issued on April 1, 1926, and hence the decree-holder should have applied to the Deputy Commissioner from the order of the Assistant Collector dismissing his application for execution.

Held, also that a second appeal would lie to the High Court so far as the District Judge assumed a jurisdiction which he did not possess. AIR (Vol 20) 1933 All 403: (1933) ALJ 103: 147 Ind Cas 201.

——S. 100 — Appellate Court disallowing cross-objections — Appeals.

An appeal lies from the decree of an Appellate Court disallowing the cross-objections of the respondent. AIR (Vol 20) 1933 Lah 400: 149 Ind Cas 520 (2) (DB).

——S. 100 — Competency of, where first appeal was incompetent.

If the District Judge entertains an appeal which does not lie to his Court, a second appeal lies against his decision and the competency of the second appeal does not depend upon the view taken by the lower Appellate Court with regard to the competency of the appeal before it. AIR (Vol 20) 1933 Mad 475: 147 Ind Cas 494 (DB).

——S. 100 — Rent suit — Appeal by tenants — Death of some—Entire appeal abates—But appeal allowed by mistake — Held, second appeal was maintainable. ' AIR (Vol 20) 1933 Pat 607: 14 PLT 603: 148 Ind Cas 1087.

——S. 100 — No second appeal lies from an order setting aside a transfer under Section 54, Prov. Insol. Act and a revision lies only under the 1st proviso to Section 75. AIR (Vol 19) 1932 Lah 321: 33 PLR 255: 137 Ind Cas 55.

——S. 100 — Lower appellate Court setting aside preliminary decree of trial Court but not actually passing decree — Second appeal lies. AIR (Vol 17) 1930 Lah 125: 31 PLR 386: 124 Ind Cas 676.

——S. 100 — Where an appeal is decided ex

parte by the lower Appellate Court the High Court has jurisdiction in second appeal to reverse the Appellate Court's decree on the ground that he was wrong in proceeding to decide the appeal ex parte. AIR (Vol 16) 1929 Lah 294: 117 Ind Cas 229 (DB).

——S. 100 — Where a plaint was headed "Suit valued at Rs. 86 for enforcing an award" and ad velorem Court-fees had been paid accordingly, though at the conclusion of the plaint there was a prayer that the award may be ordered to be filed, but the prayer further asked that a decree be passed in accordance with its terms.

Held, that there was a suit for the enforcement of the award and not an application to file an award before the trial Judge and that a second appeal did therefore lie. AIR (Vol 16) 1929 Rang 166: 7 Rang 136: 117 Ind Cas 574.

——S. 100 — If the parties disputing the sale are parties to the suit they approach the Court under Section 47 which decides the forum. The Court then proceeds according to its statutory powers. It may exercise its inherent jurisdiction under Section 151, or it may exercise its power under Order 21, Rule 90. There is no second appeal when a Court approached under Section 47 acts under Order 21, Rule 90. But when it is so approached and exercises its inherent power under Section 151 there is a second appeal. AIR (Vol 11) 1924 Mad 778: 47 MLJ 549: 84 Ind Cas 975: 1924 MWN 842.

——S. 100 — The High Court cannot in second appeal entertain an application for a review of judgment based on the ground that since the disposal of the appeal documentary evidence has been discovered which, if sufficiently proved, would have led the Court below to come to a different finding, although had such evidence been discovered before the disposal of the appeal the Court might have allowed the appellant to withdraw the appeal with a view to apply to the lower appellate Court for a review of judgment on the ground of the discovery of fresh evidence. The question whether any particular record has been rightly or wrongly framed is certainly a question of fact and not a question of law. AIR (Vol 10) 1923 All 541: 73 Ind Cas 1016: 45 All 458: 21 ALJ 377: 4 LRA Civ 416 (DB).

——S. 100 (S. 584 old Code) — No appeal to lower Court — Semble.

There can be no second appeal from an order passed by the lower Court on an appeal, when no appeal itself lies to it. (1904) 6 Bom LR 462: 28 B 458 (460) also (1902) 6 CWN 614 (615) (DB).

——S. 100 (S. 584 old Code) — Second appeal— Decree as per award — Misconduct of arbitrator, alleged — Appeal, competency of — Second appeal against appellate decision.

Where a decree passed in accordance with an award is attacked only on the ground of misconduct of arbitrators, no appeal lies, and consequently no second appeal. (1902) 6 Cal WN 614 (615): 6 CWN 614 (DB).

——S. 100 (S. 584 old Code) — Appeal.

A second appeal lies from an order of the lower appellate Court erroneously dismissing an appeal on the ground that no appeal lay, provided a second appeal is otherwise entertainable, having regard to the nature of the original suit. (1904) 8 CWN 64 (65).

——S. 100 (S. 584 old Code) — Second Appeal — Appeal allowed without jurisdiction — Civil Procedure Code, S. 622 — Dismissal for default.

Where an appellate Court reversed and remanded a case when in law no appeal lay, no second appeal will lie, and the High Court cannot set aside the reversing judgment without a revision petition to it under Section 622, C. P. C. (1902) 29 C 60 (62) (DB).

63. State of mind.

——S. 100 — Question as to state of mind.

The question of the state of mind of the parties is, of course, a question of fact. Therefore, where the Judge comes to the conclusion that the parties intended to deprive the Solicitor of his costs, that conclusion is a finding of fact which ought not to be disturbed by the High Court unless it could be demonstrated to its satisfaction that there was really no evidence at all on which the Judge could have so found. AIR (Vol 22) 1935 Cal. 168: 38 CWN 1031: 61 Cal 1005: 154 Ind Cas 781 (DB).

——S. 100 — Execution of document.

A finding as to the unsoundness of mind of a person at the time execution of a document is one of fact. AIR (Vol 20) 1933 Lah 458: 34 PLR 297: 144 Ind Cas 741.

——S. 100 — Finding of fact — State of mind.

A finding as to the state of mind of a person when he performed a certain act is ordinarily a finding of fact. The High Court on second appeal, cannot go behind the finding that a deed of gift was executed in immediate apprehension of death unless it is entirely unsupported by evidence. (1911) 8 ALJ 1154: 12 Ind Cas 730.

64. Status.

——S. 100 — Mixed question of fact and law — Question if Hindu family is joint.

Where in considering the question whether a Hindu family is joint or separate the appellate court has fallen into an error in the proper appreciation of some of the material documentary evidence in the case as well as in regard to the legal effect of certain important pieces of evidence and proved facts, its finding is open to reconsideration by the High Court in second appeal, as there are mixed questions of fact and law. AIR (Vol 33) 1946 Pat 278: 222 Ind Cas 604: 12 BR 298 (DB).

—— S. 100 — Finding of fact — Finding as to disruption of joint status.

A finding come to by the Court of appeal below that though there was no partition by metes and bounds, there was a complete cessor of commensality between the brothers and that they were in separate possession as tenants-in-common is essentially a finding of fact and cannot be reopened in second appeal. AIR (Vol 33) 1946 Pat 231: 25 Pat 1: 221 Ind Cas 683: 12 BR 218 (DB).

——S. 100 — Voter.

The question whether a person is a qualified voter is one of fact and a finding thereon cannot be disturbed in second appeal. AIR (Vol 24) 1937 Cal 727: 65 CLJ 358: 173 Ind Cas 275.

——S. 100 — Question whether ancestors of a party were inferior holders or tenants, if one of law.

The question whether the plaintiff's ancestors were "inferior holders" or "tenants" or occupied some other position, is purely one of law and can be raised for the first time in second appeal. AIR (Vol 23) 1936 Nag 29: 161 Ind Cas 784.

——S. 100 — Pardanashin.

A finding that a woman is not 'pardanashin' is a finding of fact and cannot be disturbed in second appeal. AIR (Vol 20) 1933 Lah 451: 34 PLR 304: 144 Ind Cas 720.

——S. 100 — Question whether grant was made to one not holding kudivaram — Decision necessary to see whether civil suit lies — Question being purely of fact and cannot be re-agitated in second appeal or revision. AIR (Vol 16) 1929 Mad 259: 116 Ind Cas 133.

——S. 100 — The finding of the first Court of appeal on the question of the plaintiff's status is a

finding of fact which cannot be attacked in second appeal. (1928) 109 Ind Cas 458: 29 PLR 162.

——S. 100 — Question whether a certain person is a hereditary and exclusive joshi of a village is a question of fact. AIR (Vol 15) 1928 Nag 150: 107 Ind Cas 911.

——S. 100 — Quaere.

Where questions determining status of tenure-holders are themselves questions of law. AIR (Vol 14) 1927 Pat 209: 6 Pat 698: 105 Ind Cas 633: 9 PLT 72 (FB).

——S. 100 — Mixed question of law and fact — Hindu family — Status.

Question as to jointness of Hindu family may be a mixed question of law and fact. AIR (Vol 13) 1926 Nag 389: 95 Ind Cas 183.

——S. 100 — Hindu Family.

The question whether a Hindu family is joint or separate is not a pure question of fact but is a mixed question of law and fact, and it is open to a High Court to look into evidence to find out how far the evidence let in by the parties as to the status of the family is legal evidence and justifies the conclusions arrived at by the lower Court. AIR (Vol 12) 1925 Nag 284: 86 Ind Cas 505.

——S. 100 — Question of status of a party is one of fact. AIR (Vol 10) 1923 Lah 626: 80 Ind Cas 264 (DB).

——S. 100 — It is not necessary for a Court of first appeal to refer in detail to every piece of evidence on the record. So long as its judgment leaves no doubt that all the available evidence has been given due weight to, its findings on questions of fact cannot be attacked in second appeal. Whether or not there has been a separation of a joint Hindu family is a question of fact. AIR (Vol 9) 1922 Lah 140: 65 Ind Cas 475: 16 PWR 1922 (DB).

——S. 100 — Question whether persons form members of Hindu joint family, is a question of fact — Hindu Law — Joint family. AIR (Vol 8) 1921 Lah 267: 67 Ind Cas 789: 3 LLJ 552 (DB).

——S. 100 — Finding of fact — Evidence when open to examination.

It is not necessary in law for Appellate Courts such as the District Judge to refer in detail to every piece of evidence on the record. So long as the judgment leaves no doubt that all the available evidence has been given due weight to, his findings on questions of fact cannot be attacked in second appeal. Whether or not there had been a complete separation, is a question of fact. (1919) 1 Lah LJ 72 (DB).

——S. 100 — Nature of tenancy — Mistake as to area.

A finding as to the status of a tenant is a finding of fact and should not be interfered with in second appeal except on the ground of some clear error of law. A mistake as to area is not a mistake of law. AIR (Vol 5) 1918 Cal 122: 46 Ind cas 351 (DB).

——S. 100 — Nature of tenancy — Question of law.

Question of status of a tenant is a question of law. AIR (Vol 3) 1916 Pat 417: 1 Pat LJ 157: 35 Ind Cas 544.

65. Sufficiency of evidence.

——S. 100 — Whether instances of burial proved are adequate to infer dedication is question of fact.

Whether instances of burial proved in any particular cases are "adequate in character, number and extent" to justify an inference of dedication is a question of pure fact. AIR (Vol 27) 1940 Sind 43: ILR (1940) Kar 174: 187 Ind Cas 227 (DB).

——S. 100 — Question whether description is sufficient to identify property is question of fact and cannot be raised in second appeal for the first time. AIR (Vol 17) 1930 Cal 235: 33 CWN 1211: 125 Ind Cas 603 (DB).

——S. 100 — A finding by a Judge as to alteration of a figure in a bahi which is based solely on his personal observation and not upon evidence by any expert or other evidence on record being based on no evidence is not final. AIR (Vol 17) 1930 Lah 336: 31 PLR 109.

——S. 100 — Finding of fact though erroneous cannot be disturbed if it is supported by evidence on record.

An erroneous finding of fact is a different thing from an order or defect in procedure. AIR (Vol 16) 1929 PC 190: 117 Ind Cas 1: 25 NLR 121: 30 MLW 443: 50 CLJ 197: 31 Bom LR 883: 56 IA 280: 1929 MWN 452: 33 CWN 893: 1929 ALJ 780: 57 MLJ 205.

——S. 100 — A finding of fact, based on mis-direction of law, can be reversed. The nature & quantum of evidence required to prove that what was once grove land has ceased to retain that character is a question of law. When a Court has misdirected itself on this point, it is impossible to maintain its finding as a finding of fact. AIR (Vol 16) 1929 All 567: 117 Ind Cas 616: 10 LRA Rev. 272.

——S. 100 — When a person gets a decree, he is entitled to execute that decree against any property of the judgment-debtor and if the judgment-debtor alienates some of his property, he restricts the facility of the decree-holder to execute that decree. It is a question of fact whether his other property is of such an amount and so easily available for satisfaction of the decree as to render the disposal by the judgment-debtor of the particular property immaterial. AIR (Vol 16) 1929 All 458: 116 Ind Cas 815.

——S. 100 — High Court cannot set aside decision of fact in second appeal, nor can it question sufficiency of evidence. AIR (Vol 16) 1929 Pat 98: 10 PLT 10: 115 Ind Cas 674 (DB).

——S. 100 — Erroneous finding of fact based on proper evidence cannot be a basis of second appeal.

An erroneous finding of fact, however gross or inexcusable the error may be, cannot be made the basis of a second appeal, provided the fact found is relevant and finding is based on evidence proper for consideration. AIR (Vol 15) 1928 Nag 329: 114 Ind Cas 454.

——S. 100 — Finding of fact cannot be attacked on ground of error or insufficiency of evidence. AIR (Vol 15) 1928 Oudh 353: 5 OWN 510: 110 Ind Cas 531 (DB).

——S. 100 — A finding of fact cannot be attacked in second appeal on the ground of insufficiency of evidence or on the ground of error though the error is gross and inexcusable. (1928) 111 Ind Cas 376: 12 RD 236.

——S. 100 — Question of fact decided on insufficient evidence gives rise to question of law. AIR (Vol 15) 1928 Rang 152: 6 Rang 175: 110 Ind Cas 601 (DB).

——S. 100 — Whether there was undue influence or not is a question of fact — If evidence is not sufficient to justify finding, Hi h Court will interfere. AIR (Vol 14) 1927 Mad 255: 38 MLT 1: 99 Ind Cas 571: 25 MLW 550: 52 MLJ 20.

——S. 100 — There is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however inexcusable the error may seem to be. Where there is no error or defect in procedure the finding of the first Appellate Court upon a question of fact is final if that Court had before it evidence proper for its consideration in support of the finding. AIR (Vol 13) 1926 Oudh 257: 91 Ind Cas 1046: 13 OLJ 176.

——S. 100 — In second appeal the High Court is not entitled to go behind the findings of fact of

the Lower Appellate Court unless such findings result from the misconstruction of a document of title or the misapplication of law or procedure. Such findings cannot be assailed however gross and inexcusable the error therein if the lower Appellate Court had before it evidence proper for its consideration in support of its finding. AIR (Vol 13) 1926 Pat 9: 90 Ind Cas 895: 1925 PHCC 281: 6 PLT 787 (DB).

——S. 100 — It is not proper for a Court in second appeal to lay down whether a piece of evidence is or is not sufficient to rebut the presumption raised under S. 50, that being a question of fact. AIR (Vol 12) 1925 Cal 1133: 88 Ind Cas 584 (DB).

——S. 100 — Grossly erroneous finding of fact — No second appeal lies in absence of error in procedure, if lower Court had evidence before it. AIR (Vol 12) 1925 Lah 150: 78 Ind Cas 36

——S. 100 — Meagreness or weakness of evidence is no ground for interference. AIR (Vol 12) 1925 Nag 271: 8 NLJ 29: 86 Ind Cas 847.

——S. 100 — Finding of fact supported by evidence cannot be questioned in second appeal, however erroneous it may be. AIR (Vol 12) 1925 Nag 111: 80 Ind Cas 885.

——S. 100 — Sufficiency of rebutting evidence is a question of fact. AIR (Vol 11) 1924 All 146: 74 Ind Cas 297 (DB).

——S. 100 — Finding based on opinion of expert is not always a finding of fact. The opinions of experts are relevant but not conclusive as to the matters to which they relate; and where they materially differ their value and sufficiency may legitimately form the subject of consideration and scrutiny despite the acceptance of any of them by one Court or another. AIR (Vol 11) 1924 All 116: 75 Ind Cas 502: 21 ALJ 811: 4 LRA Civ. 561.

——S. 100 — Absence of evidence is question of law. AIR (Vol 11) 1924 Pat 687: 75 Ind Cas 928 (DB).

——S. 100 — Finding of the fact cannot be attacked on ground of insufficiency of evidence. AIR (Vol 10) 1923 Cal 279: 68 Ind Cas 500 (DB).

——S. 100 — Sufficiency of evidence.

Finding of fact based on some evidence cannot be questioned in second appeal. (1917) 4 OLJ 456: 42 Ind Cas 53.

——S. 100 — Sufficiency of evidence.

In second appeal the Court cannot go into the question of sufficiency of evidence. (1911) 9 Ind Cas 427 (Oudh).

66. Sustainability.

See also N. 62.

——S. 100 — When maintainable.

Appeal to District Court from order of Collector under S. 74, Madras Estates Land Act — Collector's order affirmed — No further appeal lies either under Madras Estates Land Act or under S. 100, Civil P. C. Before S. 100 can be held to apply, it is incumbent upon the appellants to show that the orders passed by the District Court on appeals amounted to decrees. An order does not become a decree merely because it happens to be an order which is final so far as the Court passing it is concerned. AIR (V 29) 1942 Mad 73: ILR (1942) Mad 236 : 54 MLW 382 : 1941 MWN 855 : (1941) 2 MLJ 529 : 201 Ind Cas 97.

——Ss. 100, 115, O. 43, R. 1 (a), O. 7, R. 10 — Order returning plaint under O. 7, R. 10 for presentation to proper Court — Appeal against, dismissed — No second appeal lies.

No second appeal lies against an order dismissing an appeal against an order returning a plaint for presentation to the proper Court under R. 10 of O. 7 of the Civil P. C. But a revision lies against such an order. AIR (V 29) 1942 Oudh 480 : 1942 OWN 494 : 1942 AWR 322 (1) : 202 Ind Cas 378.

——S. 100 — Necessary party impleaded in suit but not in first appeal — Right of such party to go in second appeal.

A necessary party who is impleaded in the suit, but not impleaded in first appeal, has a right of second appeal as he is interested in the right decision. An appeal should be dismissed if such a party is not impleaded. AIR (V 25) 1938 Lah 70 : 177 Ind Cas 632.

——S. 100 — Mere dismissal of an appeal summarily under O. 41, R. 11, Civil P. C. does not necessarily mean that no second appeal lies to High Court. Where the lower Appellate Court has not dismissed the appeal summarily without giving any reasons but has, in effect, written a judgment, a second appeal is necessarily maintainable if the other requirements of S. 100 are satisfied. AIR (Vol 25) 1938 Pat 330 : 19 PLT 305 : 4 BR 389 : 174 Ind Cas 159 (DB).

——S. 100 — Party has right of appeal to High Court but not to any particular Bench of particular constitution.

Under S. 100, a party has a right of appeal to the High Court from the decree passed in appeal by the Subordinate Judge on the grounds mentioned therein. The right is to appeal to the High Court and not to any particular Bench of the High Court. Under S. 108 (1), Govt. of India Act, the Allahabad High Court has made its own rules providing for the exercise of its appellate jurisdiction by one or more Judges or by Division Courts constituted of two or more Judges. This rule is exclusively for regulating the procedure in the High Court as regards the constitution of Benches. A party has no vested right in such a constitution. If by an amendment of the rules the constitution of the Benches is altered, the appeal still lies to the High Court and the appellant cannot claim that the appeal must be heard by a Bench as constituted before the rule was amended. AIR (V 24) 1937 All 19 : (1936) ALJ 1046 : 1936 AWR 975 (1) : ILR (1937) All 191 : 166 Ind Cas 615 (1) (DB).

——S. 100 — An application under O. 21, R. 90, rejected — No second appeal lies. AIR (V 23) 1936 All 763 : (1936) ALJ 959 : 9 RA 292 : 1936 AWR 869 : 165 Ind Cas 654 (DB).

——S. 100 — Absence of clear finding that funds left with widow were insufficient.

Where in a suit to set aside an alienation made by a Hindu widow to raise money for a litigation, there is some evidence on the record to show what the funds in the hands of the widow were, when her husband died, but the Judge has not given a clear finding that the funds left with her when the litigation started were insufficient to meet the necessary expenses to be incurred on it, it cannot be said that the finding is one of fact and cannot be attacked in second appeal. AIR (V 23) 1936 Lah 98 : 161 Ind Cas 922.

——S. 100 — No dispute about status of tenant or enhancibility of rent or area — Dispute only about amount of rent — No second appeal lies. AIR (V 22) 1935 Cal 278 : 60 CLJ 453 : 155 Ind Cas 812.

——S. 100 — Finding based on surmise.

A finding based wholly upon surmise without any positive evidence to support it can be set aside. AIR (V 22) 1935 Mad 190 : (1935) MWN 193 : 41 MLW 318 : 68 MLJ 648 : 157 Ind Cas 1040 (DB).

——S. 100 — Maintainability of appeal in case District Judge had no jurisdiction.

Where a District Judge entertained an appeal, in spite of the fact that he had no jurisdiction to do it, and passed a decree from which a second appeal was open to the High Court:

Held, that the second appeal was not incompetent. AIR (V 21) 1934 All 825 : 18 RD 222 : (1934) ALJ 708 : 3 AWR 674 : 152 Ind Cas 115 (DB).

——**Ss. 100, 47, O. 21, R. 90 — Application merely to set aside sale on account of irregularities — Second appeal, if lies.**

No second appeal lies from an application merely to set aside a sale on account of irregularities even though the application is headed under S. 47 and O. 21, R. 90. AIR (V 21) 1934 Pat 627 : 1 BR 100 : 16 PLT 16 : 152 Ind Cas 776 (DB).

——S. 100 — Where a plaint presented to the first class Subordinate Judge was returned for presentation to the proper court and on appeal the District Judge affirmed the order,

Held, that a second appeal was not maintainable against the appellate order. (1930) 31 Pun LR 178.

——S. 100 — Misstatement not affecting the main points is no ground for interference. AIR (V 14) 1927 Mad 1181 : 105 Ind Cas 375.

——S. 100 — Where instead of passing first an order directing the award to be filed and then passing a decree in terms of it, the Court passed a composite order decreeing the plaintiff's claim in terms of it:

Held, that even if the order of the Court were taken to be an order recording a compromise, an appeal lies from that order and that such appeal must be treated as an appeal from an order, with the result that no second appeal lies. (1926) 92 Ind Cas 600 (All) (DB).

——S. 100 — Where the decision in favour of a party is based on a finding which is dead against the case set up by him, it is contrary to law and second appeal lies although the finding is one of fact. AIR (V 13) 1926 Lah 535 : 95 Ind Cas 298.

——S. 100 — Scope — Question for consideration is not weight of evidence but whether there is any evidence for the finding. AIR (V 9) 1922 Pat 384 : 65 Ind Cas 175 : 3 Pat LT 343 : 1 Pat 246 (DB).

——**S. 100 — Sustainability — Decree of lower Appellate Court set aside on review.**

Where an appellant presented a second appeal pending an application for review to the lower Appellate Court and subsequently the lower appellate court set aside its decree:

Held, that as the decree appealed from had ceased to exist, the second appeal could not be heard. AIR (V 7) 1920 Lah 18: 166 PR 1919 : 55 Ind Cas 763.

——**S. 100 — Second appeal — Maintainability of — Order rejecting cross-objection.**

A second appeal is not maintainable against an order rejecting cross-objections that the courts might interfere in revision. AIR (V 5) 1918 Lah 201 : 20 PR 1918 : 44 Ind Cas 812.

——**S. 100 — Second appeal — Maintainability of — Decree dismissing suit but granting permission to withdraw with liberty.**

Where the lower Appellate Court confirms the dismissal of a suit by the first court but grants permission to the plaintiff to bring a fresh suit on the same cause of action and the defendant appeals against so much of the appellate decree as is favourable to the plaintiff.

Held, that the appeal cannot be treated as an appeal from an order under O. 23, R. 1 but must be treated as one against that portion of the decree as is favourable to the plaintiff, and is, therefore, maintainable. AIR (V 4) 1917 All 134 : 37 Ind Cas 940 (DB).

——**S. 100 — Finding of fact — No evidence.**

A decision that there is no evidence to support a finding is a decision of law, on which the Privy Council will interfere with the findings of fact of the Courts below. AIR (V 1) 1914 PC 67 : 41 Cal 972 : 41 IA 910 : 1 LW 1050 : 27 MLJ 80 : (1914) MWN 462 : 16 MLT 6 : 18 CWN 817 : 19 CLJ 484 : 16 Bom LR 400 : 12 ALJ 774: 23 Ind Cas 637.

——**S. 100 — Second appeal — Maintainability of — Vinchur Court's decision.**

A special appeal lies to the Bombay High Court from the decree of the Civil Judge at Vinchur on grounds specified in S. 100 of the C. P. C. AIR (V 1) 1914 Bom 30 : 38 Bom 340 : 16 Bom LR 75 : 23 Ind Cas 617 (DB).

67. Title.

——**S. 100 — Question of law — Interpretation of khasra.**

In cases in which the only document of title is the 'khasra', recording the incidents of a tenure, it is the 'khasra' which would serve the purpose of a deed of title the interpretation of which would necessarily be a question of law. AIR (V 36) 1949 All 493 : 1949 AWR 496 : 1950 ALJ 21.

——**S. 100 — Question of law or fact — Interpretation of Record of Rights.**

Where the Record of Rights is relied on by both the Courts below as the only evidence of the status of the defendants and the parties also relied on them as an instrument of title, the interpretation of the Record of Rights is a question of law and it can be gone into in second appeal. (1949) 53 CWN (1 DR) 32.

——**S. 100 — Finding of fact — Question as to inquiry by transferee into title of transferor — Application of S. 41, Tranfer of Property Act — Power of High Court in second appeal to go into question.**

The question whether a particular section of an Act applies to the facts as found or not is a question of law. The question whether a transferee did or did not do any act to ascertain the power of the transferor, so as to avail himself of the benefit of S. 41, Transfer of Property Act, is one of fact, but whether from that finding it can be said that reasonable and sufficient inquiry was made by the transferee so as to attract the application of S. 41 is a question of law. It is therefore open to the High Court in second appeal to accept the finding of the lower appellate Court as to what the transferee did to inquire into the title of the transferor and then proceed to see whether that inquiry was sufficient to attract the application of S. 41. AIR (V 34) 1947 Bom 49 : 48 Bom LR 586 : ILR (1946) Bom 984 : 229 Ind Cas 227.

——**S. 100 — Question of law.**

Decision on the question of nature of title involves a question of law. AIR (V 32) 1945 PC 165: 72 IA 211: 53 MLW 500: (1945) 2 MLJ 352: 1945 MWN 637.

——**S. 100 — Finding that plaintiff failed to prove title by adverse possession.**

A finding that the plaintiffs have failed to establish proprietary title to the suit land by adverse possession is a finding of fact. AIR (V 29) 1942 All 221 : (1942) ALJ 375 : ILR (1942) All 667 : 1942 AWR 107 & 175 : 201 Ind Cas 707 (FB).

——S. 100—Finding that defendant had not openly asserted title is one of fact — Whether admitted facts constitute assertion of title is question of law. AIR (V 29) 1942 Mad 725 : (1942) 2 MLJ 415 : 55 MLW 614 : 1942 MWN 803 : 205 Ind Cas 67.

——**S. 100 — Deed document of title and foundation of suit.**

Where a deed is the document of title in the case and is the foundation of the plaintiff's suit, the construction of such a document is a question of law which can be raised in second appeal. AIR (V 27) 1940 Lah 486 : 42 PLR 660 : ILR (1941) Lah 601 : 193 Ind Cas 789.

——S. 100 — Finding on question of title.
The finding of the lower Appellate Court on the question of title cannot be successfully challenged in second appeal. AIR (V 23) 1936 Cal 245 : 40 CWN 758 : 63 CLJ 591 : 162 Ind Cas 522 (DB).
——S. 100 — Document of title — Construction.
The meaning of documents has been held in some cases to be a question of fact, but the construction of a document of title is a question of law or, at any rate, of mixed fact and law, and the High Court is bound to go into the matter. AIR (V 23) 1936 Pat 287 : 2 BR 514 : 162 Ind Cas 838.
——S. 100 — Title based on sale-deed.
Where a person bases his title on a sale-deed, the interpretation of it is a question of law. AIR (V 22) 1935 Lah 857 : 159 Ind Cas 861.
——S. 100 — Natural guardian's power to alienate minor's property — Question, if guardian could not convey valid title.
Under Hindu Law, a natural guardian can alienate the property of the minor for necessity or for the benefit of the estate. Consequently, the question whether the guardian could not convey a valid title is a question of mixed law and fact and cannot be raised for the first time in second appeal. AIR (V 21) 1934 Lah 329 : 35 PLR 278 : 147 Ind Cas 1144 (1).
——S. 100 — The determination of the intention of the parties is a question of fact but if the sole evidence to decide it is a document of title, then a wrong interpretation of that document is a question of law on which a second appeal lies. AIR (V 21) 1934 Lah 193 : 36 PLR 98 : 149 Ind Cas 1016.
——S. 100 — Document of title.
Interpretation of a document of title is a question of law and a second appeal is competent. AIR (V 21) 1934 Lah 35 : 149 Ind Cas 934.
——S. 100 — The question of interpretation of the terms of a document of title is one of law and is open to challenge in second appeal. AIR (V 16) 1929 Lah 38 : 115 Ind Cas 77 (DB).
——S. 100 — Construction of a title deed is a question of law. AIR (V 13) 1926 Pat 49 : 88 Ind Cas 820.
——S. 100 — Companies Act (VII of 1913), S. 38 — Question of title need not be decided but if decided appeal will lie. AIR (V 9) 1922 All 258 : 65 Ind Cas 291 : 44 All 151 : 19 ALJ 937 (DB).
——S. 100 — Adverse possession — Question of law.
The question of adverse possession is a mixed question of fact and law. Whether a defendant did act in a particular manner is a question of fact but when the Court is called upon to decide the true legal effect of that act upon the title of the plaintiffs the question is a question of law. AIR (Vol 5) 1918 Cal 68: 29 CLJ 241: 51 Ind Cas 123 (DB).
——S. 100 — Adverse possession — Hindu widow — Title — Finding of fact.
The question of widow's acquisition of a prescriptive title and the extent of the title acquired is one of fact. (1911) 1 MWN 314 : 9 MLT 445 : 10 Ind Cas 63 (DB).

68. Waiver.

——S. 100 — Plea of collusion.
The plaintiff made no mention in the plaint of the previous litigation and a compromise decree passed in it. Even after the defendant, in her 'jawab-i-dawa', had specifically pleaded the compromise and given full details of the litigation, the plaintiff, in her replication, did not allege that the compromise decree was collusive or not binding on her:
Held, that in these circumstances, the plaintiff could not in appeal be allowed to contend that the litigation, and the compromise decree which followed, were collusive. AIR (V 23) 1941 Lah 286 : 43 PLR 357 : 196 Ind Cas 177 (DB).
——Ss. 100, 101 — Section 101 restricts grounds of second appeal to those mentioned in S. 100. AIR (V 26) 1939 Rang 59 : 179 Ind Cas 946 (DB).
——S. 100 — Suit to set aside a transaction — Trial Court upholding transaction to some extent — Plaintiffs not appealing to District Judge — Whether plaintiffs can agitate the point in second appeal.
Where the plaintiffs have not appealed to the District Judge against the decree of the trial Court upholding to a certain extent a transaction which they sought to set aside, it is not open to them to reagitate that point in second appeal. AIR (V 21) 1934 Lah 598 : 148 Ind Cas 1091 (DB).
——S. 100 — Contention given up in lower appellate Court cannot be raised in second appeal. AIR (V 13) 1926 Nag 160 : 89 Ind Cas 18.
——S. 100 — Point adumbrated in plaint but no issue raised nor evidence led — Point cannot be raised. AIR (V 12) 1925 Cal 1184 : 88 Ind Cas 477 (DB).
——S. 100 — Question of law dealing with the admissibility and the legal effect of evidence will not as a general rule be entertained in second appeal in the High Court if they have not been taken at least at the stage of the first appeal in the court below. AIR (V 11) 1924 All 845 : 80 Ind Cas 874 : 46 All 815 : 22 ALJ 761 : 5 LR A Civ 536 (DB).
——S. 100 — Questions of law dealing with the admissibility and the legal effect of evidence will not as a general rule be entertained in second appeal if they have not been taken at least at the stage of first appeal. AIR (Vol 11) 1924 All 709: 78 Ind Cas 221: 22 ALJ 153: 5 LRA Civ 44 (DB).
——S. 100 — Where probably advisedly a plea was given up in the first Court by the party, he cannot be allowed to set up the plea in the Court of second appeal AIR (V 10) 1923 Lah 252 : 79 Ind Cas 462 : 5 Lah LJ 14 (DB).
——S. 100 — The question whether there is a waiver in a particular case is a question of fact and the finding on that question cannot be challenged in second appeal. AIR (V 7) 1920 Sind 25: 59 Ind Cas 607 : 14 SLR 128.
——S. 100 — Waiver — Question of fact.
The question of waiver is a mixed question of law and fact; the question of fact is whether circumstances exist from which waiver may be inferred and the question of law is whether from the facts proved waiver can be inferred. The terms of the bond and the conduct of the creditor may be taken into consideration in deciding whether there has been waiver. AIR (V 4) 1917 Mad 47 : 5 LW 514: 38 Ind Cas 302.
——S. 100 — Waiver — Law or fact.
Waiver is primarily and in most cases an inference from facts though in certain classes of cases this inference is looked on as an inference of law. (1913) 37 Bom 480 : 15 Bom LR 382 : 19 Ind Cas 894 (DB).
——S. 100 — Waiver — Mixed question of law and fact.
The Court may, even in second appeal hold that there had been a waiver as it is a mixed question of law and fact. (1911) 15 CWN 10 : 13 CLJ 206 : 6 Ind Cas 138 (DB).
——S. 100 — Mixed question of law and fact.
The question of waiver is a mixed question of law and fact and depends upon the circumstances of each case. Whether certain circumstances, from which a waiver is inferred exist or not, may

be a question of fact; whether when the existence of such circumstances has been established they are sufficient to justify an inference of a waiver is a question of law. (1907) 11 Cal WN 848 (853) : 6 Cal LJ 62 (DB).

——S. 102.

1. "Any suit — Cognizable by the Courts of Small Causes".
2. Appeal from order of remand.
3. Appeal from order of review.
4. Effect of trying small cause suits as ordinary suits.
5. Other cases.
6. Scope.
7. Suits for accounts.
8. Suits for contribution.
9. Suits for damages.
10. Suits for declaration.
11. Execution proceedings.

See also Provincial Small Cause Courts Act, S. 27.

12. Suits for maintenance.
13. Suits relating to marriage.
14. Suits for profits.
15. Suits for money.
16. Suits for property.
17. Suits for rent.
18. Suits for specific performance of contract.
19. Suits for title.
20. Suits relating to trusts.
21. Revision.

1. "Any suit — Cognizable by the Courts of Small Causes".

——S. 102 — Suit of the nature of Small Causes.

Where in an execution of a decree obtained in a suit of the nature cognizable by a Small Causes Court, where the amount of the value of the subject-matter of the original suit does not exceed Rs. 500, an order is passed, no second appeal is maintainable. AIR (V 28) 1941 Oudh 101 : 1940 OWN 1118 : 1940 AWR 444 : 191 Ind Cas 227.

——S. 102 — Right of second appeal — Criterion to determine.

It is the nature of the suit and not the Court in which the suit is tried that determines the right of second appeal conferred upon a party. Section 102, Civil P. C., contemplates a suit of the nature cognizable by a Court of Small Causes irrespective of what defence is put up in the case. AIR (V 24) 1937 Oudh 244 : 1937 OWN 263 : 13 Luck 204 : 167 Ind Cas 557.

——S. 102 — "Any suit of the nature cognizable by Courts of Small Causes", meaning of.

The words "any suit of the nature cognizable by Courts of Small Causes" in S. 102 of the Civil P. C., indicate and mean any suit in which the claim is cognizable by Courts of Small Causes as such. AIR (V 22) 1935 Rang 386 : 13 Rang 633 : 158 Ind Cas 804 (FB).

——S. 102 — Criterion — Nature of suit — Value.

Where the nature of the suit as disclosed by the plaint was clearly one which made the suit cognizable by the Court of Small Causes and the value of the subject-matter of that suit was below Rs. 500, the appeal was barred under S. 102, C. P. Code. (1928) 108 Ind Cas 898 : 5 OWN 240.

——S. 102 — Transfer of suit under S. 23 of Provincial Small Cause Courts Act.

The transfer of a suit under S. 23 does not and cannot change its nature and it is the nature of the suit which is the test under S. 102, C. P. Code and O. 43, R. 1 (v), C. P. Code. A first appeal is, therefore, valid, but under S. 102, C. P. Code a second appeal is barred. AIR (V 13) 1926 Mad 622 : 23 MLW 518 : 94 Ind Cas 77 (DB).

——S. 102 —Determination of.

A suit is cognizable by the Small Cause Court if in respect both of its character and of the amount or value of its subject-matter it is within the jurisdiction of the Court. The value or amount is not that actually recoverable or ascertained at the trial, but that claimed by the plaintiff and set out in the plaint. AIR (V 11) 1924 Cal 405 : 80 Ind Cas 317 : 51 Cal 62 : 28 CWN 6.

——S. 102 — Suit for grazing fee.

No second appeal lies in a suit for recovery of less than five hundred rupees claimed as grazing fee. There can be no claim for rent unless there is a tenancy and there can be no tenancy unless a right to the land has been given to the grantee. AIR (V 7) 1920 Cal 733 : 59 Ind Cas 595 : 32 CLJ 83 (DB).

——S. 102 — Small Cause nature — meaning of.

The words "suit of a nature cognizable in Courts of Small Causes" in the section refer to the nature of the suit and not to the forum. AIR (V 3) 1916 Bom 106 : 41 Bom 367 : 19 Bom LR 83 : 38 Ind Cas 881 (DB).

——S. 102 — Nature of suit.

Nature of suit should be determined from the plaint apart from the defence. AIR (V 2) 1915 Nag 124 : 12 NLR 47 : 32 Ind Cas 998.

——S. 102 — Small cause nature — Question depends upon the suit as originally framed.

The question whether a second appeal lies or not must be determined by the nature of the suit as originally framed not as it was afterwards amended. (1911) 2 MWN 587 : 10 MLT 528 : 22 MLJ 47 : 13 Ind Cas 174 (DB).

——S. 102 (S. 586, old Code) — Small Cause nature.

For the purpose of determining whether a second appeal lies in execution, the test is the amount of the subject-matter of the suit and not the amount claimed in execution. (1905) 17 MLJ 376 : 30 M 212 (213) (DB).

2. Appeal from order of remand.

——S. 102, and O. 41, R. 23 and O. 43, R. 1, Cl. (u) — Remand — Order of — Appeal from — Suit of Small Cause nature — Appeal, whether lies.

Order of remand passed by the Lower Appellate Court in a suit cognizable by a Small Cause Court is not appealable. AIR (V 3) 1916 All 125 : 36 Ind Cas 396.

——S. 102 — O. 41, R. 23 and O. 43, R. 1 (u) — Remand — Appeal against order of.

An appeal does not lie against an order of remand in a suit decided by Small Cause Court for less than Rs. 500 in value as a second appeal is not allowed against the decree of the lower Appellate Court in such a suit. AIR (V 3) 1916 Cal 581 (1) : 22 CLJ 97 : 30 Ind Cas 894 (DB).

3. Appeal from order of review.

——S. 102 — Second appeal — Appeal against order granting review — Maintainability.

An appeal allowed under O. 43, R. 1 (w) is only an appeal from the order granting the application for review and not an appeal from the final decree passed in the suit and therefore it would be absurd to allow a second appeal on the merits against a decree passed in a Small Cause suit of the value of less than Rs. 500, merely because the decree is one which has been passed in review. AIR (V 8) 1921 Lah 124 : 60 Ind Cas 259 : 3 LLJ 166.

4. Effect of trying Small Cause suits as ordinary suits.

——S. 102 — A suit cognizable by Small Cause Court which has been tried against the provisions of S. 16, Prov. Small Cause Courts Act, as an ordinary suit by a Judge who is not invested with Small Cause Court powers, the parties to the suit having raised no objection to the trial, cannot be

considered as a Small Cause suit and the decision is appealable. AIR (V 21) 1934 Nag 121 : 30 NLR 252 : 149 Ind Cas 886.

——S. 102 — Though a small cause suit which is transferred to the regular side under S. 23, Provincial Small Cause Courts Act, becomes a regular suit, the nature of the suit still continues to be a small cause and second appeal is barred under S. 102, Civil P. C. (1931) 134 Ind Cas 251 : (1931) ALJ 967 (DB).

——S. 102 — Execution in regular Court — Suit of Small Cause nature — Appeal — Second appeal.

Where a decree passed by a Court of Small Causes was transferred to a Sub-Judge's Court for execution as it involved the sale of immovable property, it must be supposed under S. 42 that the decree was passed by the Court executing it and its order would be subject to the same rules in respect of appeal as if the decree had been passed by itself. First appeal would, therefore, lie against such order, but a second appeal would be barred by S. 102, the original suit being of a nature cognizable by the Court of Small Causes. AIR (V 15) 1928 Bom 534 : 30 Bom LR 1447 : 114 Ind Cas 861 : 53 Bom 46 (DB).

——S. 102 — Plaint of original nature — Amendment into small cause nature — Second appeal.

The course of appeal is determined by the character of the plaint as originally made and is not affected by the plaintiff subsequently dropping or being unable to seek relief with regard to a part of his claim.

A plaintiff sued a defendant for ejectment. But later he withdrew his prayer for ejectment and confined his claim merely to recovery of rent, the amount of which was below Rs. 500. It was contended that no second appeal could lie from the decision in that case because after the withdrawal of the prayer for ejectment the suit assumed a character of a small cause.

Held second appeal would lie. AIR (Vol 15) 1928 Lah 764 : 115 Ind Cas 858.

——S. 102 — Small Cause Suit tried on Original Side — Second appeal — Revision.

Where a suit for less than Rs. 500 was of a small cause nature and was tried by the Munsif on the Original Side and the decision was confirmed in appeal, the High Court refused to interfere in revision and to remand the suit for retrial on the Small Cause side.

Held, also that no second appeal lies. AIR (V 9) 1922 Mad 352 : 42 MLJ 118 : 66 Ind Cas 207 : 14 MLW 349 (DB).

——S. 102 — Trial on the regular side — Small Cause suit tried as a regular suit — Effect of.

A suit filed in the Small Cause Court was returned to be presented on the regular side. The suit was tried as a regular suit and there was also an appeal before the Dt. Judge.

Held, that the suit remained a suit of small cause nature and that under S. 102 no second appeal lay. AIR (V 7) 1920 Oudh 281 : 23 OC 117 : 57 Ind Cas 557.

——Ss. 102 and 96 — Appeal — Small cause nature — Suit instituted during the absence of a Munsif who had small cause court jurisdiction and tried by his successor who had no such power.

While a Munsif having Small Cause Court powers obtained privilege leave and left his district and his successor who had no such power joined the district a week after, but in the meantime a suit to recover Rs. 50 was instituted which was subsequently tried by the second Munsif.

Held, that the suit was not tried as a Small Cause Court suit and an appeal lay to the District Judge. (1913) 11 ALJ 360 : 19 Ind Cas 362.

——S. 102 — Small cause nature — Trial as regular suit.

No second appeal lies against an order for presentation to the proper Court under S. 23, Prov. Small Cause Courts Act in a suit of a small cause nature though tried as a regular suit involving a question of title. (1911) 12 Ind Cas 957 : 10 MLT 500 (DB).

5. Other cases.

——S. 102 — Claim of small cause nature — Interest on sum due on that claim is also of small cause nature.

If the principal claims are of a small cause nature, interest on the sums due on those claims will also be of a small cause nature. AIR (V 31) 1944 Mad 442 : (1944) 1 MLJ 456 : 57 MLW 359.

——S. 102 — Decree in suit to recover sums payable by khatedar to inamdar as superior holder — Second appeal, if lies.

Sums payable by a 'khatedar' to an 'inamdar' as superior holder are "dues", and a suit to recover such dues is not cognizable by a Court of Small Causes and a decree passed in such suit is subject to a second appeal. AIR (V 27) 1940 Bom 12 : 41 Bom LR 1174 : 185 Ind Cas 608.

——S. 102 — Plaintiff making over certain sum to defendant No. 3 for investment — Defendant No. 3, advancing it to defendants Nos. 1 and 2 on registered bond in his own name — Plaintiff's knowing this after over three years — Simple mortgage suit against defendants Nos. 1 and 2 or for simple money decree against defendant No. 3:

Held, that since a suit had been bona fide framed as a mortgage suit Section 102, Civil Pro. Code, did not apply. AIR (V 25) 1938 Cal 336 : 42 CWN 381 : 66 CLJ 541 : ILR (1938) 2 Cal 81 176 Ind Cas 681.

——S. 102 — Artificial channels — Suit for water cess by channel owner — If of Small Cause nature.

A suit by a person maintaining artificial channels against persons to whom water is supplied is not a suit of Small Cause nature. AIR (V 21) 1934 Mad 683 : 40 MLW 629 : 67 MLJ 558 : (1934) MWN 1063 : 153 Ind Cas 14.

——S. 102 — Nature of suit — Second appeal.

Where a suit was filed by the judgment-debtor for recovery of excess of the decretal amount paid to the decree-holder under fraud and cheating.

Held, that the suit is not of a small cause nature and a second appeal is entertainable. AIR (V 15) 1923 Cal 776 : 115 Ind Cas 581 (DB).

——S. 102 — Suit for price of crop.

A suit for the price of the paddy alleged to be cut and misappropriated by the defendant not amounting to a criminal offence is a suit of a nature cognizable by Courts of Small Causes and if under the value of Rs. 500 no second appeal lies. AIR (V 13) 1926 Cal 1230 : 44 CLJ 190 : 97 Ind Cas 556 (DB).

——S. 102 — Applicability of Prov. S. C. C. Act, Sch. II, Cls. 26 and 2.

After A brought a property to sale B applied for rateable distribution and it was granted. A then was allowed to bid on satisfying B's decree. When he had bought the property, the sale was set aside at the instance of a third party. A sued B to recover from him Rs. 270 paid in satisfaction of his decree.

Held, no second appeal lies as the suit does not fall either under Clause 2 or 26 of Prov. S. C. C. Act. AIR (V 10) 1923 All 310 : 74 Ind Cas 836 : 21 ALJ 248 : 45 All 359 : 4 LR A (Civ.) 146 (DB).

——S. 102 — Plea of mandatory injunction.

A suit is not a suit of a Small Cause Court nature if it includes a plea for a mandatory injunction. A judgment does not operate as res judicata where the Munsif in his capacity of an officer hearing a suit of a Small Cause Court nature is not competent to try the later suit. Apart from his capacity as an officer trying suits of a Small Cause Court nature he may be competent to try the later suit but the combination of two functions in the same officer does not affect the question of competency. AIR (V 9) 1922 All 241 : 66 Ind Cas 613.

——S. 102 — Suit for interest on mortgage money.

A suit only for the interest on the mortgage money due to the mortgagee is one triable by a Court of Small Causes and there is no second appeal from the decision in the case. (1922) 66 Ind Cas 285 (Lah).

——S. 102 — Suit for price of articles supplied.

A suit for price of coal supplied under an agreement is in the nature of Small Cause suit and where the amount sued for is below Rs. 500 no second appeal lies. AIR (V 7) 1920 Cal 781 : 59 Ind Cas 183 (DB).

——S. 102 — "Rent" — Thunduwaram — Provincial Small Cause Courts Act, Art. 13.

Per Sadasiva Iyer and Napier JJ.: — Mirasi right is an interest in the village lands. The 'thunduwaram' payable to the mirasdar is not of the nature of "rent" (like 'jadi') but comes under the general expression "dues" in Art. 13 of the Prov. S. C. C. Act. A second appeal lies in a suit for the recovery of 'thunduwaram', though the amount sought to be recovered is less than Rs. 500. AIR (V 5) 1918 Mad 7 : 41 Mad 374 : 34 MLJ 104 : 23 MLT 44 : (1948) MWN 350 : 7 LW 243 : 44 Ind Cas 699 (FB).

——Ss. 102, 73 — Refund of assets — Prov. S. C. C. Act (IX of 1887), Sch. II, Art (26).

Where a suit is for refund of assets improperly distributed under S. 73 and it is found that he is not entitled to it, the nature of the suit is not altered and the suit is one not cognizable by the Small Cause Court and so a second appeal lies. (1912) 15 CLJ 49: 13 Ind Cas 907 (DB).

——S. 102 — Second appeal — Suit cognizable by Small Cause Court.

On second appeal a preliminary objection was taken that as the amount decreed in respect of purchase money and interest in the first court amounted to less than Rs. 500 no second appeal lay.

Held, overruling the objection, that the claim was not only for money but was also for possession and, therefore the suit as framed was not cognizable by a Court of Small Causes. (1910) 12 Bom LR 723 (729) : 35 Bom 29 : 7 Ind Cas 955 (DB).

——S. 102 (S. 586. old Code) — Suit for compensation for illegal distress — Not a suit of a small cause nature.

(1902) 25 M 540 (542)

6. Scope.

——S. 102 — Applicability — Suit to recover money payable under award on arbitration — Second appeal — Competency. AIR (V 37) 1950 Pat 48.

——S. 102 — Trying of small cause suit as ordinary suit — Effect of — Test for deciding the nature of suit.

That a suit was heard and determined by a Court other than a Court of Small Causes does not decide the question as to whether a suit is of a small cause nature so as to bar the second appeal under S. 102. The test of a small cause suit is, whether it comes under any of the Articles contained in Sch. II of the Provincial Small Cause Courts Act. A suit by the proprietor to recover cesses under Bengal Cess Act from the tenure-holder is not a small cause suit. AIR (Vol 32) 1945 Pat 417 : 24 Pat 307 (DB).

——S. 102 — Application under S. 174 (3), Ben. Ten. Act, compromised — Application under S. 144 for compensation for breach of compromise — Such proceeding is neither suit nor execution proceeding — Second appeal is not barred either by S. 102, Civil P. C., or by S. 153, Ben. Ten. Act. AIR (Vol 26) 1939 Cal 612 : 43 CWN 859.

——S. 102 — Suit to recover price of trees alleged to have been cut by defendant from plaintiff's land and misappropriated — Case, whether falls under Chap. XVII, Penal Code (Act XLV of 1860) — Jurisdiction of Small Cause Court to try such suit — Second appeal from such suit, whether competent.

Where, in a suit for the recovery of the price of nine trees said to have been cut from the land of the plaintiff-landlord and misappropriated by defendants, the case against the defendants is one of wrongful or illegal cutting of trees which is not necessarily penal so as to bring them within the purview of Chap. XVII, Penal Code, the jurisdiction of the Small Cause Court to try such a suit is not at all barred and a second appeal to the High Court in such a case is barred by S. 102, Civil P. C., if the value of the subject-matter of the suit does not exceed Rs. 500. AIR (Vol 26) 1939 Pat 216 : 5 BR 814 : 182 Ind Cas 708.

——Ss. 102, 47 — Orders in execution under S. 47 — Section 102, if applies — Appeal barred against judgment-debtor, if barred against surety.

Section 102, Civil P. C., not only applies to appeals but to orders in execution under S. 47. If an appeal against an order under S. 47 is barred under S. 102 against the judgment-debtor, it is also barred against his surety. AIR (Vol 26) 1939 Sind 360 : ILR (1939) Kar 342 : 185 Ind Cas 486 (DB).

——S. 102 — Suit to recover tax under Madras Local Boards Act and for injunction restraining Board from levying it in future is not of small cause nature. AIR (Vol 25) 1938 Mad 941 : 48 LW 512 : (1938) MWN 931 : (1938) 2 MLJ 589 : 182 Ind Cas 908 (DB).

——S. 102 — Where there is no allegation of criminal act or intent, the suit is cognizable by the Court of Small Causes. Section 102 applies and no second appeal lies. AIR (Vol 23) 1936 Nag 276 (1) : 168 Ind Cas 596.

——Ss. 102, 115 — Suit for damages for breach of contract valued at less than Rs. 500 — Suit cognizable by Small Cause Court but tried by Munsif as regular suit — Second appeal, whether lies — Revision under S. 115 — Provincial Small Cause Courts Act (IX of 1887), S. 25, whether applies.

Where a Munsif tries as a regular suit, a suit for damages for breach of contract valued at less than Rs. 500 and cognizable by Small Cause Court, no second appeal lies from it but it can be treated as revision application u/s. 115, Civil P. C. Court cannot, however, treat it as revisable under S. 25 of the Provincial Small Cause Courts Act, as this section has no applicability to the case where an appellate decision of the District Judge is challenged. AIR (Vol 23) 1936 Oudh 129 : 1935 OWN 1244 : 165 Ind Cas 251.

——Ss. 102, 24 — U. P. Honorary Munsifs Act (II of 1896), Ss. 7, Cl. (4); 9 — Suit of value below Rs. 500 — Institution of suit in Honorary Munsif's Court — Transfer by District Judge to Munsif's Court — Trial by Munsif — Second appeal from

decision of Munsif to High Court — Competency of.

Where a suit for a sum of money below Rs. 500 was rightly filed in the Honorary Munsif's Court but on the Honorary Munsif writing to the District Judge that as he was related to one of the parties, he would not like to try the suit, the District Judge under S. 24, Civil P. C., transferred the suit from the Court of the Honorary Munsif to another Court which was not a Court of Small Causes, and the suit was heard by that Munsif:

Held, that it was not obligatory on the District Judge to transfer it to the Court of Small Causes but as the suit was of a nature cognizable by a Small Cause Court and was heard by a Munsif against whose decision an appeal did lie, the decision of the lower Appellate Court was not appealable by way of a second appeal to the High Court under S. 102, Civil P. C. AIR (Vol 22) 1935 All 574: 1935 ALJ 426: 1935 AWR 354: 155 Ind Cas 95.

——S. 102 — Giving up claim — Nature of suit if altered.

Where a suit as framed is not a suit of a small cause nature, it does not attain that character, if the plaintiff in the course of hearing gives up a part of his claim. 89 Ind Cas 59 : 49 Bom 596 : 27 Bom LR 637 : AIR (Vol 12) 1925 Bom 440 (DB).

——S. 102 — A claim for 'jodi, russums' and road cess is similar to a claim for rent, which is not of the nature of the cesses mentioned in Cl. 13, and no second appeal lies if the value of the claim is less than Rs. 500. 90 Ind Cas 496 : 49 MLJ 185 : AIR (Vol 12) 1925 Mad 1196.

——S. 102 — Small Cause nature — Test of.

The original character of a suit rather than the character it assumes by operation of the findings therein has to be regarded to find out whether it is cognizable by a Small Cause Court. The mere fact of a question of title arising is immaterial. (1919) 50 Ind Cas 629 (Nag).

——S. 102 — Scope of — Cognizable by Small Causes — Second appeal — Suit subsequently withdrawn from Small Causes — Right of appeal.

The word "cognizable" in S. 102, C. P. C., is restricted to the nature of the proceedings prior to the decree and not to its character at the time of filing the second appeal. The principle of law that a right to prefer an appeal being a vested right could not be affected by legislation is equally applicable to parties who have acquired a right to treat a judgment as final and conclusive. An act which deliberately withdraws certain class of cases from the jurisdiction of particular Courts cannot be said to declare the law and does not have a retrospective effect. 23 MLT 255 : (1918) MWN 238 : 35 MLJ 377 : 8 LW 374 : 45 Ind Cas 11 : AIR (Vol 5) 1918 Mad 162 (DB).

——S. 102 (S. 586 old Code) — Applicability of — Test — Suit of a Small Cause nature — Institution in regular Court.

The applicability of S. 586 depends on the real nature of the suit and not on the Court in which it is instituted. 1 C 123 Diss. from. (1904) 1904 AWN 50 : 26 A 358 (360) (DB).

7. Suits for accounts.

——S. 102 — Suit for produce of land.

A suit for the produce which defendant had taken from the land which he had entered and forcibly worked, or its value is not one for accounts and is of a small cause nature. 5 Rang 388 : 104 Ind Cas 818 : AIR (Vol 14) 1927 Rang 262.

8. Suits for contribution.

——S. 102 — Prov. S. C. C. Act, (1887) Sch. 2, Cl. 41 — Second appeal.

A suit to recover by way of contribution a share of the decretal amount paid by the plaintiff is a suit of a Small Cause nature and not one falling under Cl. 41 and where the value of the suit is less than Rs. 500 no second appeal lies. AIR (Vol 13) 1926 All 456: 94 Ind Cas 949.

——S. 102 — Prov. S. C. Courts Act, Art. 41.

Suit to recover from defendant the landlord, the whole amount paid by plaintiff to save the property denying all liability or in the alternative for proportionate amount which alternative claim was allowed is a suit for contribution exempted under Art. 11 of Prov. S. C. Courts Act. AIR (Vol 3) 1916 Cal 954: 23 CLJ 125: 32 Ind Cas 200 (DB).

9. Suits for damages.

——S. 102 — Claim for damages by land-holder against person not his tenant, for unauthorised use of water — Claim is not for rent and is of small cause nature.

A claim by the land-holder against a person who is not his tenant, for the unauthorised use of the land-holder's water for cultivation can only be for damages and not for rent and hence the claim is of a small cause nature. Nor can the claim be regarded as one for rent within the definition of rent in S. 3 (ii), Madras Estates Land Act, for that definition applies only to what is lawfully due by a 'ryot' to his land-holder. It cannot therefore, apply to what is due by one who is not a 'ryot' of the land-holder. AIR (Vol 31) 1944 Mad 442: (1944) 1 MLJ 456: 57 MLW 359.

——S. 102 — Suit of nature — cognizable by Small Cause Court — Defence, nature of, if makes any difference as to nature of suit — Suit for damages for cutting of and appropriation of fruit of trees — Defence that land on which trees stood did not belong to plaintiffs — S. 102 if applies — Second appeal if lies.

Section 102 of the Civil P. C. contemplates a suit of the nature cognizable by Courts of Small Causes irrespective of what defence is put up in the case.

A suit for damages in regard to the cutting of two 'seeshum' trees and appropriation of the fruit of mango trees is of a nature cognizable by a Court of Small Causes. The defence that the land on which the trees stood did not belong to the plaintiffs makes no difference so far as the nature of the suit is concerned. Section 102, Civil P. C., applies to it, and no second appeal is competent. AIR (Vol 22) 1935 Oudh 413: 1935 OWN 503: 155 Ind Cas 240.

——S. 102 — Suit to set aside ex parte decree obtained against plaintiff for damages for removal of a tree — Suit, if in the nature of title suit — Whether cognizable by Small Cause Court — Second appeal — Competency of.

A suit for the setting aside of an ex parte decree obtained against the plaintiff for a sum of money as damages for alleged removal of a tree, is of the nature of a title suit and is not cognizable by a Court of Small Causes and, therefore, whatever its value, a second appeal will lie. AIR (Vol 22) 1935 Pat 482: 1 BR 848: 16 PLT 844: 158 Ind Cas 155.

——S. 102 — Provincial Small Cause Courts Act, (IX of 1887) — Art. 35. cl. (ii) — Suit for damages — Allegation of offence — Jurisdiction of Small Cause Court — Second appeal.

Where it was clearly alleged in a suit for damages that the defendants had forcibly and criminally cut certain branches of a tree and no objection was taken in the trial Court to the jurisdiction of the Court to try the suit on the regular side:

Held, that S. 102, Civil P. C., did not apply to the case and a second appeal lay. AIR (Vol 18) 1931 Oudh 411: 8 OWN 1019: 135 Ind Cas 889 (DB).

——S. 102 — Scope — Suit for damages for breach of contract.

S. 102 must be construed to apply to all suits of a civil nature of which the value does not exceed Rs. 500 except those which are contained in Sch. II of the Provincial Small Cause Courts Act. There is no authority for restricting the section to cases where the Court trying the suit on the original side was also empowered to try the suit on the Small Cause Court side. The test in deciding whether a second appeal lies or not is to be found in the nature of the suit and not in the powers of the Court which tried the suit. Where a suit for damages arising out of a breach of contract was tried by both the courts and damages awarded fell below Rs. 500,

Held, that no second appeal lay. AIR (Vol 18) 1931 Oudh 49: 129 Ind Cas 174: (1930) 7 OWN 1112.

——S. 102 — Suit for damages for cutting fruit trees.

The plaintiff sued for damages for cutting Dak jungle and removing fruits of the trees by the defendants and the amount claimed was Rs. 50 on each count, the total being Rs. 100. There was nothing in the plaint to allege that the defendants acted with any criminal intention.

Held, that the suit was cognizable by the Small Cause Court and that no second appeal lay. (1930) 1930 ALJ 1247 (DB).

——S. 102 — Suit for compensation in Small Cause Court — Representation in ordinary Court — Second appeal.

Suit for compensation for damage done to plaintiff's property by the wrongful act of the defendant of digging a pit close by and letting water accumulate there was originally presented to the Court of Small Causes but that Court returned it for presentation to the ordinary Civil Court on the ground that it involved a question of title. The first Court decreed the claim to the extent of Rs. 10. The decision was appealed against by the defendant but his appeal was unsuccessful.

Held that a second appeal did not lie. AIR (Vol 15) 1928 Nag 136: 107 Ind Cas 193.

——S. 102 — Second appeal.

A suit by a landlord for damages for use and occupation on the footing that the defendants are tenants holding over and are trespassers in the eye of the law is cognizable by a Small Cause Court and if the value of the suit does not exceed Rs. 500, a second appeal does not lie in the suit. AIR (Vol 12) 1925 Mad 890: 90 Ind Cas 401: 22 MLW 528: 48 MLJ 701 (DB).

——S. 102 — Suit for compensation for cutting trees — Applicability of Prov. S. C. C. Act, Sch. 2 Art. 35 (ii) — Second appeal.

The defendant was prosecuted by the plaintiff's for the cutting of trees and acquitted. It had been found that the defendants had right for some portion of the trees.

Held the mere taking of trees by the Defendants would not of itself amount to theft or criminal misappropriation unless this was done with dishonest intention. The criminality of the act of the Defendants will therefore depend on the intention with which this act was done and not whether the particular act was saved by the provisions of Chap. IV of the Indian Penal Code. The case does not come within Art. 35 (ii) of Second Schedule of the Provincial Small Cause Courts Act and therefore no second appeal lies. AIR (V 10) 1923 Cal 568: 77 Ind Cas 77: 27 CWN 469 (DB).

——S. 102 — Suit for declaration of title to fish and damages — Second appeal.

The Suit, which was merely a suit for damages after declaration of title to fish and not to the tank, being a suit for money less than the sum of rupees five hundred, no second appeal was held to lie. AIR (Vol 10) 1923 Cal 321: 68 Ind Cas 626 (DB).

——S. 102 — Damages — Contract to pay — Second appeal.

After a period of five years during which plaintiff enjoyed certain lands under a registered instrument of lease from the proprietors they obtained a decree for ejectment against plaintiff through a Revenue Court. The plaintiff sued defendants for a sum of Rs. 125, with interest on the allegation that they could not be legally ejected without the payment of the sum, held, that if the plaintiff's suit could be treated as one for damages the suit was cognizable by the Small Cause Court and there was no second appeal by S. 102, C. P. C. and that if the contract amounted to a mortgage, as he was not in possession at the date of a suit, he was not entitled to possession or to recover the sum paid by him. AIR (Vol 4) 1917 All 340: 15 ALJ 534: 40 Ind Cas 578 (DB).

——S. 102 — Damages — Cutting trees.

A suit for damages for wrongfully cutting and carrying off trees is a Small Cause suit though it involves a question of title and is on that account tried on the regular side. It is not cognizable by Revenue Courts under S. 213, Mad. Est. Lands Act. AIR (Vol 4) 1917 Mad 897: (1916) 2 MWN 315: 20 MLT 281: 4 LW 245: 36 Ind Cas 202 (DB).

——S. 102 — Small cause nature — Tests of — Relief regarding matter cognizable by Civil Court abandoned in second appeal — No second appeal.

Where a plaintiff sues for cancellation of document as well as damages against the defendant but drops his case regarding cancellation in second appeal, the whole second appeal becomes incompetent as the remaining claim is one cognizable by a Court of Small Causes only. AIR (Vol 3) 1916 Pat 386: 34 Ind Cas 909.

——S. 102 — Damages.

Where in a suit for damage sustained by plaintiff having a right to flow of water over another's land a decree for Rs. 50 was passed, it is doubtful if a second appeal would lie. (1913) 21 Ind Cas 393 (Cal) (DB).

——S. 102 — Small cause nature — Tests of.

The suit as originally brought must be looked at to see whether a second appeal lies or not, so in an ejectment suit the awarding of damages only by the Court will not bar a second appeal. (1912) 13 Ind Cas 493 (Oudh).

——S. 102 — (S. 586, old Code) — Suit of Small Cause nature — Second appeal — Suit for damages for trespass — Trespass — Suit for damages — Small Cause Court — Jurisdiction.

A suit for damages on the allegation that the defendant had in plaintiff's absence entered his house with police and strangers, gone into his inner apartments and obliged his wife and others to remain secluded and thereby humiliated the plaintiff, is clearly a suit for damages for trespass and therefore cognizable by a Court of Small Causes. When therefore the value is below Rs. 500 no second appeal lies. (1909) 10 CLJ 198 (200): 1 Ind Cas 592 (DB).

——S. 102 (S. 586, old Code) — Suit for damages for malicious prosecution — Information to police — Police investigation — Police search — Small cause nature — Civil Procedure Code, S. 586.

A suit for damage for trespass, alleging that the defendants wrongfully caused the plaintiff's house to be searched by the police is a suit of small

cause nature and no second appeal lies under S. 586, C. P. C. (1902) 12 MLJ 349 (350) (DB).

10. Suits for declaration.

—— S. 102 — Declaration — Prayer for if alters the nature of suit — Second appeal.

The mere addition of an unnecessary prayer for declaration, does not alter the character of a suit which is of a nature cognizable by a Small Cause Court, so as to give the party a right of second appeal which is prohibited by S. 102. AIR (Vol 5) 1918 Cal 528: 41 Ind Cas 627 (DB).

——S. 102 — Declaration — Hut — Cognizable by Small Cause Court.

A hut is immoveable property and so a suit for a declaration that the hut is liable for dues on account of a certain decree is not of a nature cognizable by Small Cause Court. So a second appeal will lie. (1911) 9 Ind Cas 1 (Cal).

11. Execution Proceedings.

See also Provincial Small Cause Courts Act, S. 27.

——S. 102 — Second appeal — Competency — Order passed in execution in a suit of a small cause nature.

A second appeal against an order passed in execution proceedings arising out of a suit of the nature of small causes is not entertainable, though one appeal against such an order is permissible. AIR (Vol 37) 1950 All 580: 1950 ALJ 833 (FB).

——S. 102 — "Suit" — Meaning of — Order in execution arising out of suit of Small Cause nature — Second appeal.

The expression "suit" in Section 102, C. P. Code, includes execution proceedings. Therefore if the suit is of the nature described in Section 102, no second appeal would lie from an order made in execution of the decree passed in such suit unless the value of the suit exceeded Rs. 500. The test in such cases is not the nature of the proceedings in execution, but the nature of the suit in which the decree sought to be executed was passed. AIR (Vol 36) 1949 Bom 115: 50 Bom LR 696.

——Ss. 102 and 47 — Small Cause Court's decree transferred for execution to regular side — Executing Court deciding question under S. 47 — No second appeal lies from such decision if subject-matter of small suit is less than 500 rupees.

The word 'suit' in Section 102 covers proceedings in execution as well. Though proceedings under Section 47 cannot be regarded as proceedings in suit for all purposes, they must be deemed to be proceedings in suit for purposes of Section 102 as the order in such proceedings is deemed to be a decree under S. 2 (2).

Where a decree of Small Cause Court is transferred for execution to the regular side and the executing Court decides a question under Section 47, the decision amounts to a decree by virtue of Section 2 (2) and no second appeal will lie from such decision if the subject-matter of the original suit is less than 500 rupees. AIR (Vol 33) 1946 Nag 165: ILR (1946) Nag 26: 1946 NLJ 14: 223 Ind Cas 491

——S. 102 — Order in — Second appeal.

No second appeal will lie in respect of an order made in execution proceedings relating to matters governed by Section 102, even when the decree is transferred for execution to a Munsif's Court. AIR (Vol 14) 1927 All 740: 103 Ind Cas 344.

——S. 102 — Small Cause decree— Second appeal.

No second appeal lies in execution proceedings of a Small Cause decree for less than Rs. 500. AIR (Vol 13) 1926 All 345: 93 Ind Cas 292.

——S. 102 — Order in — Second appeal.

No second appeal lies in a matter of execution in a suit which is of a Small Cause nature. AIR (Vol 12) 1925 Mad 742: 90 Ind Cas 794: 48 MLJ 499 (DB).

——S. 102 — Nature of suit — Value — Second appeal.

Where the suit is one of a Small Cause Court nature below Rs. 500 in value, no second appeal lies against an order in execution of a decree in such a suit. AIR (Vol 11) 1924 All 263: 79 Ind Cas 605: 46 All 73: 21 ALJ 861: 4 LRA Civ 591.

——S. 102 — Order in — Second appeal.

Where the suit is one of a small cause nature and the claim is valued at less than Rs. 500, no second appeal lies even in the matter of execution. (17 Cal 631 and 18 CLJ 538, Diss.) AIR (Vol 11) 1924 Mad 367: 45 MLJ 651: 76 Ind Cas 750: 18 MLW 739: 33 MLT 125 (DB).

——S. 102 — Claim under O. 21, R. 71.

Where the claim under O. 21, R. 71 was for less than Rs. 500.

Held, the application must be treated as one made in execution of a Small Cause Court decree and no second appeal will lie from such an application. AIR (Vol 8) 1921 Bom 229: 45 Bom 223: 59 Ind Cas 192 (DB).

——S. 102 — Execution — Second appeal.

No second appeal lies against an order passed in execution proceedings arising out of a suit of the nature cognizable by a Court of Small Cause below Rs. 500. AIR (Vol 7) 1920 Cal 174: 54 Ind Cas 429 (DB).

——S. 102 — Execution — No second appeal.

No second appeal lies from an order in execution of a decree in a suit of a Small Cause nature where the value of the subject-matter does not exceed 500 rupees. AIR (Vol 5) 1918 Oudh 269: 5 OLJ 187: 46 Ind Cas 82.

——S. 102 — Execution — Second appeal.

There is no second appeal from an order by a Munsif acting as an original Court in execution of a Small Cause decree. AIR (Vol 3) 1918 Pat 624: (1917) Pat HCC 80: 3 Pat LW 132: 43 Ind Cas 15 (DB).

——S. 102 — Execution — Sale in execution in rent suit for less than Rs. 100.

A second appeal lies against an order refusing to set aside a sale held in execution of a decree in a rent suit for less than Rs. 100. AIR (Vol 2) 1915 Cal 268: 18 CWN 1266: 20 CLJ 341: 27 Ind Cas 294 (DB).

——Ss. 102 and 115 — Execution — No second appeal.

Section 102 applies no less to orders passed in execution than to a decree itself. AIR (Vol 2) 1915 Nag 91: 11 NLR 99: 29 Ind Cas 740.

——S. 102 — Execution — Sale — Setting aside.

No second appeal lies from the order refusing to set aside sale in execution of a Small Cause decree. AIR (Vol 4) 1917 Mad 188: 32 Ind Cas 712 (DB).

——S. 102 — Execution — Order in — No second appeal.

An order in execution proceedings of a Small cause decree is within Section 102, C. P. C. and is not open to second appeal. (1913) 18 Ind Cas 245 (Oudh).

——S. 102 — Execution — Appeal.

The word 'suit' in Section 102 includes not only proceedings till the passing of the decree,

but also its execution proceedings. Therefore no second appeal lies from an order made in the execution proceedings of the decree in a suit cognizable by a Court of Small Causes where the value or amount of the subject-matter in it is below Rs. 500. The question for determining a person's representative character representing the original decree-holder is capable of being decided in the execution proceedings. (1912) 16 CLJ 96: 16 Ind Cas 975 (DB).

——S. 102 — Execution — Suit cognizable by a S. C. C. — No second appeal.

No second appeal lies against an order in execution of a decree in a suit valued at less than Rs. 500 of the nature cognizable by S. C. C. (1911) 10 Ind Cas 412 (Cal) (DB).

——S. 102 (S. 586 old Code) — Small Cause decree — Execution — Transfer to regular Court — Order in execution — Appeal — Second appeal.

Where a Small Cause Court decree was sent for execution to the Regular Court of the District and an order was passed under Section 244, C. P. C., by the Court (which was a Court of a Sub-Judge):— Held: — That an appeal lay to the Court of the District Judge against such order. But the value of the decree being less than Rs. 500 a second appeal was barred by Section 586, C. P. C. (1907) 11 CWN 861 (862) (DB).

12. Suits for maintenance.

——S. 102 — Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 38 — Suit for arrears of maintenance — Jurisdiction of Small Cause Court — Value below Rs. 500 — Second appeal, competency of.

A suit for arrears of maintenance due under a bond or agreement is not cognizable by the Court of Small Causes under Art. 38 and consequently, even though the claim be below Rs. 500, a second appeal is competent. AIR (Vol 18) 1931 Bom 286: 33 Bom LR 510: 135 Ind Cas 477.

——S. 102 — Suit for annuity — Allowance not in satisfaction of any right of maintenance:—

Where a person allows maintenance to his sister not by way of satisfaction of her right of maintenance, but the allowance is to be paid out of the income of her own property which she transfers to her brother, the same is an annuity, and a suit for the recovery thereof is maintainable by a Court of Small Causes. (1902) 13 MLJ 471 (471).

13. Suits relating to Marrriage.

——S. 102 — Marriage Contract — Suit for recovery of presents made on a promise of mariage — Small Cause suit — Act IX of 1887, Pro. Sm. C. Courts Act.

A suit can be brought for recovering presents made on a promise of marriage, when the marriage itself does not take place owing to the refusal of the party to whom they are given, but such a suit does not lie in a Small Cause Court and consequently a second appeal is maintainable. (1912) 5 Bur LT 57: 14 Ind Cas 837.

14. Suits for profits.

——S. 102 — Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 31 — Suit for profits between co-sharers, whether suit of Small Cause nature — Second appeal, competency of.

A suit for profits between co-tenants is a suit of the nature cognizable by a Court of Small Causes and no second appeal lies in such a suit where the value of the subject-matter is less than Rs. 500. AIR (Vol 18) 1931 All 551 : 132 Ind Cas 201.

——S. 102 — Suit for value of share in produce.

The possession of one co-sharer is deemed to be on behalf of all in law and neither such possession nor receipt of profits can be considered wrongful. Failure of the co-sharers to give other co-sharers their share of the profits is, however, wrongful. Art. 31, therefore, does not apply to suit by certain co-sharers for recovery of the value of their share of the produce realized by other co-sharers in possession of their joint land, there being no "wrongful" receipt of profits. Such a suit if its value for jurisdiction is less than Rs. 500 is a suit of a small cause nature and no second appeal from it is competent. AIR (Vol 17) 1930 Lah 613.

——S. 102 — Profits — Wrongful appropriation of — Suit of Small Cause Court nature — Second appeal.

Where the plaint, as framed, does not show an allegation of wrongful receiving of profits of immoveable property on the part of defendant, but a only wrongful appropriation of share due to plaintiff, it is a suit of a nature cognizable by a Small Cause Court, and no second Appeal lies. 31 Ind Cas 797 : AIR (Vol 2) 1915 All 396.

——S. 102 (S. 586 old Code) — Suit for mesne profits — Cognizable by Small Cause Court — No second appeal. (1909) 24 M 118 (119) : 11 MLJ 26.

——S. 102 (S. 586 old Code) — Suit by contractor for share of profits — Suit cognizable by a Small Cause Court.

A suit by a co-sharer to recover the share of the profits of a Khotitakshim recovered by another co-sharer is cognizable by a small cause Court; and if the claim is below Rs. 500, no second appeal lies. (1904) 6 Bom LR 370 (372) (DB).

——S. 102 (S. 586 old Code) — Suit to recover share of land revenue—Paid by one—Joint khataholder.

A suit by a joint khata-holder against other joint holders for their share of land revenue paid is a suit of small cause nature. (1902) 4 Bom LR 90 : 26 B 437 (442) (DB).

——S. 102 (S. 586 old Code) — Small Cause nature — Second appeal — Profits of land — Provincial Small Cause Courts Act, Arts. II and 31:

A suit for the profits of land wrongfully recevied by the defendant is a suit of small cause nature, and S. 586, C. P. C., bars a second appeal in such a suit. (1901) 3 Bom LR 239 : 25 B 625 (628) (DB).

15. Suits for Money.

——S. 102 — Suit excluded by Sch. II, Provincial Small Cause Courts Act.

Section 102 does not bar a second appeal in a suit for money valued at less than Rs. 500, but which is excluded from the cognizance of Small Cause Court under Sch. II of the Provincial Small Cause Courts Act. (1945) 1945 OWN (HC) 264 : 1945 ALW HC 285.

——S. 102 — Suit for refund of amount recovered as tax with praver for declaration of plaintiff's non-liability — Second appeal does not lie.

A suit for refund of amount recovered as a tax with a praver for declaration of plaintiff's nonliability to pay the tax, is a suit of Small Cause nature and hence no second appeal lies under S. 102, Civil P. C. AIR (Vol 28) 1941 All 144 : (1940) ALJ 889 : 1941 AWR 13 : ILR (1940) All 216 : 193 Ind Cas 633.

——S. 102 — Suit for recovery of money value of bhaoli produce of trees — Whether a suit for rent — Cognizability by Small Cause Court — Second appeal, if lies.

A suit for recovery of money value of bhaoli produce of some Mahua trees standing on a plot

of land is not a suit for rent and is not outside the jurisdiction of a Small Cause Court and hence no second appeal lies in the suit. AIR (Vol 23) 1936 Pat 102 : 2 BR 184 : 17 PLT 88 : 160 Ind Cas 186.

——**S. 102 — Suit for refund of profession tax and injunction — Second appeal.**

A suit for the recovery of a sum of money less than Rs. 500 illegally levied as profession tax and for an injunction restraining the municipality from levying such tax in respect of succeeding years is not a suit of a small cause nature for the purposes of S. 102, Civil P. C. AIR (Vol 20) 1933 Mad 22 : 36 MLW 659 : (1932) MWN 1248 : 140 Ind Cas 273.

——**S. 102 — Money suit on — Nature of suit — Absurd prayer for injunction — Jurisdiction of Small Cause Court.**

A suit for money to be recovered on foot of a simple bond remains a suit cognizable by a Court of Small Causes in spite of an additional absurd and fictitious prayer for an injunction to restrain defendant from transferring his immovable property. 1930 ALJ 1043 : AIR (Vol 17) 1930 All 702 (DB).

——**S. 102 — Suit for money for permissive possession of land.**

In a suit for money due for use and occupation on the ground of permissive possession the Small Cause Court passed an order under S. 23, Provincial Small Cause Courts Act, returning a plaint.

Held, that on proper construction of plaint no second appeal did lie. 120 Ind Cas 370 : AIR (Vol 16) 1929 Mad 781.

——**S. 102 — Suit for money — Forcible taking.**

A suit to recover money forcibly taken from the plaintiff by the defendant is cognizable by the Court of Small Causes and if the amount is claimed less than Rs. 500, there is no second appeal. 2 UPLR (All) 212 : 57 Ind Cas 505 : AIR (Vol 7) 1920 All 123 (DB).

——**S. 102 — Partnership — Suit for recovery of money advanced in partnership business with profits — Prov. Sm. C. C. Act, Art. 29 (c).**

Plaintiff sued for recovery of Rs. 40 advanced for a partnership business which had since ceased to exist and also for Rs. 9 as approximate profits of the money put into the business. Held, that no second appeal lay, the suit not being one for the balance of partnership accounts within Art. 29 (c) of the Prov. S. C. C. Act. 51 Ind Cas 435 : AIR (Vol 6) 1919 Cal 328.

——**S. 102 — Profits of office — Small Cause Suit.**

A suit for his share of the profits of an office exclusively received by the Defendant a co-sharer, is one for money had and received and as such of a small cause nature. There is no second appeal against the decree. 37 Bom 700 : 15 Bom LR 803 : 21 Ind Cas 181 : AIR (Vol 1) 1914 Bom 284 (DB).

——**S. 102 — Damages — Government.**

A suit to recover an amount less than Rs. 500 against Government for repairs executed is of small cause nature and no second appeal lies thereon. 12 MLT 299 : (1912) MWN 954 : 23 MLJ 732 : 37 Mad 533 : 16 Ind Cas 400 : AIR (Vol 1) 1914 Mad 578 (DB).

——**S. 102 — (C. P. C., S. 586 old Code).**

A suit brought to recover money said to have been taken by the police as stolen property from a person suspected for having committed an offence and not returned to him after he had been acquitted of the charge brought against him, but made over wrongly to another person, the complainant in the criminal case in whose house the offence was committed by order of the Magistrate, presumably under the provisions of S. 517 of the Code of Criminal Procedure, is a suit of the nature cognizable in Courts of Small Causes, and where the amount claimed does not exceed Rs. 500, no second appeal would lie. (1905) Ind Cas LJ 355 (359) (DB).

——**S. 102 (S. 586 old Code) — Suit of the nature cognizable by a Court of small causes — Appeal — Provincial Small Causes Courts Act, Arts. 15, 18 and 31:**

The plaintiff sued as widow of a deceased Brahmin priest to recover from the defendant certain books containing lists of clients of her late husband and, also a sum of Rs. 60, on the allegation that the defendant had been entrusted with the books and had realized the money as her agent for the purpose of carrying on the business of her deceased husband, and contrary to the terms of the agency, had not handed over the money which he had obtained from the clients to her.

Held, that as this was a suit of the nature cognizable by a Court of Small Causes within the meaning of S. 586, C. P. C., the suit will not fall under Arts. 15, 18 or 31. (1904) AWN 227 : 27 A 200 (203) (DB).

——**S. 102 (S. 586 old Code) — Suit for value of fruits taken away — Question of title to land incidentally raised — Suit of a Small cause nature — Second appeal.**

A suit for value of fruits illegally taken away is a suit of a Small Cause nature, although a question as to the title of the land itself is raised. (1902) 6 CWN 687 (688) (DB).

——**S. 102 (S. 586 old Code) — Suit to recover money given on pledge of moveable property — Suit cognizable by a Court of Small Causes — Second appeal.**

A mortgage of the fruit of plantain trees is a mortgage of moveable property and there is no second appeal in a suit for the recovery of less than Rupees 500 upon such a mortgage, the suit being one cognizable by a Court of Small Causes. (1901) 11 MLJ 343 (343) (DB).

16. Suits for property.

——**Ss. 102 and 42 — Execution proceedings — Decree of Small Cause Court — Execution against immoveable property — Second appeal.**

An order passed by a District Munsif in execution of a decree of a Small Cause Court transferred to him for execution against the immoveable properties of the judgment-debtor is appealable. S. 102, C. P. C., prohibits a second appeal from the order. 37 MLJ 303 : 26 MLT 256 : 53 Ind Cas 408 : AIR (Vol 6) 1919 Mad 264 (DB).

——**S. 102 — Possession — Damages — Not Small Cause.**

The claim being not only for money under O. 21, R. 91 but also for possession of property the suit is not cognizable by a Court of Small Causes and so second appeal can lie. (1911) 35 Bom 29 : 12 Bom LR 723 : 7 Ind Cas 955 (DB).

17. Suits for Rent.

(a) General.

(b) Taxes or Cesses.

(a) General.

——**S. 102 — Claim for cess paid by land-holder for person who is not intermediate land-holder within S. 88, proviso, Madras Local Boards Act, is not rent — Claim is of small cause nature.**

A claim by the land-holder against a minor inamdar who is not an intermediate land-holder within the meaning of the proviso to S. 88, Madras Local Boards Act, for cess paid by him to the Government for the minor 'inamdar', is not rent because the land-holder is not bound to pay to Gov-

ernment the cess due by the minor 'inamdar'. The claim therefore, is of a small cause nature. AIR (Vol 31) 1944 Mad 442 : (1944) 1 MLJ 456 : 57 MLW 359.

——**S. 102 — Suit for poruppu is of small cause nature.**

Poruppu is not rent and therefore, a claim for poruppu is of a small cause nature. AIR (Vol 31) 1944 Mad 442 : (1944) 1 MLJ 456 : 57 MLW 359.

——**S. 102 — Suit for rent — Second appeal.**

Where at a rent sale in 1904 in execution of a decree for his share of the rent, a co-sharer purchases a certain holding which constituted an occupancy holding, such co-sharer after his purchase becomes liable to pay rent as tenant to the whole body of landlords including himself. His liability is for rent and not for use and occupation. Consequently, a suit for rent by the landlord against the co-sharer is not a suit of the nature cognizable by a Court of Small Causes within the meaning of S. 102, Civil P. C. AIR (Vol 30) 1943 Cal 252 : 76 CLJ 38 : 46 CWN 494 : 208 Ind Cas 228.

——S. 102 — A suit to recover rent of agricultural land is not a suit of the nature cognizable by Courts of Small Causes and a second appeal lies even if the amount is less than Rs. 500. AIR (Vol 22) 1935 Rang 386 : 13 Rang 633 : 158 Ind Cas 804 (FB).

[Overruled AIR (Vol 13) 1926 Rang 19 : 91 Ind Cas 639 (DB)].

——**S. 102 — Suit for rent and damages.**

A suit, instituted for rent under a lease agreement or alternatively for damages for use and occupation, is a suit of small cause nature and it would not cease to be so even when transferred to the original side, question of title having been raised. And if such suit is of value of less than Rs. 500 no second appeal lies. 119 Ind Cas 386 : AIR (Vol 16) 1929 Mad 525.

——**S. 102 — If "Land Suit" — Bengal Civil Courts Act, S. 2.**

A suit for rent of land is not a "land suit" within the meaning of section 2 and therefore if the value does not exceed Rupees 500 no second appeal lies under section 11. 3 LBR 90; 42 Cal 638 Diss. 91 Ind Cas 639 : 3 Rang 390 : AIR (Vol 13) 1926 Rang 19 (DB).

——**S. 102 — Land-holder and ryot — Jurisdiction of Small Cause Court.**

Both under the Madras Estates Land Act which definitely excludes the jurisdiction of all Civil Courts and on the true construction of S. 15 of the Provincial Small Cause Courts Act, a Small Cause Court has no jurisdiction over a suit for rent by a land-holder against his ryot, and therefore the provisions of S. 102 of the C. P. Code do not apply to such a suit. 63 Ind Cas 8 : 15 Mad LW 150 : 44 Mad 697 : 1921 MWN 565 : AIR (Vol 9) 1922 Mad 119 : 40 MLJ 466 (DB).

——**S. 102 — Rent suit.**

Suits for recovery of rent other than house rent being excepted from the cognizance of a Court of Small Causes the provisions of S. 102 of the Civil Procedure Code do not apply to them. 1922 Pat HCC 154 : AIR (Vol 9) 1922 Pat 184 (DB).

——**S. 102 — Rent — Suit for.**

Though a suit for rent due by a tenant of Malik Makbuza fields is not triable by a Small Cause Court it is still one of a nature cognizable by a Small Cause Court and unless the subject matter involved in the suit exceeds Rs. 500, there is no second appeal from a decree in it. 56 Ind Cas 845 : AIR (Vol 7) 1920 Nag 216.

——**S. 102 — Rent — Damages — B. T. Act S. 153.**

Decision in a suit for less than Rs. 100, as arrears of rent or in the alternative for damages for use & occupation, is not subject to second appeal, either under S. 153, B. T. Act or S. 102, C. P. C. 22 CLJ 664 : 33 Ind Cas 346 : AIR (Vol 3) 1916 Cal 907 (DB).

——**S. 102 — Joinder of claims — B. T. Act, S. 153, Bar cannot be evaded by.**

Where no second appeal would lie if two different suits had been filed for the recovery of rent and the recovery of damages for breach of a contract by reason of S. 153, Ben. Tenancy Act and S. 102 of the C. P. C., the bar provided by these sections could not be evaded by joining the two claims in one suit for rent. 23 CLJ 557 : 34 Ind Cas 697 : AIR (Vol 3) 1916 Cal 887 (DB).

——**S. 102 — Rent — Incidental prayer for declaration.**

In a suit for the recovery of rent, where a prayer for a declaration of right is added but no separate Court fee is paid therefor such prayer should be treated as incidental to the prayer for rent and no second appeal lies. (1912) 23 MLJ 517 : 17 Ind Cas 704 (DB).

——**S. 102 (S. 586 old Code) — "Suit of the nature cognizable by a Court of Small Causes" — Suit for rent less than Rs. 500 and for a declaration of the propriety of patta.**

The plaintiff prayed for a declaration that the patta tendered by him was a proper patta and for rent the amount of which was less than Rs. 500.

Held, that no second appeal lay in the case. (1905) 16 MLJ 477: 30 M. 101 (103) (FB)

——**S. 102 — (S. 586 old Code) — Suit for rent containing prayer for the enforcement of a charge in respect of the cist.**

A suit for rent containing prayer for the enforcement of a charge in respect of the cist must be regarded as one for the enforcement of the terms of a muchilika and was of a small cause nature and no second appeal lay. (1901) 24 M. 508 (510, 511) (DB).

——**S. 102 — (S. 586 old Code) — "Suit of a Small cause nature".**

A suit for recovery of rent (the amount sought to be recovered being less than Rs. 500) coupled with a prayer for declaration that the lands are nanjah lands is a suit of a Small Cause nature, and no second appeal lies in such a case. (1901) 16 MLJ 432(432) (DB).

(b) Taxes or cesses.

——**S. 102 — Suit for recovery of terminal tax on movable property valued at less than Rs. 500 — No second appeal lies.**

It is the nature of the suit and not the Court in which it is tried that determines the right of appeal within the provisions of S. 102, Civil P. C. No second appeal lies in a suit for recovery of taxes upon movable property having as its subject-matter property worth less than Rs. 500. AIR (Vol 26) 1939 Sind 35 : ILR (1939) Kar 134 : 179 Ind Cas 927 (DB).

——**S. 102 — Suit to recover Rs. 24-5-7 as rent including galli patti and local cesses — Suit, if of small cause nature — Second appeal, competency of — Right of appeal — How determined.**

Where a suit is to recover Rs. 24-5-7 as rent due in respect of the plaint property for two years including galli-patti and local cesses and the defence is that the rent was fixed at six and eight pavalis, that the suit would not lie until the plaintiffs got a declaration that they were entitled to enhance the rent, and that the rent claimed was excessive, the suit is of the nature cognizable by a Small Cause Court and a second appeal is not competent. It is the nature of the suit and not the Court in which it is tried that determines the

right of appeal. AIR (Vol 22) 1935 Bom 254(2) : 37 Bom LR 355 : 156 Ind Cas 607.

——S. 102 — Second appeal — Competency.

A suit for a sum below Rs. 500, alleged to have been unlawfully collected from the plaintiff as tax, is of a Small Cause nature and no second appeal lies in such a suit. AIR (Vol 19) 1932 Mad 226: 35 MLW 70: (1932) MWN 142: 139 Ind Cas 620.

——S. 102 — Suit for choutarji dues — Nature of — Applicability of Prov. S.C.C. Act, Sch. 2, Cl. 13.

A suit to recover choutarji dues which are in the nature of a jodi is a suit of a small cause nature. There is no difference in principle between inam jodi paid to a zamindar and sub-inam jodi paid to an inamdar as would make Art. 13 applicable to the latter while not applicable to the former. AIR (Vol 14) 1927 Mad 670 : 52 MLJ 706 : 103 Ind Cas 120 : 38 MLT 385 : 1927 MWN 748.

——S. 102 — Grazing fee — Small Cause nature.

No second appeal lies in a suit for recovery of less than five hundred rupees claimed as grazing fee. There can be no claim for rent unless there is a tenancy and there can be no tenancy unless a right to the land has been given to the grantee. AIR (Vol 7) 1920 Cal 733: 32 CLJ 83: 59 Ind Cas 595 (DB).

——S. 102 — Tax — Suit for.

A suit to recover katiari or a tax for homestead paid by the followers of certain traders is a Small Cause suit and no second appeal lies under S. 102. AIR (Vol 4) 1917 Pat 672: 1 Pat LW 541: (1917) Pat 250 : 39 Ind Cas 949 (DB).

——S. 102 — Small Cause nature — Meaning of.

The words "suit of a nature cognizable in Courts of Small Causes" in the section refer to the nature of the suit and not to the forum. A rent suit for Rs. 250 was filed in a second class Sub Judge's Court having Small Cause jurisdiction only up to Rs. 50. A decree was passed and was affirmed in appeal. No second appeal lay as the suit was of a nature cognizable by the Courts of Small Causes. AIR (Vol 3) 1916 Bom 106 : 41 Bom 367 : 19 Bom LR 83 : 38 Ind Cas 881 (DB).

——S. 102 — Cess — Suit for share of cess paid by landlord — Madras Local Boards Act S. 73.

A suit by a landlord to recover Rs. 5 a moiety of the cess paid by him under S. 73 of the Local Boards Act, is a suit of a Small Cause nature and not open to second appeal. (1910) 7 MLT 362: 5 Ind Cas 438 (DB).

——S. 102 — (S. 586 old Code) — Suit for recovery of cess — Payment as rent — Charge on land — Suit cognizable by Court of Small Causes.

A suit for the recovery of cesses paid as part of rent is cognizable by a Court of Small Causes and no second appeal lies in such suits, even though the plaintiff claimed to recover the money as a charge on land. (1900) 11 MLJ 115 (116) : 24 Mad 511n.

18. Suits for Specific Performance of Contract.

——S. 102 — Award — Declaration of invalidity — Jurisdiction of Small Cause Court.

Plaintiff paid a certain amount to defendant for compounding a non-compoundable offence out of Court. Subsequently parties referred the matter to arbitration and an award was made for the repayment of the amount so paid. The plaintiff sued to enforce the award, wherein the defendant challenged its validity. Plaintiff thereupon withdrew the suit and filed a fresh suit for declaration that the award was void and for recovery of the amount paid by him. It was contended that the addition of a prayer for a declaration did not prevent the suit from being of a small cause nature and no second appeal lay.

Held, that the suit was not of a small cause nature. The existence of the award made it impossible for plaintiff to sue for return of the money, which was the subject of the award, except by enforcement of the award or after setting it aside. So long as the award was in existence he could not sue for the return of the money and ignore the award. AIR (Vol 15) 1928 Rang 173: 6 Rang 238: 111 Ind Cas 21.

——S. 102 — Enforcement of — Nature of suit.

A suit to enforce an award is in essence a suit for specific performance of a contract, and is not of a Small Cause nature. AIR (Vol 11) 1924 Rang 192: 1 Rang 700: 79 Ind Cas 718.

——S. 102 — Breach of covenant — Possession not given — Suit for money not one for specific performance — Prov. Sm. C. C. Act, Art. 15.

A Zuripeshqi provided at the end "if the lessee does not get possession of the land, he will be entitled to recover possession by suit or to recover the money advanced with interest at the rate of Rs. 1-6-0 per mensem personally from the executants and from their property. As possession was not delivered the lessee sued to recover the money which was less than Rs. 500. Held, that the suit was not one for specific performance but being a small cause suit, no second appeal lay in the case. (1910) 6 Ind Cas 704 (All).

——S. 102 (S. 586 old Code) — Frame of plaint the guiding factor.

Section 586, C. P. C., contemplates rather the original character of the suit than the character which it may subsequently assume by operation of findings of the Courts. Consequently, where the plaintiff prayed for specific performance of a contract and in the alternative for Rs. 400 as damages, and the first Court awarded damages but the lower appellate Court dismissed the whole suit: Held that a second appeal lay. (1904) 6 Bom LR 731 (732): 32 Bom 356 (DB).

19. Suits for title.

——S. 102 — Suit of small cause nature — Second appeal.

The nature of suit is to be decided on the plaint. In a suit which was originally instituted as a small cause suit by a zamindar against an Inamdar claiming a certain sum as damages for use and occupation, the defendant in his written statement raised the question of plaintiff's title and the suit was thereupon taken to the original side of the Munsif's Court and tried as such:

Held, that the suit did not cease to be a small cause suit and no second appeal lay though incidentally a question of title was raised by the defendant. AIR (Vol 16) 1929 Mad 389: 30 MLW 365: 116 Ind Cas 114.

——S. 102 — Moveables — Declaration of title — Nature of suit — Second appeal.

A suit for declaration of ownership of a share in the crop by virtue of purchase is one to recover moveable property or its value and is of a small cause nature. No second appeal lies. (1913) 11 ALJ 599: 21 Ind Cas 638 (DB).

——S. 102 — Damages — Incidental decision of title.

No second appeal lies from the decision that the defendant was a trespasser and hence was liable in damages for cutting away crops, although the question of title was incidentally decided in the lower Court. (1910) 6 Ind Cas 415 (Cal) (DB).

——S. 102 (S. 586 old Code) — **Suit of Small Cause nature — Second Appeal.**

An appeal lies from a decree passed in a suit of the nature cognizable in a Court of Small Causes but there is no second appeal under Section 586 of the Civil Procedure Code. Where a plaintiff, Jotedar, brought a suit against a tenant for damages for cutting wood and the defendant raised a defence of title by custom and the plaintiff also raised a reserved forest right, the suit is not in the nature of a Small Cause Court suit. (1907) 6 CLJ 218 (220) (DB).

20. Suits relating to Trusts.

——S. 102 — **Suit for recovery of offerings to a shrine.**

A suit to recover offerings for a shrine from a person wrongfully appropriating them falls under Art. 18 of the Second Schedule, as it relates to a trust, and also probably under Art. 35 (ii), so that it is an unclassed suit, and not a small cause, and a second appeal, therefore, lies. AIR (Vol 13) 1926 Lah 228: 92 Ind Cas 731.

21. Revision.

——S. 102 — If the decretal debt is less than Rs. 500, no second appeal lies under Section 102. But if there is a substantial question of law involved, the appeal can be converted into a revision. AIR (Vol 27) 1940 Bom 239: ILR (1940) Bom 353: 42 Bom LR 457: 189 Ind Cas 706 (DB).

——S. 102 — As a rule, the High Court is not in favour of entertaining revisions from the orders of the lower Appellate Courts in cases which are covered by Section 102. These orders are intended by the Legislature to be final and to allow an appeal against such orders amounts to circumventing the policy of the Legislature. AIR (Vol 23) 1936 Lah 293: 165 Ind Cas 137.

——S. 102 — **Ss. 102 and 115 — Small cause nature — Suit for money due.**

Where P. executed a bond in favour of J. for Rs. 400 and on the same day gave him a lease of his occupancy holding which provided that the rent was to be retained by J. on account of interest payable under the bond and where J. having been ejected from the occupancy holding, sued to recover Rs. 400 due under the bond but his suit was dismissed but the Dt. Judge on appeal decreed the suit.

Held, on second appeal that the transaction (simply money-bond and the lease of the occupancy holding) was illegal and the plaintiff could not sue for the recovery of the money due under the bond: that as the Dt. Judge had decreed the plaintiff's suit in appeal and as the suit was one of the nature cognizable by the Small Cause Court, no second appeal lay to the High Court; nor the High Court will interfere in revision as the Dt. Judge had not failed to exercise a jurisdiction vested in him or exercised a jurisdiction not vested in him or acted in the exercise of his jurisdiction illegally or with material irregularity. (1912) 17 Ind Cas 522 (All).

——S. 103.

1. Scope and Object.
2. Issue not decided by lower Court.
3. Issue wrongly decided.

1. Scope and Object.

——S. 103 — **Issue of fact — Determination of — Power of High Court in second appeal.**

The reliance by the lower Appellate Court on the deposition of a witness which is inadmissible in evidence and its failure to apply its mind to any part of the plaintiff's oral evidence containing vital admission of the truth of the defendant's case is an "omission" affecting the correctness of its determination of the issue in question. These defects in its judgment raise questions of law, and they flow from his wrong and irregular approach to a question of fact arising between the parties. The High Court in such circumstances has power even in second appeal to determine under Section 103, C. P. Code, the issue of fact on a consideration of the entire materials on the record. AIR (Vol 36) 1949 All 493: 1949 AWR 496: 1950 ALJ 21.

——S. 103 — **Powers of High Court — Failure of lower Court to determine material issues — Power to consider evidence and decide question of fact in second appeal.**

The High Court under Section 103, C. P. Code, has the power to dispose of a second appeal on an issue of fact, if the evidence on the record is sufficient for the disposal of the appeal, and the issue of fact has not been determined by the first appellate Court or it has been wrongly determined by such Court by reason of any irregularity, omission, error or defect, such as is contemplated by Section 103 (1). Where material issues which are mixed questions of law and fact have not been determined by the first appellate Court, the High Court in second appeal can, under Section 103, proceed to consider the evidence on the record and determine the issues itself. AIR (Vol 33) 1946 Sind 10: ILR (1945) Kar 301: 222 Ind Cas 513 (DB).

——S. 103 — **Second appeal — Power to decide question of fact.**

It is open to the High Court in second appeal to deal with small questions of fact to avoid a remand. AIR (Vol 18) 1931 Cal 129 (2): 34 CWN 951: 130 Ind Cas 140 (DB).

——S. 103 — **Finding of fact — Onus of proof wrongly laid.**

Although the findings of fact of the lower Appellate Court are findings conclusive on the Court of second appeal, where that Court misplaces the burden of proof on a party, it is permissible for the Court of second appeal to examine the finding which is not binding on it because of wrong onus placed on a party. AIR (Vol 17) 1930 Cal 591 (DB).

——S. 103 — **Fresh finding not given after remand.**

Where a Court in second appeal remands a case after vacating a finding on an issue and fresh finding is called for but is not given by the lower Court, the appellate Court is perfectly entitled to determine the issue as one of fact under Section 103. AIR (Vol 17) 1930 Mad 489 (DB).

——S. 103 — **Finding of fact on wrong presumption.**

It is a wrong presumption to hold that the mortgagee has only to allege that the original instrument is lost and if the Court comes to the conclusion that there was a mortgage, the mortgagee is relieved from the duty of affirmatively making out the terms of the contract, because the Court may presume that any contract which they set up is true. And a finding based upon such a presumption is vitiated by an error of which the High Court can, if it pertains to facts, take notice under Section 103, C. P. Code. AIR (Vol 17) 1930 Mad 65: 57 MLJ 789: 30 MLW 1045 (DB).

——**S. 103 — When not applicable.**

High Court has power to determine a question of fact in order to save a remand. AIR (Vol 15) 1928 Pat 318: 7 Pat 260: 107 Ind Cas 821 (DB).

——**S. 103 — Applicability — Appeal against decree — Subsequent declaration in favour of appellant in original suit — Second appeal.**

A suit for profits instituted in the revenue Court was dismissed by the revenue Court on the ground that the plaintiff had no title to the property, but on appeal to the District Judge it was held that he was entitled to sue and the case was remanded under O. 41, R. 23. There was no appeal against the remand order. A decree was passed after remand, whereupon the defendant appealed. Before the hearing of the appeal he obtained a declaration from the Civil Court that he was owner and in possession of the property in suit. The District Judge thereupon held that he was bound by the Civil Court's declaration and decreed the appeal and dismissed the suit.

Held, that though the District Judge cannot go back on his own decision, yet, as the matter opened up completely on second appeal, the High Court would be bound to take notice of the decree of the Civil Court and to act accordingly. AIR (Vol 14) 1927 All 694: 103 Ind Cas 349.

——**S. 103 — (As amended by Act VI of 1926) — Finding of fact.**

Under the provisions of Act VI of 1926, S. 103 gives the High Court on second appeal, if the evidence on the record is sufficient, power to determine any issue of fact necessary for the disposal of the appeal not only in cases where that question of fact has not been disposed of by the lower Court, but also in cases in which it has been wrongly determined by such Court by reason of any illegality, omission, error or defect such as is referred to in sub-S. (1) of S. 100. AIR (Vol 14) 1927 Pat 167: 102 Ind Cas 391: 8 PLT 74: (DB).

——**S. 103** — Where the question has been determined by the lower Court, and that decision cannot be supported because it is based in part on evidence improperly admitted, S. 103 does not apply. AIR (Vol 11) 1924 Cal 1042: 78 Ind Cas 219: 40 CLJ 39 (DB).

——**S. 103 — Remand for re-hearing.**

Where an issue has been raised and determined, it is not within the competence of High Court in second appeal to remand the case for a re-hearing upon that very issue. AIR (Vol 9) 1922 Pat 575: 67 Ind Cas 494: 1 Pat 639 (DB).

——**S. 103 and O. 43 R. 1 (a) — Order of remand — Appeal — Findings of fact.**

The High Court cannot go behind the findings of fact by the lower Appellate Court in an appeal against an order of remand by the latter Court. (1909) 6 MLT 198: 3 Ind Cas 283 (DB).

2. Issue not decided by lower Court.

——**S. 103 — Mixed question of law and fact — Issue not determined — High Court's power.**

Where the issue involves a mixed question of law and fact (whether the plot in question is a 'street' within S. 3 (19), Bom. Municipal Boroughs Act) and it is a material issue and the first Appellate Court has failed to determine it, the High Court can, under S. 103, consider the evidence on the record & determine the issue itself. AIR (Vol 33) 1946 Sind 10: ILR (1945) Kar 301: 222 Ind Cas 513 (DB).

——**S. 103 — First Appellate Court not determining issue — In second appeal issue remitted to trial Court for recording further evidence — Trial Court taking evidence and returning issue to High Court — High Court, if can determine issue under S. 103.**

Where an issue had not been determined by the lower Appellate Court, and when the case came before the High Court, the evidence on record was found to be insufficient and the issue was, therefore, remitted on remand to the trial Court, and the trial Court, after recording such evidence and giving its finding on that issue, returned the case to the High Court:

Held, that the issue could not be said to have been determined by the lower Appellate Court. The High Court, therefore, had jurisdiction to determine such issue of fact under S. 103, Civil P. C. AIR (Vol 26) 1939 Nag 173: 1939 NLJ 815 :ILR (1940) Nag 643: 182 Ind Cas 12 (DB).

——**S. 103 — Failure to give finding — High Court can substitute finding.**

When there is no definite finding of fact in the judgment of the lower appellate Court, High Court will go into the question of fact, if without a clear finding on point of fact which goes to the root of the whole case, it is impossible to deal with the law in the case. AIR (Vol 18) 1931 Rang 29: 8 Rang 425: 128 Ind Cas 366.

——**S. 103 — Failure to consider.**

Where the Court below fails to determine a question as regards the concealment and removal of property by judgment-debtor, in order to apply R. 40, O. 21, it is open to the Appellate Court in second appeal under S. 103 to decide the question after a consideration of the evidence in the case, instead of making a remand to the lower appellate Court for reconsideration of the appeal. AIR (Vol 16) 1929 Pat 728: 118 Ind Cas 312 (DB).

——**S. 103 — Failure to give finding.**

Under S. 103 the High Court can give a finding of fact only when none has been given in the lower Appellate Court; where one has been given but is found to be illegal the only course open to the High Court under that section is to remand the case for a fresh decision. AIR (Vol 13) 1926 Nag 339: 93 Ind Cas 650.

——**S. 103 — Construction of document — Issue as to title — Determination of.**

Court of second appeal can decide a question of title itself if left undetermined by the lower Court whether it was a question of fact or law, under S. 103 read with Order 41, R. 25. Where the question of title rests purely on interpretation of certain documents and the legal inferences to be drawn from them, it is not a question of fact alone and the High Court can interfere and decide it itself. AIR (Vol 11) 1924 Oudh 266: 78 Ind Cas 895: 27 OC 77: 10 OLJ 646.

——**S. 103 — Failure to decide.**

Where the Trial Court did not decide a question of fact but the evidence on record was sufficient for the purpose and there was already a very great delay, the High Court decided the fact itself. AIR (Vol 10) 1923 All 134: 76 Ind Cas 12: 21 ALJ 33: 45 All 191 (DB).

——**S. 103 — Documentary evidence not considered.**

Where lower Court fails to consider documentary evidence, High Court can give a finding itself. AIR (Vol 10) 1923 All 71: 82 Ind Cas 772 (DB).

——**S. 103 — Findings called for, by High Court not returned — Power of High Court to find on the evidence.**

In a suit by a landlord (ryotwari pattadar) to eject his tenants, the latter claimed permanent

C., which has no application to the filing of an award under S. 11, Cl. (2) of the Arbitration Act. AIR (Vol 5) 1918 Cal 191: 45 C 502: 46 Ind Cas 687 (DB).

——S. 104 (1) (h) and O. 43, R. 1(r) — Order under O. 39, R. 2(3).

An appeal lies against an order refusing to take action under O. 39, R. 2(3). AIR (Vol 4) 1917 Mad 448: 39 Mad 907: 3 LW 430: 30 MLJ 523: 19 MLT 314: (1916) 1 MWN 328: 34 Ind Cas 588 (FB).

——S. 104(2) and O. 21, R. 90 — Execution sale — Order refusing to set aside — Appeal to Privy Council — Maintainability — C. P. Code (1882), Ss. 2, 588 and 595.

Orders under O. 21, R. 90 of the C. P. Code (S. 311) setting aside or refusing to set aside sale on appeal by the High Court, deal finally with the rights of parties and are appealable to the Privy Council. (1913) 40 Cal 635: 40 IA 140: 17 CWN 637: (1913) MWN 387: 11 ALJ 517: 15 Bom LR 155: 14 MLT 37: 25 MLJ 140: 19 Ind Cas 296 (PC).

2. Arrest.

——S. 104(h) — An order directing imprisonment of a person who obstructs the execution of a decree is not appealable. AIR (Vol 30) 1943 Pesh 58: 207 Ind Cas 607.

——S. 104 — Order directing arrest or detention in civil prison.

Under S. 104(h) an appeal lies from an order directing the arrest or detention in the civil prison of any person otherwise than in execution of a decree. AIR (Vol 19) 1932 All 524: (1932) ALJ 221: 136 Ind Cas 367 (DB).

——S. 104 — Order issuing arrest warrant.

An order issuing a warrant for the arrest of a judgment-debtor in execution of a decree, falls under S. 47 and is appealable as a decree under S. 96 though not under S. 104 (1) (h). AIR (Vol 11) 1924 Lah 360: 73 Ind Cas 766.

——S. 104(1)(h) — Execution — Order directing arrest of judgment-debtor — Appeal, if lies.

An Order passed in execution of a decree under S. 9 of the Specific Relief act is not appealable. Therefore an order passed in execution of such a decree directing the arrest of the judgment-debtor is not appealable either as a decree or as an order under S. 104(1)(h), C. P. C. AIR (Vol 4) 1917 Lah 24: 39 Ind Cas 379: 5 PWR 1917: 18 PLR 1917.

[See also AIR (Vol 4) 1917 Lah 21: 39 Ind Cas 375].

——Ss. 104(1)(h), 42, 145 and 47 — Surety — Appeal by.

Though a surety for failing to satisfy a decree is arrested under S. 104, Cl. (h) yet he is given a right to appeal under Ss. 42, 47 and 145 of C. P. Code. AIR (Vol 2) 1915 Cal 688: 19 CWN 1085: 30 Ind Cas 684 (DB).

3. Award decree.

——S. 104 — Schedule II, Para. 21, does not take away the right of appeal given to a person aggrieved by S. 104, Cl. (f). The fact that the filing of the award was followed by judgment and decree does not disentitle a person aggrieved from filing an appeal against the order filing or refusing to file the award, the same being expressly permitted by S. 104(f). AIR (Vol 27) 1940 Nag 386: 1940 NLJ 393: ILR (1940) Nag 659: 192 Ind Cas 371.

——S. 104(a) — Order rejecting objections to award — Appeal, if lies — Decree on award — Appeal, if one under S. 104(a).

No appeal lies against an order of the District Judge rejecting objections made to an award and passing a decree on the award. It is not an appeal from the decree; it cannot be an appeal under Cl. (a), S. 104, Part I as Cl. (a) refers to orders superseded and not to orders refusing to supersede. The distinction is obvious from the wording of Cls. (d), (e) and (f) of the same section. Nor can the order be one modifying or correcting the award. It is an order refusing to do so. No appeal, incidentally, can also lie against the decree itself, on the ground that the award was not a valid one. AIR (Vol 23) 1936 Rang 240: 163 Ind Cas 590 (DB).

——S. 104 — Scope of appeal.

In appeal from a decree based on an award no objection can be taken except in so far as the decree is not in accordance with the award. AIR (Vol 17) 1930 Lah 102: 10 Lah 688: 30 PLR 722: 122 Ind Cas 90 (DB).

——S. 104 — Appeal if lies.

Where the decree appealed against was not in excess of the award and where the award had been made on a reference through the Court under Schedule II to the Code of Civil Procedure:

Held, the award cannot be treated either as a compromise under R. 3 of O. 43, or an order appealable under S. 104(1)(f) of the Civil Procedure Code. AIR (Vol 11) 1924 Bom 324: 26 Bom LR 171: 79 Ind Cas 723 (DB).

——S. 104(1)(f) and O. 43, R. 1(d) — Order refusing to set aside ex parte decree.

An order refusing to set aside an ex parte decree passed in accordance with an award is appealable. AIR (Vol 3) 1916 All 51: 38 All 297: 14 ALJ 332: 33 Ind Cas 80 (DB).

——S. 104(1)(f) and Sch. II, Para. 20 — Arbitration — Award — Conditional purchase of outstandings by one partner.

Where certain disputes were referred to arbitrators and an award was made directing the purchase of the partnership outstandings at a certain valuation by the plaintiff partner and holding the defendant responsible for any error on accounts regarding the outstandings: Held the award did not finally determine the questions referred to for arbitration. AIR (Vol 1) 1914 Low Bur 40: 7 Bur LT 287: 8 LBR 58: 24 Ind Cas 132.

——S. 104(1)(f) — Decree based on — Award without intervention of Court — Appeal — Revision.

Section 104(1)(f), C. P. C., provides an appeal from an order filing an award and so an application for revision of the final decree passed on an award out of Court can be heard as an appeal though no appeal is provided against the decree. 176 PWR 1913: 310 PLR 1913: 21 Ind Cas 298 (DB).

——S. 104(1) and (f) Sch. II, Paras. 16 and 17 to 21 — Proceedings and decree under paras 17 to 19 — Appeal.

The words "without the intervention of the Court" in S. 104(1)(f) of C. P. C., refer only to those proceedings which are taken under paras 20 and 21 and not to proceedings taken under paras 17 to 19 of the second Sch. A decree passed in accordance with an award, as the result of the proceedings under paragraphs 17 to 19 is not appealable. 9 PR 1913: 243 PLR 1913: 16 Ind Cas 996 (DB).

——S. 104(1)(f) and Sch. II, Paras. 15 and 16 — Appeal — Misconduct of arbitrator — Objection disallowed after inquiry — Decree in conformity with award.

A reference to arbitration was made in a pending litigation. The award was challenged, on the ground of misconduct of the arbitrator. After making an inquiry into the allegations of misconduct, the Court disallowed the objections and passed a decree in accordance with the award. Held, that no appeal lay from the order disallowing the objections or from the decree passed on the basis of the award. (1912) 16 Ind Cas 595 (Oudh).

4. Award, filing of.

——S. 104(1)(f) — Applicability.

Section 104(1)(f), Civil P. C., applies only to orders filing an award in an arbitration without the intervention of the Court. AIR (Vol 30) 1943 Pat 285: 22 Pat 108: 10 BR 344: 211 Ind Cas 137 (DB).

——Section 104(f) empowers the Appellate Court not only to go into the question of the existence of the reference and of the award but also to go into questions such as are indicated by Para. 14 or Para. 15, Sch. II. AIR (Vol 22) 1935 Pesh 69: 155 Ind Cas 1022 (DB).

——S. 104(1)(f), Sch. II, Para. 21 — Decree passed in pursuance of award — Effect.

Section 104(1)(f), allows an appeal from an order filing or refusing to file an award in an arbitration without the intervention of the Court and the fact that as a result of the Court's order directing the award to be filed, a decree has subsequently been passed in accordance with the award does not take away the right of appeal against the order directing the award to be filed. AIR (Vol 18) 1931 Oudh 345: 8 OWN 789: 7 Luck 128: 134 Ind Cas 474.

——S. 104 — Order on application — Appeal if lies.

An order filing or refusing to file an award in an arbitration without the intervention of the Court is not and cannot be regarded as a decree. AIR (Vol 15) 1928 Lah 137: 9 Lah 380: 107 Ind Cas 756 (DB).

——S. 104 — Order on application — Appeal, if lies.

Where an order directing an award to be filed and a decree in accordance with the award were not separately passed but the Court disposed of the whole case by a single order.

Held, that the appeal was in substance an appeal from an order directing the award to be filed, and as such was competent. AIR (Vol 12) 1925 All 404: 23 ALJ 440: 6 LRA Civ 350: 47 All 743: 88 Ind Cas 76 (DB).

——S. 104 — Implied order.

Where at the hearing of an application for filing an award under C. P. Code, Sch. II, P. 20, the objections of the opposite party are overruled and the Court eventually passes a decree in accordance with the award, though there is no order in so many words that the award be filed, the decision of the Court dismissing the objection must be held to amount to an order filing an award. The right conferred by the Legislature cannot be defeated by the mere fact that no express order filing the award was made. AIR (Vol 12) 1925 Lah 321: 26 PLR 466: 7 LLJ 91: 88 Ind Cas 533.

——S. 104 — Meaning of.

'Order filing the award' does not mean the order by which the arbitrators are directed to send their award or bring their award to Court before the objections have been lodged or disposed of; but an order filing an award is passed after the objections have been disposed of and an appeal does lie from an order filing an award even if in consequence the decree has to be set aside. In this connection the provisions of S. 104(f) should be observed and paragraph 21(2), Sch. II of the Code should be treated as a dead letter. AIR (Vol 11) 1924 Lah 231: 73 Ind Cas 820.

——S. 104 — Arbitration through Court — Applicability.

Where an award was given by arbitrators with the intervention of the Court and the defendants after filing objections were absent on an adjourned date and the Court passed the decree in the terms of the award and dismissed the application under O. 9, R. 13 to set aside the award.

Held, no appeal lay against the order and that S. 104(f) did not apply as the arbitration was with the intervention of the Court. AIR (Vol 11) 1924 Pat 603: 1924 PHCC 170: 3 Pat 839: 6 PLT 212: 83 Ind Cas 26 (DB)

——S. 104 — Appeal against order — Power of Court.

The effect of S. 104(1)(f) seems to give a right of appeal against the decision of the Court on the question whether the award should be filed or not. Paragraph 21(2) of the Second Schedule allows an appeal also if the decree of the Court does not correctly interpret the award and on an appeal under this provision the decree can be corrected so as to bring it in accordance with the award. But when the decree does correctly interpret the award then there is no appeal against the decree; in other words, when an award has lawfully been made there is no appeal against the decision of the arbitrators. The Court has invariably to go into the merits of the decision contained in the award. It is limited to the three questions whether there has been a reference, whether there has been an award, and whether any grounds under paras. 14 and 15 have been proved. AIR (Vol 10) 1923 Rang 199: 1 Rang 265: 76 Ind Cas 504.

——S. 104 — Arbitration through Court — Appeal.

Section 104(1)(f), C. P. Code provides for an appeal against an order filing or refusing to file an award in an arbitration without the intervention of the Court and applies to an award filed under Sch. II, Para 21, C. P. Code. No appeal lies against an order filing an award made in pursuance of an order of reference made by the Court and filed under para. 19 of Sch. II. (1921) 60 Ind Cas 590 (Lah) (DB).

——S. 104(1)(f) and Sch. II, Para 21(1) — Award — Appeal.

An appeal lies from an order filing or refusing to file an award in an arbitration without the intervention of the Court. In an arbitration without the intervention of the Court the fact that the decree is drawn up on the basis of the judgment which follows the order filing the award cannot take away the right of appeal of the party aggrieved by the order. Where such an appeal is allowed, the decree will become infructuous, the whole foundation of the decree will disappear and the appellate Court can declare that the decree has been vacated by reason of the fact that the order on which it was based had been cancelled. AIR (Vol 2) 1915 Cal 745: 21 CLJ 273: 19 CWN 948: 28 Ind Cas 557 (DB).

——S. 104 (1) (f) Sch. II para S. 21 cl. (2) — Private arbitration — Appeal.

An appeal lies against an order filing an award in an arbitration out of Court even after a decree on the award is passed, as the validity of the decree depends upon the validity of the order directing the award to be filed. AIR (Vol 1) 1914 Cal 899: 18 CWN 381: 22 Ind Cas 391 (DB).

——S. 104 (1) (f) and (2) Sch. II paras 20 and 21 cl. (2) — Arbitration pending litigation without intervention of Court — Filing — Award — Appeal — Revision, if lies.

An appeal lies against an order directing an award to be filed; and no further appeal lies to the High Court. AIR (Vol 1) 1914 Cal 581: 22 Ind Cas 690 (DB).

——S. 104 (1) (f) and (2) — Appellate Court allowing award to be filed — Appeal or Revision.

An order passed by an appellate Court under Sch. II para 20, C. P. C. allowing an award to be filed and directing the first Court to pass a decree in accordance therewith is not open to appeal. It is exceedingly doubtful even if a revision lies. AIR

(Vol 1) 1914 Lah 187: 280 PLR 1914: 143 PWR 1914: 27 Ind Cas 332 (DB).

——**S. 104 (1) (f) — Order directing filing of award whether appealable.**

An order directing an award to be filed is appealable, even though the decree following the same is not and even though the order also embodies a a decree in accordance with the award. (1911) 2 MWN 223: 21 MLJ 1005: 12 Ind Cas 269 (DB).

——**S. 104 (1) (f) and Sch. II Para 21 (1) and (2).**

An appeal lies under S. 104 (f) of the Code of C. P. C. from an order filing an award made in an arbitration without the intervention of the court in spite of the fact that the Court has proceeded to pronounce decree under Cl. 21 (1) of Sch. II C. P. C. The provisions of S. 104 (f) are clear and are not subject to paras 21 (1) and 21 of Sch. II. 103 PWR 1911: 172 PLR 1911: 123 PR 1912: 10 Ind Cas 512 (DB).

——**S. 104 (1) (f) — Award — Court's order directing it to be filed — Appeal.**

An appeal lies from an order of Court directing an award to be filed. (1909) 6 MLT 137: 19 MLJ 394: 2 Ind Cas 92 (DB).

5. Award, refusing to file.

——**S. 104 — Private reference to arbitration — Subsequent application to Court under Para 17 (1), Sch. II, Civil Procedure Code (Act V of 1908), for filing agreement — Out of three arbitrators, two making one award and third making different award — Court finding majority award bad and refusing to make it decree — Appeal, if maintainable.**

Certain persons, after making a private reference to arbitration, made an application to the Court under Para 17 (1) of Sch. II of Civil P. C., that the agreement to refer to arbitration should be filed in Court. The Court dismissed the application, but on appeal under S. 104 (1) (d), Civil P. C., the High Court directed the application to be filed. There were three arbitrators. Two of them made one award and the third made another award. The Judge found that the award of the majority was bad. He accordingly refused to make that award a decree of the Court:

Held, that no appeal lay from the order of the Court. AIR (Vol 26) 1939 Lah 542: ILR (1939) Lah 541: 185 Ind Cas 632 (DB).

——**S. 104 — Meaning of — Remittal for re-consideration.**

S. 104 (1) (f) contemplates only final orders and an order remitting an award to the arbitrators with the direction that they should make a fresh award in compliance with the agreement of reference does not amount to refusal to file an award under S. 104 (1) (f) and is not appealable. AIR (Vol 13) 1926 Lah 658: 96 Ind Cas 779.

——**S. 104 — Procedure.**

An order refusing to file an award under the Arbitration Act is appealable. Where there is nothing to the contrary in the rules framed under S. 20, or where no such rules have been framed, the ordinary procedure of the C. P. Code is followed. AIR (Vol 8) 1921 All 273: 61 Ind Cas 269: 19 ALJ 132: 43 All 348 (DB).

——**S. 104 (1) (f) and Sch. II Paras 1 and 15 — Order refusing to file award — Appeal — Reference through Court — Order setting aside award under Para 15 — Interlocutory order — Appeal — Revision.**

Clause (f) of S. 104 of the C. P. Code refers to cases where a matter has been referred to arbitration without the intervention of the Court. There is an inherent difference between orders refusing to file an award on a matter referred to an arbitration without the intervention of the Court and those referred to under Sch. II para 1, C. P. Code. In the former case, the Court refuses to file an award, and its order amounts to a formal adjudication in the matter of controversy and conclusively determines the rights of the parties. In the case of orders setting aside an award under para 15 of Sch. II, the order is only of an interlocutory nature and is in no way a conclusive adjudication of the matter in dispute. Consequently such an order is not open to revision. AIR (Vol 5) 1918 Lah 83: 154 PWR 1918: 47 Ind Cas 171.

——**S. 104 (1) (f) and (2) — Appeal — Award — Setting aside.**

No appeal lies from the order of an Appellate Court setting aside the order of the lower Court refusing to file an award made without intervention of the Court. AIR (Vol 1) 1914 Low Bur 61: 7 LBR 277: 8 Bur LT 44: 25 Ind Cas 7 (DB).

——**Ss. 104 (1) (f) and 154 — Refusal to file an award — Appeal — C. P. C., if retrospective.**

Application was made before the passing of the new Code to have an award of arbitrators filed in Court. After the passing of the new Code, the Court refused the application. No appeal lay from the order of refusal under the new Code and S. 104 (f) of the new Code had no retrospective effect. (1910) 7 ALJ 1070: 8 Ind Cas 8 (DB).

6. Compensation.

——S. 104 — No second appeal lies from an order of the first Appellate Court in an appeal against an order of the trial Court under S. 95, Civil P. C. AIR (Vol 29) 1942 All 261: (1942) ALJ 284: ILR (1942) All 360: 1942 AWR 114: 201 Ind Cas 184.

——**S. 104 — Order refusing to set aside award — Appeal — Proper court-fee.**

An order refusing an application to set aside the award when the reference was in a suit pending before the Court, is not appealable, but such an order is analogous to an order filing an award under Cl. (21). Therefore Court-fee stamp of Rs. 4 is sufficient. AIR (Vol 16) 1929 Lah 369: 111 Ind Cas 145.

——**S. 104 — Appellate order refusing to file award — Revision — Proper fee.**

Petitioner's application for filing an award was accepted by trial Court. The order was reversed in appeal. Petitioner filed a revision petition and stamped it with a Court-fee stamp of Rs. 4.

Held, that the order was revisable and that the Court-fee was sufficient. AIR (Vol 16) 1929 Lah 367: 110 Ind Cas 302 (DB).

——**S. 104 — Order under cl. (f) — Appeal — Proper fee.**

For the purposes of Court-fees an appeal from an order under S. 104 (f), C. P. Code, would be governed by Art. 11, Sch. 2, Court-fees Act. AIR (Vol 15) 1928 Lah 137: 9 Lah 380: 107 Ind Cas 756 (DB).

——**S. 104 — Order filing award — Appeal — Proper fee.**

For an appeal under S. 104 (f) against an order filing an award without the intervention of the Court, the requisite Court-fee stamp is of eight annas. AIR (Vol 14) 1927 All 771: 103 Ind Cas 315: 25 ALJ 741 (DB).

——**S. 104 and O. 43 R. 1 — Order granting leave to sue receiver.**

An order granting leave to sue a receiver for damages caused by his negligence, laches etc., is not appealable. AIR (Vol 8) 1921 Bom 427: 45 Bom 99: 22 Bom LR 1126: 59 Ind Cas 421 (DB).

——**Ss. 104 (1) (g) and 95 — Refusal to compensate for improper attachment — Appeal.**

An appeal lies under S. 104 (g) from an order refusing relief under S. 95 of the C. P. Code as well as from one granting such relief. AIR (Vol 6) 1919 Mad 20: 25 MLT 46: 9 LW 69: 49 Ind Cas 86 (DB).

——Ss. 104 (1) (g) and 95 — Compensation for improper attachment — Order awarding, if appealable.

An appeal lies against an order awarding compensation for improper attachment under Ss. 491 and 497, C. P. C. 1882. (1911) 21 MLJ 460: 11 Ind Cas 349 (DB).

7. Interlocutory Order.

——Ss. 104, 115, O. 7, R. 10, O. 41, R. 23, O. 43, R. 1 (u) — Order returning plaint for presentation to proper Court — Appellate order setting aside order and directing suit to be decided according to law — Second appeal, if competent — Order, if open to revision.

The trial Judge framed a preliminary issue in a suit on the question of jurisdiction and held that he had no jurisdiction to try the suit and consequently, ordered the return of the plaint for presentation to the proper Court presumably under O. 7, R. 10, Civil P. C. In appeal the Appellate Court set aside the order of the trial Court holding that the trial Court had jurisdiction and ordered that Court to dispose it of according to law. In second appeal:

Held, that no second appeal was competent. The order of the Appellate Court was not one under O. 41, R. 23 inasmuch as that rule refers to a decree of the lower Court upon a preliminary point against which an appeal is preferred and does not contemplate the case of an order, as distinguished from a decree, under O. 7, R. 10.

Held, further that S. 115, Civil P. C. had no application to the case as the order of the Appellate Court, that the lower Court had jurisdiction was merely an interlocutory order which did not decide or terminate the suit. AIR (Vol 29) 1942 Oudh 370: 1942 OWN 313: 1942 AWR 208: 200 Ind Cas 512 (DB).

——S. 104 — Suit for partition — Order between preliminary and final decree — Order does not amount to decree although it may finally decide the rights of parties so far as trial Court is concerned — Such order is an interlocutory one and no appeal lies therefrom. AIR (Vol 24)1937 All 694: (1934) ALJ 809: 1937 AWR 692: 171 Ind Cas 839 (DB).

——S. 104 — Appeal — Second appeal.

No appeal lies from an interlocutory order and where such appeal has been entertained and disposed of, no second appeal will lie AIR (Vol 8) 1921 Lah 265: 67 Ind Cas 278: 82 PLR 1922.

——S. 104 — Direction to commissioner — Appeal.

An order after passing of the preliminary decree in a partition case directing Commissioners who had been appointed in the case to ascertain the value of certain property and to take possession of it, is not appealable, being merely an interlocutory order, and as there can be only one preliminary decree in a suit. AIR (Vol 8) 1921 Oudh 224: 65 Ind Cas 983: 24 OC 366 (DB).

8. Modification of award.

——S. 164 (1) (c) — Order correcting or modifying award not passed separately from order directing decree to be prepared in terms of award.

No appeal lies under S. 104 (c), Civil P. C., from an order directing that necessary adjustment be made in the award where the order is not passed separately from the order directing that a decree be prepared in terms of the award. AIR (Vol 28) 1941 Oudh 598: 17 Luck 17: 1941 OWN 1077: 1941 AWR 329: 196 Ind Cas 496 (DB).

——S. 104 (1) (c) — Second appeal — Form of appeal, if can justify its admission.

Under S. 104 (c), a party is entitled to appeal from an order modifying an award. If the appeal is expressly from the order modifying the award, no second appeal will be admissible; but if the appeal is regularly preferred from the decree and not from the order, the form of the appeal might justify the admission of a second appeal. AIR (Vol 22) 1935 Pat 109: 1 BR 232: 153 Ind Cas 764.

——S. 104 — Decree on modified award — Second appeal.

A decree is in accordance with an award within the meaning of para 16, Sch. 2, if it is in accordance with the award as modified under para 12, though it may not be in accordance with the original award. Para 16 lays down that the Court shall proceed to pronounce judgment according to the award. When an award is modified under para 12, the only award according to which the judgment can be pronounced is the modified award. No second appeal therefore lies from decree on such award there being no decree in excess of the award. AIR (Vol 17) 1930 Lah 219: 31 PLR 337: 120 Ind Cas 673.

——S. 104 — Grounds of appeal.

An appeal from a decree passed in the words of award, in so far as the decree relates to the modifications and corrections made in the award, clearly lies under S. 104 (c). But the appeal must be limited to the modifications and corrections only and no other grounds can be urged in the appeal. AIR (Vol 17) 1930 Lah 26 (DB).

——S. 104 — Appeal.

After an award was signed by arbitrators but before it was filed in Court one of the arbitrators added in the award the words "Rest of the plaintiffs' claim should be dismissed with costs". When the award was filed the Court finding that the award was not clear as regards the costs remitted it to arbitrators. The arbitrators amended the award and parties were made to pay their own costs in the suit. The Court ignored both the interpolation by one of the arbitrators before first filing the award and the amendment after it was remitted and passed a decree with proportionate costs.

Held: the order fell under S. 104 (1) (c) and was appealable. AIR (Vol 13) 1926 Lah 519: 7 Lah 327: 8 LLJ 460: 27 PLR 541: 98 Ind Cas 336 (DB).

——S. 104 — Second appeal.

When in the course of the trial of a case the parties referred the matter to arbitration and the arbitrator awarded costs to the plaintiff, but the Court refused to allow such costs in terms of the award, though it accepted the award.

Held, that the order is one falling within S. 104 (1) (c) and no second appeal lies. AIR (Vol 13) 1926 Oudh 370: 13 OLJ 144: 93 Ind Cas 272.

——S. 104 (1) (c) — Appeal — Order modifying award.

Section 104 (1) (c) of the C. P. C. does not confer an unrestricted right of appeal and when an order has been made modifying or correcting an award, the validity of the whole award cannot be called in question in an appeal preferred against that order as the appeal is allowed against the order only in so far as it modifies the award. (1913) 17 CWN 617: 15 Ind Cas 519 (DB).

——S. 104 (1) (c) and Sch. II, para 12.

Where a Court amends an award of arbitrators under S. 518, C. P. C. 1882 an appeal lies from the order of amendment under S. 588 (26). (1909) 2 Ind Cas 858 (All) (DB).

9. Remand.

——S. 104, O. 41, R. 23 — Remand in appeal, if maintainable.

No appeal lies from an order of remand passed in an appeal submitted under S. 104, read with O. 43, Civil P. C. AIR (Vol 26) 1939 Lah 65: 182 Ind Cas 896.

——S. 104 (2), O. 7, R. 10, O. 43, R. (1) (u), O. 41, R. 23 — Order returning plaint — Order set aside and case remanded on appeal — Order of remand,

whether appealable — Scope of O. 43, R. 1 (u).

Where a plaint was returned by the trial Court for presentation to the proper Court and on appeal this order was reversed and the suit was remanded for disposal on the merits:

Held, that no appeal lay from the order of remand in view of the provisions of S. 104 (2), Civil P. C. Order 42, R. 1(u) cannot apply where the adjudication of the Court of first instance does not amount to a decree.

But an appeal preferred against an order of remand made in a case of this nature can be converted into a revision petition. AIR (Vol 22) 1935 Mad 574: 158 Ind Cas 252

——S. 104 (2) and O. 43, R. 1 (a) — A plaint was returned for proper presentation under O. 7, R. 10. Plaintiff appealed under O. 43, R. 1 (a) and the appellate Court remanded the case for trial on merits under O. 41, R. 23. The defendant filed a second appeal urging that it was an appeal against the order passed under O. 41, R. 23. Held, that the order was passed and O. 43, R. 1 (a) and that no appeal lay against that order under S. 104 (2). 147 PLR 1911: 258 PWR 1911: 10 Ind Cas 36.

——S. 104 (2) and O. 43, R. 1 (a) and (w) — No appeal lies from an order passed in appeal remanding for trial on merits a case in which the plaint had been returned for presentation. (1911) 33 All 479: 8 ALJ 12: 9 Ind Cas 666 (DB).

10. Revocation of reference.

——S. 104 (1) (a), Sch. II, Para 8 — Order refusing to extend time to file award and superseding arbitration.

Where on an application by an arbitrator the Court refuses to extend the time for filing his award and supersedes the reference in exercise of the powers under Para 8 of Sch. II, Civil P. C. there is nothing more to be done by him to give effect to that order and he need not go to the extent of expressing an opinion on the point whether the reference to the arbitration was or was not a nullity. For, this expression of opinion would be of no importance whatever and would not preclude the aggrieved party from maintaining an appeal against the order of refusal to extend time and supersession of the arbitration under S. 104 (1) (a), Civil P. C. AIR (Vol 30) 1943 Oudh 117: 1942 OWN 407: 18 Luck 425: 1942 AWR 270: 204 Ind Cas 144 (DB).

——S. 104 — Order, if appealable.

Where under para 17 of 2nd Schedule. C. P. C. order, is made filing an agreement, but on finding that arbitrators were not willing to act the Court revokes the order of reference & dismisses the suit, the order is not appealable. AIR (Vol 13) 1926 All 55: 48 All 27: 23 ALJ 891: 6 LRA Civ 575: 89 Ind Cas 404 (DB).

——S. 104 (1) (d) — An agreement to refer to arbitration made by certain parties to the suit and the order thereon is appealable under the new Code as under the old Code. (1913 36 Mad 353: 21 MLJ 990: 10 MLT 248: 1911-2 MWN 249: 12 Ind Cas 372 (DB).

11. Right of.

See also Civil P. C., S. 96.

——S. 104 — Appeal against order removing receiver — If lies — Order removing receiver coupled with order appointing fresh receivers — Effect on the right of appeal.

The wording of S. 104, C. P. Code, makes it clear that unless an appeal is specially provided for in the Code, no appeal will lie against an order. Hence in the absence of any special provision in the Code for an appeal against an order removing a receiver, no appeal would lie. (1925) ILR 53 Cal 319 and (1932) ILR 60 Cal 163, not followed. AIR (Vol 37) 1950 Mad 212: 62 LW 799: 1949 MWN 684: (1949) 2 MLJ 599.

——S. 104 — Appeal is creature of statute — Legislature may delegate power to create appeal to other authority.

An appeal is a creature of the statute; it cannot exist without clear legislative provision. But the Legislature may create an appeal while enacting a statute, or in the statute itself it may delegate the power to create it to another authority and if such authority acts within the power conferred on it, the rules framed by it have the force of law as if they were enacted by the Legislature itself: when power is given to such subordinate authority to "legislate conditionally" and "the conditions have been fulfilled; the legislation becomes absolute". AIR (Vol 29) 1942 Lah 201: 44 PLR 253: ILR (1943) Lah 569: 201 Ind Cas 667 (DB).

——S. 104 — Appeal from order found not maintainable, if can be treated after three years and a half as appeal from decree based on that order.

Where the appellant chose to appeal from an order, which was found to be not appealable, he cannot change his position after about three and a half years and pray that the appeal should be treated as one against decree passed on that order. AIR (Vol 28) 1941 Oudh 598: 1941 OWN 1077: 1941 AWR 329: 17 Luck 17: 196 Ind Cas 496 (DB).

——S 104 — Right of appeal from a decree of Single Judge to High Court is not governed by Section 104 but by Letters Patent. AIR (Vol 27) 1940 Nag 39: 1940 NLJ 37: ILR (1940) Nag 141: 186 Ind Cas 129 (FB).

——S. 104 — Under S. 104, Civil P. C. a right of appeal which is a substantive right, is enjoyed only in respect of orders specified in that section or in O. 43, R. 1. AIR (Vol 22) 1935 Mad 609: (1935) MWN 582: 41 MLW 811: 69 MLJ 99: 58 Mad 814: 157 Ind Cas 1012 (DB).

——S. 104 — Law applicable.

Except where otherwise a right of appeal 'ad hoc' is given under some statute or enactment having the force of a statute, the right of appeal from orders that do not amount to "judgments" is regulated by the provisions of the Civil P. C. AIR (Vol 22) 1935 Rang 267: 13 Rang 457: 157 Ind Cas 1107 (FB).

——S. 104 — Order filing award — Award decree — Appeal against order.

S. 104 of the Code clearly gives a right of appeal against an order to file the award, and the fact that a judgment has been pronounced and decree drawn up does not render the order to file the award incapable of appeal. AIR ((Vol 12) 1925 Pat 810: 93 Ind Cas 261: 4 Pat 670: 7 PLT 644 (DB).

——S. 104(2), O. 21 R. 90 and O. 43, R. 1 (j) — Execution sale before before new Code — Alienation to set aside after new code — Right of appeal — No vested right in procedure.

No litigant has a vested right in procedure. An application presented after an enactment of a new Code must be deemed to have been presented under the new Code. Where an application was made after the C. P. Code of 1908 had come into force, to set aside a sale held before the new Code came into force: Held, that the application was governed by the new Code and that a second appeal was barred under S. 104, sub-s. (2). (1912) 16 Ind Cas 436 (Cal) (DB).

12. Scope.

——S. 104 — An appeal may properly be converted into a revision and considered upon its merits.

if the points raised go very clearly to the question of jurisdiction. AIR (Vol 29) 1942 All 261: (1942) ALJ 284: ILR (1942) All 360: 1942 AWR 114: 201 Ind Cas 184.

——**S. 104 — Applicability.**

Section 104 obviously applies only to appeals from orders and not to appeals from decrees. AIR (Vol 29) 1942 Lah 95: 44 PLR 140: ILR (1942) Lah 491: 200 Ind Cas 652 (FB).

——S. 104 — Order interpreting a scheme under S. 92 deciding general questions concerning the rights of parties is not one within S. 104, but is a decree and is appealable. AIR (Vol 28) 1941 Cal 618: 73 CLJ 532: 199 Ind Cas 841 (DB).

——S. 104 — No explicit order filing award — Decree upon award — Appeal against whole decision must be treated as one against implied order filing award — Appellate order falls under S. 104 (2). AIR (Vol 28) 1941 Cal 202: ILR (1940) 2 Cal 551: 44 CWN 1034: 194 Ind Cas 610.

——S. 104 — Appeal provided by cl. 15, Letters Patent (Bom) is special jurisdiction within the meaning of S. 4, Civil P. C. and is not affected by S. 104, Civil P. C. AIR (Vol 27) 1940 Bom 216: 42 Bom LR 428: ILR (1940) Bom 426: 189 Ind Cas 656 (DB).

——S. 104 (1) (f) — The order under S. 104 (1) (f) cannot by any possibility be treated as a decree. AIR (Vol 26) 1939 Oudh 104: 1939 OWN 128: 179 Ind Cas 799 (DB).

——**S. 104 (1) (c) — Validity of award itself, if can be challenged.**

The scope of an appeal under S. 104 (c), Civil P. C., is a limited one, and the party appealing can attack the order of the Court only in so far as it modifies the award and must confine itself to points which have a bearing on the modification made in the award. It is clearly open to the party attacking the order to show that none of the conditions mentioned in Para. 12 of Sch. II applied and the award could not have been modified; but S. 104 does not entitle a party to appeal against the award itself; nor can he, in appeal under this provision, attack the proceedings before the arbitrator after a decree has been passed on the basis of the award. An award cannot, therefore, be challenged in an appeal under S. 104, on the ground that the arbitrator was not justified in, allowing certain amendment in the plaint. AIR (Vol 26) 1939 Pat 597: 20 PLT 700: 6 BR 144: (1939) PWN 703: 185 Ind Cas 273 (DB).

——S. 104 — An order passed on appeal setting aside the sale of judgment-debtor's property is a decree. Section 144 is wide enough to cover such an order. AIR (Vol 25) 1938 Lah 456: 40 PLR 692: 177 Ind Cas 430.

——S. 104 (2) — If a sale is attacked on the ground of material irregularity in the conduct or publication of the sale, the provisions of law contained in S. 104 (2), Civil P. C. would come into operation. AIR (Vol 23) 1936 Lah 969: 38 PLR 839: 163 Ind Cas 765.

——**Ss. 104, 109, 110 — S. 104, if forbids appeals to Privy Council when conditions laid down in Ss. 109 and 110 are complied with.**

Section 104 of the Civil P. C. refers to appeals to High Courts in British India, and does not forbid appeals to His Majesty in Council when they comply with the conditions laid down in Ss. 109 and 110 of the Civil P. C. AIR (Vol 21) 1934 Oudh 291: 10 Luck 76: 11 OWN 577: 148 Ind Cas 1202 (DB).

——**S. 104, O. 43, R. 1 — Non-appealable order drawn up in form of a decree — Whether becomes an appealable decree.**

A non-appealable order does not become an appealable decree because the order is drawn up in the form of a decree. Where an order of remand merely sets aside the decree of the trial Court and does not itself decide any of the points raised for determination and does not determine the rights of the parties with regard to any of the matters in controversy in the suit, it cannot amount to a 'decree' and must be treated as a non-appealable order. AIR (Vol 21) 1934 Pat 13: 151 Ind Cas 947.

——S. 104 (1) (e) — Section 104 (e) relates only to orders under Para 18, Sch. II of the Code, and has nothing to do with Arbitration Act which is complete in itself. Hence an order under S. 19, Arbitration Act, refusing stay of proceedings is not appealable. AIR (V 18) 1931 Lah 644: 13 Lah 59: 33 PLR 887: 132 Ind Cas 850 (DB).

——S. 104 — The provisions in sub-s. 2 of S. 104 deal with internal appeals within the limits of British India. The application to file an award may be made in the Court of the Subordinate Judge. If any dispute arises, and the amount at stake is below a certain figure, the appeal would lie from him to the District Judge. If it were above that figure, it would lie to the High Court. The provision is intended to prevent any appeal beyond the District Judge where the sum in dispute is small. In this respect it runs parallel with S. 100, which limits second appeals from appellate decrees by District Judges. That section deals with decrees only while the decisions on arbitration questions are styled orders. There is therefore nothing in S. 104 to take away the general right of appealing to the Crown given by S. 109. AIR (Vol 11) 1924 PC 95: 46 MLJ 628: 83 Ind Cas 531: 5 LRPC 216: 1924 MWN 79: 7 NLJ 62: 34 MLT 62: 19 MLW 549: 20 NLR 33: 51 IA 72: 22 ALJ 386: 51 Cal 361: 26 Bom LR 586: 28 CWN 977.

——S. 104 — The object of the Legislature in enacting sub-S. (2) was to make it clear that there was no second appeal under the Code from the orders specified in sub-S. (1) of S. 104, and that sub-S. (2) was not intended to override the express provisions of the Letters Patent. S. 104 does not take away by implication the right of appeal conferred in express terms by the special provision relating to appeal to be found in the Letters Patent. AIR (Vol 9) 1922 Lah 380: 67 Ind Cas 388: 3 Lah 188 (DB).

——**S. 104 (1) Cl. (f) — Scope of.**

Clause (f) does not make any change in the previous law under the old Code. AIR (V 8) 1921 All 384: 18 ALJ 960 (DB).

——S. 104 (1) (f) — Section 104 (1) (f) applies to arbitrations under the Code. (1912) 5 Bur LT 155: 6 LBR 88: 17 Ind Cas 902 (DB).

——**S. 104 and O. 43, R. 1 — Letters Patent Cl. 15.**

S. 588 does not take away the right of appeal given by Letters Patent. (1909) 11 Bom LR 245: 2 Ind Cas 150 (DB).

——**S. 104 and O. 43, R. 1 — Appeal.**

In an appeal from an order under S. 588 (5) C.P.C. 1882 the appellate court can only hold whether the order appealed against is correct or not. In the latter case, it cannot itself proceed to hear the suit and decree the plff's claim. (1909) 12 OC 388: 4 Ind Cas 780.

13. Second appeal.

(a) General.
(b) Setting aside or refusing to set aside a sale.
(c) Order returning a plaint.
(d) Recording a compromise.

(a) General.

——**Ss. 104 (1) and 2 (2) — Appeal — Competency — Order rejecting memorandum of appeal on the**

ground that copies of the judgment were not filed.

An appeal to the High Court against the order of a District Judge rejecting the memorandum of appeals for failure on the part of the appellants to put in separate copies of the judgment in the different appeals is incompetent. AIR (Vol 35) 1948 Cal 134: ILR (1948) 2 Cal 1.

——S. 104 (2) — Order under O. 22 R. 10 — Second appeal. 1946 NLJ 499: AIR (Vol 34) 1947 Nag 75.

——S. 104 (2), O. 43, R. 1 (m) — Order under O. 43, R. 1 (m) on appeal — Second appeal, if lies.

No appeal lies from any order passed in appeal under O. 43, R. 1 (m), Civil P. C. AIR (Vol 22) 1935 All 738: 1935 AWR (HC) 765: (1935) ALJ 962: 155 Ind Cas 1067.

——S. 104 — No appeal lies against an appellate order disallowing an objection under O. 21, R. 90. But the memorandum of second appeal may be treated as an application in revision. AIR (Vol 20) 1933 All 654: 145 Ind Cas 731.

——S. 104, O. 21, R. 92, O. 43, R. 1 (j) — Order under O. 21, R. 92 — Second appeal, whether lies.

An appeal from an order made under O. 21, R. 92 lies under O. 43, R. 1 (j) but no second appeal lies from an order passed on appeal. AIR (Vol 20) 1933 Nag 72: 6 NLJ 8: 29 NLR 92: 142 Ind Cas 162.

——S. 104 — Order under O. 43, R. 1.

No second appeal is allowed from the result of appeal under O. 43, R. 1(a). The Court cannot, framing its order as an order passed under O. 41, R. 23, permit an appeal which would not otherwise lie. If the argument that where the Judge purports to pass an order under O. 41, R. 23, an appeal is permissible by virtue of O. 43, R. 1 (u), is allowed, there would be a conflict between Cl. (a) and Cl. (u) of O. 43, read in light of S. 104. AIR (Vol 17) 1930 All 122: 1930 ALJ 454: 121 Ind Cas 545 (DB).

——S. 104 — Order under O. 43, R. 1.

No second appeal lies from decision on appeal under provisions of O. 43, R. 1 (j). AIR 1923 Lah 592, Ref. AIR (Vol 17) 1930 Lah 208: 11 LLJ 546: 31 PLR 57: 120 Ind Cas 684.

——S. 104 — Order refusing to file award.

No appeal lies against the appellate order of the District Judge, dismissing an application for filing an award. AIR (Vol 16) 1929 Lah 507: 120 Ind Cas 277 (DB).

——S. 104 — Suit dismissed on a preliminary ground — Case remanded in appeal — Appeal preferred on the remand order — Maintainability of second appeal.

A suit was filed for declaring ineffectual certain execution proceedings. It was dismissed by the Subordinate Judge on the ground that plaintiff having preferred no appeal from the decree, the present suit was not maintainable. On appeal by the plaintiff the District Judge held that the suit was maintainable and remanded the case under O. 41, R. 23. Against this order of remand a miscellaneous appeal under O. 43, R. 1(u) was preferred by the defendant. It was contended that the order passed by the trial Court was really one rejecting the plaint, that the appeal to the District Judge by the plaintiff must be considered to have been filed under O. 43, and no further appeal lay against the order of the District Judge as laid in S. 104, Cl. (2).

Held, that the order of the trial Court was not one rejecting the plaint, under O. 7, R. 11, but was clearly one dismissing the suit on a preliminary point and the appeal preferred by the plaintiff himself to the District Judge was filed not under O. 43, C. P. Code, but under S. 96 against the decree passed by the Subordinate Judge and therefore the appeal was competent. AIR (Vol 15) 1928 Lah 766: 108 Ind Cas 55.

——S. 104 — Order under O. 43, R. 1 (g).

Where though the memorandum of appeal filed by appellants in the Court of the District Judge purported to be one under S. 96, O. 21, R. 92, and O. 43, R. 1 (j), C. P. Code, in reality the appeal lay only under the last provision.

Held, that no second appeal lay under S. 104 (2). AIR (Vol 15) 1928 Lah 414: 10 LLJ 161: 108 Ind Cas 391.

——S. 104 — Order under O. 43, R. 1(j).

No second appeal lies from an order under O. 43, R. 1 (j). AIR (Vol 8) 1921 Lah 156: 3 LLJ 463: 62 Ind Cas 986.

——S. 104 (1) (f) Cl. (2) — Second appeal — Order on an application to file private award.

The decision of a Court on an application to file a private award, part of it being on a matter outside the scope of the arbitration, is an "order" and is not open to second appeal. S. 104 C. P. C., Sub-section (2) prohibits a second appeal from an appeal under it. AIR (Vol 2) 1915 Lah 105: 66 PR 1915: 146 PWR 1915: 31 Ind Cas 80 (DB).

——S. 104 (2), O. 43, R. 1 (j), and O. 21 R. 89 — Second appeal.

No second appeal lies from an appellate order disallowing an application under O. 21 R. 89. Change in law pointed out. (1911) 38 Cal 339: 15 CWN 844: 14 CLJ 224: 10 Ind Cas 345 (DB).

——S. 104 (2) and O. 43 — Appeal.

No appeal lies against an appellate order setting aside an order of court of first instance refusing to set aside an 'ex parte' decree. (1911) 9 MLT 269: 9 Ind Cas 55 (DB).

——S. 104 and O. 41, R. 10(2) — Order dismissing appeal under O. 41, R. 10 (2) — Second appeal.

Second appeal does not lie against an order of the Appellate Court under O. 41, R. 10 (2) dismissing an appeal for failure to furnish security. (1911) 9 MLT 117: 8 Ind Cas 436 (DB).

(b) Setting aside or refusing to set aside a sale.

——Ss. 104, 2 (2), O. 43, R. 1 (j) — Second appeal from order refusing sale, maintainability of — Refusing to set aside sale, if a decree.

From O. 43, R. 1 (j) it is evident that an appeal lies under S. 104, against an order refusing to set aside a sale but no second appeal lies from an order passed under that section.

Since the refusal to set aside a sale has been made appealable under O. 43, R. 1 (j) it cannot be regarded as a decree within the meaning of the definition given in S. 2 (2). Therefore, no second appeal can lie from such order of refusal under S. 47. AIR (Vol 25) 1938 Nag 107: ILR (1938) Nag 436: 172 Ind Cas 465 (DB).

——S. 104 (2), O. 43, R. 1, cl. (j) — Sale confirmed — Application to set it aside, rejected — Appeal — Second appeal, whether lies.

Where the application by the judgment-debtor for setting aside the order of confirmation of sale, is rejected by the Munsif, the order rejecting that application must beld to have been passed under O. 21, R. 92, and such an order is expressly made appealable under O. 43, R. 1, cl. (j), and consequently, under S. 104, sub-s. (2), no second appeal lies against the appellate order. AIR (Vol 23) 1936 Oudh 172: 1936 OWN 137: 160 Ind Cas 468 (DB).

——S. 104, Cl. (2), O. 21, R. 90 — Material irregularity in conducting and publishing sale — Applicability of O. 21, R. 90 — Second appeal, if lies.

Where there is a material irregularity in the publishing and in conducting a sale, O. 21, R. 90, Civil P. C., applies and no second appeal will lie. AIR (Vol 22) 1935 Rang 521: 160 Ind Cas 331.

——S. 104 — Order confirming sale — Second ap-

peal, competency of — Non-adherence to compromise by which judgment-debtor withdrew objection to sale — Whether affects the question.

No second appeal lies from an order confirming the sale. The fact that the compromise by which the judgment-debtor withdrew his objection to the sale cannot affect the question of competency of the second appeal. AIR (Vol 21) 1934 Lah 326 (1): 151 Ind Cas 314 (1).

——S. 104 — Order under O. 21, R. 92.

Where a decree-holder objected to the sale by which he had purchased a property, his case being that he had agreed to purchase it at the estimated value put down by him and which had been accepted by the Court, namely, Rs. 500 and therefore if the sale be said to have taken place as recorded by the amin for Rs. 1,358 then great loss would result to him, and where the Court of first instance dismissed the objection, no second appeal lies to the High Court under S. 104 (2) as the order dismissing the objection was under O. 21, R. 92 and the appeal was an appeal under O. 43. AIR (Vol 16) 1929 All 553: 115 Ind Cas 636 (DB).

——S. 104 — Order setting aside or refusing to set aside sale.

No second appeal lies against an order setting aside or refusing to set aside a sale, although the matter is one between the decree-holder auction purchaser and judgment-debtor. AIR (Vol 14) 1927 Cal 657: 45 CLJ 557: 104 Ind Cas 188 (DB).

——S. 104 — Order under O. 21, R. 92.

No second appeal lies against an order of an appellate Court, confirming a sale or refusing to set aside a sale under O. 21, R. 92. AIR (Vol 13) 1926 Lah 204: 91 Ind Cas 213.

——S. 104 — Order setting aside sale under O. 21, R. 90.

No second appeal lies against an order of District Judge reversing order of Sub-Judge and setting aside sale under O. 21, R. 90. AIR (Vol 11) 1924 Pat 803: 5 PLT 443: 78 Ind Cas 315 (DB).

——S. 104 — Appellate order setting aside sale.

No appeal can lie from an appellate order, setting aside a sale, because S. 104, sub-section (1), Cl. (ii) read with Order 43, Clause (j), of the Code allows only a single appeal from the order passed by the Court executing the decree under O. 21, R. 92. A possessory mortgagee holds an interest in immovable property sufficient to justify the application of Order 21, Rule 89, of the Code of Civil Procedure to his case. AIR (Vol 9) 1922 Oudh 146: 25 OC 78: 9 OLJ 50: 66 Ind Cas 929.

——S. 104 — Application to set aside sale under O. 21, Rr. 90 and 22 — Second appeal from order under O. 21, R. 90 if lies.

Although no second appeal lies from an order on an application under O. 21, R. 90, still where the application to have the sale set aside is a combined application under O. 21, R. 90, as well as under O. 21, R. 22 and an appeal lies so far as the decision under O. 21. R. 22 is concerned, High Court can deal with the order passed under O. 21, R. 90. AIR (Vol 8) 1921 Pat 145: 2 PLT 401: 6 PLJ 319: 1921 PHCC 181: 61 Ind Cas 823 (DB).

——S. 104 (2), O. 21 R. 92 and O. 43 R. 1 (j) — Execution sale set aside — Appeal, second, whether lies.

Where an execution sale is set aside under O. 21, R. 92 and the right of appeal under O. 43 R. 1 (j) has been availed of. no second appeal is competent from the order of the Appellate Court. AIR (Vol 7) 1920 Pat 610: 1 Pat LT 47: 2 UP LR (Pat) 58: 54 Ind Cas 941.

——S. 104 (2) and O. 43, R. 1 (j) — Appeal — Second appeal — Execution sale — Setting aside.

No second appeal lies against an order passed in appeal upon a petition by an auction purchaser to set aside a sale on the ground that the judgment debtor had no saleable interest in the property. AIR (Vol 5) 1918 Mad 262: 45 Ind Cas 701 (DB).

——S. 104 (2) and O. 21, R. 90 — Application to set aside execution sale — Order — Second appeal, if lies — Letters Patent (Allahabad) S. 10.

Under S. 10 of the Letters Patent (Allahabad) no appeal lies from the order of a single Judge of the High Court dismissing an appeal from an order of the executing Court on an application under O. 21, R. 90 to set aside an execution sale. AIR (Vol 4) 1917 All 325: 39 All 191: 15 ALJ 46: 39 Ind Cas 460 (DB).

——Ss. 104 (2), 47 and O. 21 R. 90 — Second appeal.

Impeachment of sale proclamation in execution by a judgment debtor on the ground of fraud antecedent to publication is not by itself a ground for a second appeal. Quaere:— Whether the decision of a question of fraud antecedent to the execution and conduct of an execution sale brings the case within the scope of S. 47, C. P. C. AIR (Vol 4) 1917 Cal 443: 25 CLJ 399: 40 Ind Cas 426 (DB).

——S. 104 (2) and O. 21, R. 72 — Second appeal — Order of the appellate Court — Setting aside sale.

No second appeal lies from an order of the Appellate Court against an order passed under O. 21, R. 72 (3) of the Code. AIR (Vol 2) 1915 All 54: 13 ALJ 351: 28 Ind Cas 270 (DB).

——S. 104 (2), O. 43, R. 1 (j) and O. 21, R. 92 — Second appeal —Order on appeal by judgment-debtor refusing to set aside auction sale.

An order of the Appellate Court in appeal by the judgment-debtor under O. 43, R. 1 (j) C. P. C. against the order of a Court refusing under O. 21, R. 92 to set aside, on his application under O. 21, R. 90, the auction sale of his immoveable property to the decree-holder, is not a decree and consequently no second appeal lies under S. 104 (2) against that order. AIR (Vol 2) 1915 Lah 293: 6 PWR 1915: 38 PLR 1915: 27 Ind Cas 589.

——S. 104 (2) and O. 21, R. 90 and O. 43, R. 1 (j) — Execution sale — Application setting aside — Fraud.

There is no second appeal against an appellate order confirming an order refusing to set aside a sale on the ground of fraud under S. 104 (c) (2) and O. 21, R. 90 read with O. 43, R. 1 (j). 17 CWN 524: (1912) 14 Ind Cas 53.

See also 16 CWN 1015: (1912) 15 Ind Cas 679 (DB).

——S. 104 (2) O. 43 R. 1 (j) and O. 21 Rr. 90 and 92 — Order setting aside a sale — Second appeal.

No second appeal lies from an appellate order setting aside a sale under O. 21 R. 90. But the High Court may regard an appeal as a revision if the case calls for further consideration. (1912) 13 Ind Cas 147 (All) (DB).

(c) Order returning a plaint.

——S. 104 — No second appeal lies against an order dismissing an appeal against an order returning plaint for presentation to proper Court. Revision, however, is maintainable. AIR (Vol 29) 1942 Oudh 480: 1942 AWR 322 (1): 1942 OWN 494: 202 Ind Cas 378.

——Ss. 104, 105 (1) — Trial Court holding that Civil Court has no jurisdiction and returning plaint for presentation to proper Court — Appellate Court remanding case holding Civil Court has jurisdiction — Suit decreed — Appeal dismissed — Second appeal — Question of jurisdiction, if can be raised.

In a suit brought in a Civil Court, the defendant pleaded that the Revenue Court had exclusive jurisdiction to try the suit and that the Civil Court therefore, had no jurisdiction. The trial

Court accepting the argument ordered the plaint to be returned for presentation to proper Court. The Appellate Court remanded the case for disposal on merits holding that the Civil Court had jurisdiction. The trial Court decreed the suit and an appeal therefrom was dismissed by the lower Appellate Court. In second appeal the question of jurisdiction was raised.

Held, that no appeal lay from the order of the lower Appellate Court the first time, when the jurisdiction question came before it, but as the case had been concluded, a second appeal lay from the decree of the lower Appellate Court and therefore, under S. 105 (1), Civil P. C., the question of jurisdiction could be raised in second appeal. AIR (Vol 25) 1938 All 511: (1938) ALJ 720: 1938 RD 714: ILR (1938) All 754: 1938 AWR 520: 177 Ind Cas 450 (DB).

——S. 104 — Order returning plaint — Appeal from — Order remanding the case for trial — Further appeal — Competency.

Where on appeal from an order retruning a plaint to be presented to the proper Court, an order was passed remanding the case to the trial Court, no further appeal therefrom is competent. Nor is it liable to revision. AIR (Vol 17) 1930 All 638: 125 Ind Cas 581 (DB).

——S. 104 — Order returning plaint.

Section bars second appeal from an order returning plaint. AIR (Vol 13) 1926 Lah 141: 89 Ind Cas 384.

——S. 104 — Appellate order under O. 43, R. 1 (a) and remand.

There is no second appeal against an appellate order setting aside an order returning a plaint to be presented to the proper Court and remanding the case for trial on the merits. (1922) 68 Ind Cas 304: 2 LLJ 587.

——S. 104 — Appellate order reversing order returning plaint.

An order of an appellate Court reversing an order of the lower Court returning a plaint for presentation to the proper Court is not open to second appeal. AIR (Vol 7) 1920 Lah 290: 7 PWR 1921: 59 Ind Cas 2.

——S. 104 (2) and O. 7, R. 10. O. 43 R. 1 (a) — Order in appeal setting aside order for return of plaint — Further appeal, if lies.

An order in appeal setting aside the order of the lower court returning the plaint for presentation to the proper court is not open to second appeal. 119 PR 1912: 101 PLR 1913: 48 PWR 1913: 18 Ind Cas 529.

(d) Recording a compromise.

——Ss. 104 (2), 96 (3) — Second appeal from order recording disputed compromise, whether lies.

No second appeal lies from an order recording a compromise when the 'factum' or legality of the compromise is questioned. AIR (Vol 22) 1935 Cal 239: 60 CLJ 173: 39 CWN 480: 62 Cal 229: 155 Ind Cas 915.

——S. 104 — Order recording compromise.

The Code provides for an appeal from an order recording compromise, which forms the basis of a consent decree, and this is apparently intended to be the proper procedure for a party who wishes to challenge the validity of a compromise on the ground of want of consent, etc. The Code does not, however, allow a second appeal in such cases. 41 Mad 233, Diss. from. AIR (Vol 16) 1929 Lah 472: 119 Ind Cas 422.

14. Revision or review.

——S. 104 (1) (a) — Award — Appeal.

Unless an award is superseded, S. 104 (1) (a) bars an appeal and if the Court in superseding an award has adopted a procedure not authorised by law, a revision will lie. 251 PWR 1912: 125 PR 1912: 17 Ind Cas 388.

——Ss. 104, 116 (S. 588 old Code) — Appeals, Final — Whether revision lies — Punjab Courts Act (XVIII of 1884) as amended — S. 70 (a) — Revision.

Orders passed on an appeal against orders detailed in S. 588 of the Civil Procedure Code are "final" and not open to appeal, but in a revision it is competent to remedy grave injustice and the exercise thereof is not to be refused merely because an appeal may eventually lie from the decree in the suit. (1909) 10 PLR No. 124 page 484 (485): 77 PR 1909.

15. Non-appealable orders. — Illustrative cases.

——S. 104 — Order removing a receiver — Not appealable.

An order removing a receiver would not become appealable merely because it is coupled with an order appointing fresh receivers. The order should be considered as two distinct orders. It would be anomalous if the removed receiver who has no right of appeal against the order of removal would be entitled to appeal merely because at the same time the court thought it necessary to appoint other receivers to administer the estate. The appointment of a successor cannot give a right to a dismissed receiver to canvass the grounds for his dismissal. AIR (V 37) 1950 Mad 212 : 62 LW 799 : 1949 MWN 684.

——S. 104, O. 43, R. 1 — Order on application for appointment of trustees for Hindu cemetery is not judgment and is not appealable.

An order which is an order merely, and not a judgment, is not appealable.

An order made upon an application for appointment of new trustees for the Hindu cemetery is plainly an order merely and is not within the definition of 'judgment'. Such order, therefore, is not appealable. AIR (V 24) 1937 Rang 522 : 174 Ind Cas 35 (DB).

——S. 104 — An order in execution refusing to award compensatory costs to the judgment-debtor who alleged "bad faith" but was not given opportunity to prove it, is not appealable under S. 104 (ff). But revision lies. (1937) 162 Ind Cas 860 : 18 NLJ 309.

——S. 104 (ff) — Compensatory costs.

Judgment-debtor alleging "bad faith" — Court refusing to give opportunity of proving it and refusing to award compensatory costs:

Held, though no appeal lay against the order, a petition to revise the order was maintainable. (1936) 162 Ind Cas 860 : 18 NLJ 309.

——S. 104, O. 43, R. 1, O. 9, R. 13 — Dismissal for default of application to set aside ex parte decree — Appeal from order.

Where an ex parte decree was passed against the defendants and their application under O. 9, R. 13, being dismissed for their default they applied to have that order set aside and their application restored and this was dismissed on merits:

Held, that no appeal lay against that order. AIR (V 22) 1935 Mad 609 : (1935) MWN 582 : 41 MLW 811 : 69 MLJ 99 : 58 Mad 814 : 157 Ind Cas 1012 (DB).

——S. 104 — An order of transfer by High Court under S. 24 of the Code not being a judgment, neither under the Code nor under any other "express enactment" is not subject to appeal. AIR (V 22) 1935 Rang 267 : 13 Rang 457 : 157 Ind Cas 1107 (FB).

——Ss. 104 (4), 152, O. 43, R. 1 — Application to amend plaint and preliminary decree on the ground of misdescription in mortgage bond.

Where an application under S. 152, for an amendment of the plaint and preliminary decree in a mortgage suit on the ground that there was a misdescription of the mortgaged shares, is allowed, the order is not one of the orders specified in S. 104 (4) or O. 43, R. 1 and as there can be no appeal against the order, an application for revision is competent. AIR (V 21) 1934 All 100 (2) : 147 Ind Cas 633 (DB).

——S. 104 — Order neither a decree nor under Civil Procedure Code, S. 47.

Where a decree is passed removing a mahant from office and in consequence an order is made on a miscellaneous application for appointing a committee in order that a suitable mahant should be appointed in place of the one evicted, the order is not appealable, it being neither a decree nor an order under S. 47, nor an application made appealable under O. 43 R. 1. AIR (V 21) 1934 Pesh 43 : 151 Ind Cas 61.

——S. 104 — Order under S. 151, Civil P. C. — No appeal lies from an order passed under the inherent powers of the Court. AIR (V 18) 1931 Lah 344 (1) : 12 Lah 602 : 33 PLR 224 : 32 PLR 863 : 134 Ind Cas 292 (DB).

——S. 104 — Appeal, whether lies — Order under C. P. Code, S. 151.

There is no specific provision in the Code for an appeal from an order passed under S. 151, and an appeal from such an order does not lie, for a right of appeal cannot be assumed unless expressly conferred by law. AIR (V 17) 1930 Lah 789 : 122 Ind Cas 102 : 31 PLR 477 : 12 LLJ 71.

——S. 104 — Order granting review.

There can be no appeal from an order granting an amendment as such unless indeed it be considered as sometimes it has been considered as a question of review in which case it may be possible to maintain an argument that there can be an appeal from that order. AIR (V 16) 1929 Cal 676 : 50 CLJ 12 : 33 CWN 958 (DB).

——S. 104 — Order giving or refusing leave to bid under C. P. Code, O. 21, R. 72.

An order giving or refusing leave to bid at an execution sale is only a ministerial order and not appealable. AIR (V 16) 1929 Mad 903 : 122 Ind Cas 161 (DB).

——S. 104 — Order granting interest on money in court.

Order granting mortgagee interest on mortgage money for the time during which sale proceeds of mortgaged property are lying in Court, is not appealable but is revisable. AIR (V 16) 1929 Rang 127 : 118 Ind Cas 416 (DB).

——S. 104 — Order removing from record names of parties who died before suit.

No separate appeal stamped as an appeal from an order lies against an order removing from the record the names of persons who admittedly died before the suit was instituted. AIR (V 13) 1926 Lah 513 : 97 Ind Cas 192 : 8 LLJ 324 : 27 PLR 735.

——S. 104 — Order under C. P. Code, O. 23, R. 1.

No appeal lies from an order passed under O. 23, R 1 allowing a suit to be withdrawn with liberty to bring a fresh suit. AIR (V 13) 1926 Oudh 185 : 88 Ind Cas 1029.

——S. 104 — Order setting aside award.

An order, under the Arbitration Act, setting aside an award is not appealable. AIR (V 12) 1925 Sind 218 : 79 Ind Cas 920 (DB).

——S. 104 — Conditional or provisional order.

An order which is either conditional or provisional and does not result in a final decree is not appealable. AIR (V 11) 1924 All 376 : 79 Ind Cas 363 : 46 All 372 : 22 ALJ 345 : 5 LRA Civ 238 (DB).

——S. 104 — Order under C. P. C., O. 23, R. 1.

An order granting permission to a plaintiff to withdraw a suit under O 23, R. 1 is not a decree and is therefore, not appealable. AIR (V 9) 1922 Lah 267 : 65 Ind Cas 719 (DB).

——S. 104 — Order refusing withdrawal of execution.

An appeal does not lie against an order of a Munsif rejecting the decree-holder's petition to withdraw his execution case. AIR (V 9) 1922 Pat 525 : 65 Ind Cas 122 : 1 Pat 232 : 3 Pat LT 445 (DB).

——S. 104 — Order granting leave to sue receiver.

An order giving leave to sue a receiver for damages caused by his negligence is not appealable. AIR (V 8) 1921 Bom 427 : 59 Ind Cas 421 : 45 Bom 99 (DB).

——Ss. 104 (1) (g) and 95 — Small Cause Court — Appeal.

No apeal lies against an order of a small cause court under S. 95. 26 Ind Cas 359, Diss. AIR (V 6) 1919 Mad 23 : 36 MLJ 435 : (1919) MWN 490 : 50 Ind Cas 886 (DB).

——S. 104 and O. 21, R. 66 (4) — Appeal.

Order under O. 21, R. 66 (4) is not appealable. AIR (V 4) 1917 Low Bur 121: 8 LBR 350: 10 Bur LT 115 : 36 Ind Cas 402 (DB).

——S. 104 (1) and (d), (f) — Application of, to arbitration proceedings.

Neither clause (d) nor (f) of S. 104 of the C. P. C. sanctions an appeal against an order of a Court in arbitration proceedings. AIR (V 3) 1916 Lah 89 : 107 PWR 1916 : 117 PR 1916 : 70 PLR 1917 : 34 Ind Cas 192 (DB).

——S. 104 (1) (e) — Appeal — Order rejecting application for reference to — Right of appeal.

Where a court refuses an application by a party in a pending suit for reference to arbitration, since one of the defendants was unwilling to agree to a reference being made, despite the plaintiff's readiness to discharge that unwilling defendant from the array of parties, there is no appeal against the order of rejection. AIR (V 2) 1915 Oudh 172 : 27 Ind Cas 721.

——S. 104 (2) and O. 43 — Suit dismissed for want of process in — Suit restored by Appellate Court.

There is no appeal from the order of an appellate Court restoring suit dismissed for want of process fee. (1911) 9 Ind Cas 484 (All) (DB).

——S. 104 and O. 43 — Order overruling — Objections to award — Appeal.

No appeal lies against an order over-ruling objections to an award. 1 PLR 1911 : 12 PWR 1911 : 9 Ind Cas 385.

——S. 104, Sch. II, P. 11 — Indian Arbitration Act (XI of 1889), S. 10 — Arbitrators — Reference to arbitration — Difference in opinion of arbitrators on a question of law — Statement of a special case for the opinion of the Court — Appeal from the Court's order.

The parties to a suit agreed to refer their disputes relating to the properties in suit to the arbitration of two persons and a consent Judge's order was obtained. They further agreed to refer to the same arbitrators their disputes with regard to properties which were not the subject-matter of the suit. The agreements provided that in case of a disagreement between the arbitrators, which prevented them from making an award, the matter in difference was to be referred to an umpire who should make the award. The two arbitrators differed on a question of law arising in the arbitration. There was no reference to an um-

pire. But the arbitrators each expressed his opinion on the question, referred it for the opinion to the High Court in the form of a special case, under the Civil Procedure Code, 1908, Sch. II, p. 11, and the Indian Arbitration Act, S. 10. It was decided by the Chamber Judge. An appeal was preferred against his decision.

Held, that no appeal lay, since the special case was in no sense an award. There was no award which could be adopted by the Court by the mere expression of its opinion, but there was simply a statement of a question of law for the opinion of the court. The case was not, therefore, one which fell under Rule II of the Second Schedule of the Civil Procedure Code, 1908, but it fell under S. 10 of the Indian Arbitration Act in so far as it related to the second agreement. (1910) 12 Bom LR 852 (860) : 35 Bom 130 : 8 Ind Cas 171 (DB).

16. Order staying or refusing to stay suit.

——S. 104 — Appeal — Arbitration Act, S. 19.

Order granting stay of suit pending arbitration is appealable. AIR (V 12) 1925 All 154 : 47 All 179 : 22 ALJ 1031 : 5 LR A Civ 756 : 85 Ind Cas 341 (DB).

——S. 104 — Order under Arbitration Act, S. 19.

No appeal lies uner S. 104, C. P. C. from an order passed under S. 19 of the Arbitration Act staying a suit. AIR (V 10) 1923 Sind 38 : 81 Ind Cas 759 : 17 SLR 195 (FB).

——S. 104 — Order under Aribtration Act, S. 19.

No appeal lies from an order staying a suit under S. 19 of the Arbitration Act. AIR (V 10) 1923 Sind 25 : 82 Ind Cas 81 (FB).

——S. 104 (1) (c) — Order granting stay of a suit — Appeal.

Under S. 104 (e) of the C. P. Code an apeal lies from an order granting or refusing stay of a suit, where there is an agreement to refer to arbitration whether under the C. P. Code or under the Arbitration Act. AIR (V 5) 1918 Sind 35 : 12 SLR 34 : 48 Ind Cas 434 (DB).

——S. 104 (1) (e) — Agreement to refer to arbitration — Finding of trial Court.

Where a Subordinate Judge decided that no agreement to refer had been entered into by the plaintiffs and that therefore the suit was not liable to be stayed under para. 18, Sch. II, C. P. C.

Held, the decision was one that the Court was competent to arrive at and is appealable under S. 104 (e), C. P. C. AIR (V 4) 1917 Lah 261 : 65 PWR 1917 : 62 PR 1917 : 39 Ind Cas 508 (DB).

——S. 105.

See also (1) Appeal.
(2) Civil P. C., O. 41, R. 23.

1. Error.
2. Ex parte decree.
3. Final order or decree.
4. Interlocutory order.
5. Interpretation.
6. Irregularity.
6-A. Powers of Court.
7. Remand.
8. Scope.
9. Second appeal.

1. Error.

——S. 105 — An order refusing to record an adjustment under O. 23, R. 3, can be challenged in appeal under O. 43, R. 1 (m), only if it could be challenged under S. 105 on the ground of some error, defect or irregularity in it. AIR (V 23) 1936 Nag 8 : 31 NLR 72 Sup : 160 Ind Cas 202.

——S. 105 — Law or fact.

The error, defect or irregularity referred to in S. 105 must be either in law or procedure and not in matters of fact. Case-law discussed. AIR (V 17) 1930 Pat 266: 9 Pat 102 (DB).

——S. 105 — Law or fact.

Any error, defect or irregularity in any order under S. 105 is an error, defect or irregularity in law or procedure and not an incorrect finding of fact. AIR (V 16) 1929 Cal 26 : 32 CWN 1020 : 115 Ind Cas 184 (DB).

——S. 105 — Order setting aside ex parte decree.

Not only can an order setting aside an ex parte decree not be questioned on appeal but, any error, etc. made by a Court in setting aside such an ex parte decree is not an error affecting the decision of the case within the meaning of S. 105. AIR (V 10) 1923 Lah 425 : 72 Ind Cas 410.

——S. 105 (1) — Affecting the decision of the case — Ex parte decree set aside.

Under S. 105 (1) any error made by a Court in setting aside an ex parte decree is not an error "affecting the decision of the case" and cannot be set forth as a ground of objection in the memorandum of appeal. AIR (V 2) 1915 Lah 353 (1) : 133 PWR 1916 : 40 PR 1916 : 31 Ind Cas 914.

——S. 105 (1) — Affecting the decision of the case.

An order extending time fixed for payment by a preliminary decree in a foreclosure suit may be assailed in an appeal from the final decree, as the question of extension is one affecting the decision of the case. (1911) 7 NLR 162 : 12 Ind Cas 795.

2. Ex parte decree.

——S. 105 — Application by defendant's Pleader for adjournment rejected and ex parte decree passed — Defendant cannot apply under O. 9, R. 13 for setting aside ex parte decree in view of the explanation added by Allahabad High Court to O. 17, R. 2. The only remedy is by way of an appeal under S. 105 (1) which entitles him in a Court of appeal to refer to the order refusing to give an adjournment when these orders affect the decision of the case and prevent him from filing his written statement and from producing evidence. AIR (V 27) 1940 All 305 : (1940) ALJ 269 : 1940 AWR 161 : ILR (1940) All 192 : 190 Ind Cas 241 (DB).

——S. 105 — Ex parte decree set aside — Dismissal of suit on re-hearing — Appeal — Order setting aside ex parte decree, if can be set aside in such appeal.

The words "affecting the decision of the case" in S. 105, Civil P. C., mean affecting the decision of the case on its merits. An order setting aside an ex parte decree does not constitute an order affecting the decision of the case; it is an order securing that the case shall be re-heard upon its merits. Consequently, where an ex parte decree is set aside by the trial Court because it was satisfied that the defendant was prevented by sufficient cause from appearing, and on dismissal of the suit on re-hearing, the plaintiff appeals, the order setting aside the ex parte decree cannot be set aside in such appeal. AIR (V 24) 1937 Rang 334 : ILR 1937 Rang 207 : 170 Ind Cas 43 (FB).

[Overrules AIR (V 14) 1927 Rang 150 : 102 Ind Cas 379.]

——Ss. 105, 115, O. 9, R. 13 — Order setting aside ex parte decree, whether can be challenged in appeal against final decree — "Affecting the decision of the case", meaning of — Revision, competency of — 'Case decided', meaning of.

The propriety of an order setting aside an ex parte decree cannot be set forth as a ground of objection in a memorandum of appeal from the decree ultimately passed in the suit under S. 105.

In a case where the order setting aside a decree has been passed by a Court in definance of the provision of O. 9, R. 13, the matter is a "case decided" under S. 115 and the High Court is entitled to interfere in revision. AIR (V 18) 1931 All 294 : (1931) ALJ 377 : 53 All 612 : 133 Ind Cas 129 (FB).

——S. 105 — Propriety of order setting aside ex parte decree against some only — Objection in appeal.

Section 105 can have no operation to a case where the ex parte decree is set aside and the point is raised that the decree should not have been set aside at all because an order so passed merely ensures a hearing upon the merits and cannot be considered to be an order affecting the decision of the case. But where a case cannot be properly decided, because the decree has been set aside only against some of the defendants but should have been set aside also against others, order should be considered an order affecting the decision of the case and in a case like that, S. 105 can clearly be invoked. AIR (V 17) 1930 Pat 266: 9 Pat 102 (DB).

——S. 105 — Order setting aside award — Appeal.

A case of setting aside an award cannot be distinguished from the setting aside of an ex parte decree. An order, therefore, setting aside an award can be assailed in appeal from the final decision whether the order affects the decision of the case on merits or not. The words "on the merits" should not be read in S. 105. AIR (Vol 12) 1925 Lah 466, Not foll. AIR (Vol 16) 1929 Lah 174: 18 Ind Cas 434.

——S. 105 — Order setting aside — If one affecting decision.

An order setting aside an ex parte decree cannot be challenged in an appeal from decree passed ultimately in the suit, as an erroneous order accepting an application to set aside an ex parte decree does not affect the decision on its merits. AIR (V 14) 1927 Bom 455: 103 Ind Cas 262: 51 Bom 495: 29 Bom LR 925 (DB).

——S. 105 — Order setting aside — If one "affecting decision".

The propriety of an order setting aside an ex parte decree can be questioned in an appeal against the subsequent decree in the same suit on the ground that the improper making of such an order involves an error, defect or irregularity in or an order affecting the decision of the case. 25 All 280 and AIR (Vol 12) 1925 Lah 466, Diss. from. AIR (Vol 14) 1927 Rang 150: 5 Rang 80: 102 Ind Cas 379 (DB).

——S. 105 — Order refusing to set aside — Refusal of adjournment — Objection in appeal — Maintainability.

Where an adjournment is improperly refused and an ex parte decree is passed and where an application to set aside the ex parte decree is dismissed, the propriety of the order refusing adjournment can be questioned in an appeal from the ex parte decree and the decree can be set aside, apart from any question raised in any application under O. 9, R. 13, as to whether the defendants had sufficient cause for non-appearance on the date on which the decree was passed. AIR (V 12) 1925 Pat 534 : 91 Ind Cas 167 : 7 PLT 381 : 1925 PHCC 199 (DB).

——S. 105 — Order setting aside — Objection in appeal.

Order setting aside ex parte decree cannot be challenged in appeal from the decree in the suit. AIR (V 11) 1924 All 929 : 79 Ind Cas 69 : 5 LR A Civ 335 (DB).

——S. 105 — Order setting aside ex parte final decree — Objection in appeal.

An order setting aside the ex parte final decree in a mortgage suit while not disturbing the ex parte preliminary decree in the same suit, is an order affecting the decision of the case and the propriety of the order can be challenged in an appeal against the final decree passed in the suit. AIR (V 11) 1924 Mad 390 : 47 MLJ 641 : 85 Ind Cas 808: 35 MLT 131: 1924 MWN 884: 20 MLW 954 (DB).

——S. 105 — Error in setting aside — If one "affecting decision of the case."

Any error, etc., made by a Court in setting aside an ex parte decree is not an error affecting the decision of the case within the meaning of S. 105. AIR (V 10) 1923 Lah 425 : 72 Ind Cas 410.

——S. 105 (1) — Affecting the decision of the case.

An order setting aside an ex parte decree cannot be subsequently questioned in appeal from the decree passed after restoration, as that order does not affect the decision of the case on its merits. (1916) 3 OLJ 231: 34 Ind Cas 713.

——S. 105 (1) and O. 43, R. 1 (d) — Order refusing to set aside ex parte decree, if appealable — Order setting aside ex parte decree, appeal against, if lies.

Under O. 43, R. 1 (d), an appeal lies against an order refusing to set aside an ex parte decree; but no appeal lies against an order setting aside such a decree. AIR (V 2) 1915 Lah 353 (1) : 40 PR 1916 : 133 PWR 1916 : 31 Ind Cas 914.

——S. 105 — Appeal — Competency of ultra vires order of lower Court.

Where the lower Court makes an ultra vires order on an application under O. 9, R. 13 the order is appealable. (1910) 7 ALJ 598 : 6 Ind Cas 205 (DB).

——S. 105, Cl. 1, O. 9, R. 13 (Ss. 591, 108, old Code) — Dismissal of application for default if bars appeal on same or other grounds.

The dismissal for default of an application under S. 108, C. P. C., to set aside an ex parte preliminary decree is no bar to the decree being questioned in an appeal preferred against the final decree. The refusal of an application under S. 108, C. P. C., is no bar to the trial in a subsequent proceeding of a question which the refusal of an application has not determined. Where on the failure of arbitrators to submit their award on the day fixed the Court proceeded to try the suit, and passed a decree ex parte against the defendants.

Held, that the dismissal of the defendant's application under S. 108, C. P. C., for default was no bar to the appellate Court setting aside the ex parte decree on the defendant's appeal, on the ground that the suit should not have been tried on a date on which it had not been fixed for hearing. (1909) 9 CLJ 367 (372. 375) : 13 CWN 493 : 5 Mad LT 360 : 1 Ind Cas 86 (DB).

——S. 105, O. 9, R. 13 (Ss. 591, 108, old Code) — 'Affecting the decision of the case' — Order setting aside ex parte decree.

An order under S. 108, C. P. C., setting aside an ex parte decree is not an order affecting the decision of the case on the merits so as to come within the purview of S. 591, C. P .C. The fact that the order was made upon the application of a person against whom the suit had been dismissed makes no difference, as the effect of the order is the same, namely to ensure merely a rehearing on the merits. (1905) 9 CWN 584 (587). See also (1903) 1903 AWN 39 : 25 A 280 (281, 282) and (1903) 13 MLJ 308 (309, 310) : 26 M 604,

also (1906) 3 ALJ 30 (34) : 1905 AWN 274 : 1 MLT 52.

3. Final order or decree.

——**S. 105 — Application for review of order dismissed — Order complained of can be attacked in appeal against decree under S. 105.**

Where an application for review of an order is rejected, the original order remains and it can be dealt with just as if there had never been an application for review and the order complained of can be attacked in the appeal against the decree under S. 105, Civil P. C. AIR (V 28) 1941 Nag 308 : 1941 NLJ 519 : ILR (1942) Nag 487 : 197 Ind Cas 221.

——S. 105 — Under S. 105 (1), the propriety of the order setting aside the dismissal of a case for default of the plaintiff cannot be set forth as a ground of objection in the memo. of appeal from the decree ultimately passed in the suit and hence where an order sets aside the dismissal for default and restores the case, there is a case decided within the meaning of S. 115 and an application in revision lies against the order restoring the case. AIR (V 28) 1941 Oudh 367 : 1940 OWN 678 : 1941 AWR 170 : 194 Ind Cas 354 (DB).

[Overrules AIR (V 20) 1933 Oudh 331 : 10 OWN 1316 : 143 Ind Cas 222.]

——S. 105 — Where a conditional order granting leave to defend is passed and on failure of the defendant to fulfil the condition, the Court decrees the suit, it is open to the appellant to canvass the validity of the order on which the decree is based. AIR (V 22) 1935 Rang 245 : 13 Rang 239 : 157 Ind Cas 778 (DB).

——S. 105 — Although no second appeal lies from an order of abatement, the order may be questioned in second appeal if it 'affects the decision of the case'. An order setting aside the abatement does not affect the merits of the case, because the result is that the parties are before the Court and the Court adjudicates in the presence of the parties. AIR (V 20) 1933 All 294 : (1933) ALJ 561 : 144 Ind Cas 133 (DB).

——S. 105 — A person who is aggrieved by an order of remand is precluded under S. 105(2) from disputing its correctness only if an appeal lies against the order, and hence if no appeal lies to the Privy Council under S. 109 (a) on the ground that the decision of the High Court is not a "final order" or a "decree" passed on appeal by the High Court, S. 105 (2) would have no application. AIR (V 20) 1933 Bom 260 : 35 Bom LR 458 : 144 Ind Cas 916 (DB).

——S. 105 — So far as the Calcutta High Court is concerned, it is well settled that an order allowing a substitution or setting aside an abatement passed by a trial Court cannot be questioned in an appeal from a decree in view of the provisions of S. 105. AIR (V 20) 1933 Cal 498 : 37 CWN 138 : 145 Ind Cas 170.

——**S. 105, Sch. II, Para. 14 — Order remitting award for re-consideration — Applicability of.**

An order remitting an award to the arbitrators for re-consideration cannot be challenged in appeal. AIR (V 20) 1933 Lah 530 : 146 Ind Cas 22.

——**S. 105, O. 22, R. 4 — Order setting aside abatement, whether can be attacked in the appeal from final decree.**

An order setting aside an abatement and allowing substitution of the heirs of a deceased party cannot be questioned in appeal from the decree in the suit whether such an order is passed before, or simultaneously with the decree, such an order not being one which affects the decision of the case with reference to its merits within the meaning of S. 105. AIR (V 20) 1933 Lah 152 : 34 PLR 221 : 14 Lah 361 : 141 Ind Cas 337 (DB).

——**S. 105 — Review — Appeal from revised decree — Power of Appellate Court to set aside order granting review — 'Affecting the decision of the case', meaning of.**

In hearing an appeal from the revised decree passed after the granting of a review, the Appellate Court has no power to revise the order granting review.

The granting of a review is not a proceeding affecting the decision of the case within the meaning of S. 105, Civil P. C., but only a proceeding which ensures a trial on the merits. AIR (V 18) 1931 All 329 : 131 Ind Cas 518.

——**S. 105 — Appeal — Objections against preliminary order — Maintainability.**

The order of the Court is the order that is embodied in the formal order drawn up and issued by the Court generally, more especially is this so with the Courts of record such as the original side of the High Court. An appeal against the final order must be deemed to include all the points decided in a preliminary order for the purpose of that order. AIR (V 12) 1925 Mad 199 : 47 MLJ 710 : 85 Ind Cas 333 : 48 Mad 267 : 21 MLW 136 (DB).

——**S. 105 — Remand order — Appeal to Privy Council.**

Where the trial Court ordered partition on the basis of a certain family arrangement between the parties, but the High Court in appeal held that the family arrangement was not binding and the case was remanded to effect partition according to the personal law of the parties.

Held, that the remand order was not final order within S. 109, that O. 43, R. 1 (a) does not apply to appeals to Privy Council & therefore no leave can be granted to present an appeal to Privy Council. AIR (V 12) 1925 Nag 349 : 88 Ind Cas 69 : 22 NLR 132 (DB).

——**S. 105 — Operation of — Order on Commissioner's report — Reversal in appeal — Effect of.**

A final decree giving directions or ordering costs of Commissioner will remain effective notwithstanding the decision of the appellate Court reversing the order on objections to the Commissioner's report, though the appellate Court's decision was given after the final decree and though in Law the lower Court was incompetent to give directions and deal with costs until disposal of the appeal from the order on objections. AIR (V 10) 1923 Bom 200 : 72 Ind Cas 401 : 25 Bom LR 237 (DB).

——**S. 105 — Order, previous and subsequent — Reversal of previous order — Effect of.**

The reversal of the previous order has the effect of nullifying the final order. AIR (V 2) 1915 Mad 197 : 37 Mad 29 : 10 MLT 437 : 21 MLJ 1063 : 12 Ind Cas 664 (DB).

——S. 105 (Ss. 591, 584, 623, 629, old Code) — Appeal from final decree — Objection to be taken, limit to — Review granted for any other sufficient reasons.

See (1907) 17 MLJ 603 (604) : 31 Mad 49 : 2 MLT 519.

4. Interlocutory order.

(a) General.
(b) Where they could be questioned.
(c) Where they could not be questioned.

(a) General.

——**S. 105 — Defendant's objection that Court has no power — Objection overruled — High Court upholding objection and dismissing suit — High Court's order, held interlocutory — Appeal from decree.**

In a suit for framing a scheme, the preliminary objection of the defendant that the Court had no power to frame a scheme was overruled. In revision ,the High Court upheld the defendant's objection and dismissed the suit. On this order being communicated, the lower Court passed a formal order dismissing the suit:

Held, that the High Court's order was not final but interlocutory and was inappropriate inasmuch as the High Court dismissed the suit itself instead of directing the lower Court to dispose of it according to law. The order fell under S. 105 (1), Civil P. C., and appeal from the decree was competent by virtue of S. 105, since the order affected the decision of the lower Court when passing the decree. AIR (V 27) 1940 Mad 756: (1941) 1 MLJ 882 : 51 MLW 727 : (1940) MWN 575 : ILR (1940) Mad 901 : 194 Ind Cas 809 (DB).

——S. 105 — No appeal — Objection.

An error, defect or irregularity in the order may be set forth as a ground even where the interlocutory order is one from which no appeal lies. AIR (V 17) 1930 Pat 266: 9 Pat 102 (DB).

——S. 105 — What is — Order after decree — Appeal.

An interlocutory order in the proper sense is an order which is passed between the date on which the plaint is filed and the date on which the decree is drawn up. An order passed after the decree on an application for amendment of the decree cannot be treated as an interlocutory order and an appeal therefrom is not incompetent. AIR (V 15) 1928 All 194 : 114 Ind Cas 41 : 26 ALJ 166 (DB).

——S. 105 (2) — Interlocutory matter — Appeal.

Apart altogether from the doctrine of res judicata a decision in a suit given on an interlocutory matter whether appealable or not, if not appealed from, is binding upon the parties in every proceeding in that suit. AIR (Vol 4) 1917 All 144: 40 Ind Cas 621 (DB).

(b) Where they could be questioned.

——S. 105 — Interlocutory order appealable but not appealed against.

Even in case where an interlocutory order is appealable but has not been appealed against, any defect in the order affecting the decision of the case may be set forth as a ground of objection in the memorandum of appeal against the decree. AIR (V 30) 1943 Oudh 288 : 1933 OWN 195 : 207 Ind Cas 38 (DB).

——S. 105 — Appeal against, filed and withdrawn — Final decree — Appeal.

An order on an interlocutory point not amounting to a decree can only be questioned in an appeal from the final decree. A person filing the appeal against the final decree is not debarred from challenging the interlocutory point even though he had appealed from the interlocutory order and withdrawn the appeal. AIR (V 30) 1943 Pesh 37 : 207 Ind Cas 282 (DB).

——S. 105 — Validity of order setting aside award, if can be attacked in appeal under S. 105.

The validity or otherwise of an order setting aside an award affects the decision of the case within the meaning of S. 105, as a simple question of jurisdiction would affect the decision of a case; and hence the validity of an order setting aside an award can be attacked in appeal under the provisions of S. 105. AIR (V 26) 1939 Sind 241 : ILR (1940) Kar 22 : 183 Ind Cas 724 (FB).

——S. 105, Sch. II, Para. 5 — Court setting aside award and deciding case itself — Order, if can be challenged in appeal.

An order of a Court setting aside the award of an arbitrator, and deciding that the case shall be tried by the Court, is an order affecting the decision of the case within the meaning of S. 105, Civil P. C., and is, therefore, liable to be challenged in appeal against the decree and the Appellate Court can consider the legality and propriety of such an order.

The Court is allowed to inquire into all the circumstances including the subsequent conduct of the arbitrator to ascertain what the arbitrator really meant and intended, in order to determine whether or not there had been a refusal on the part of the arbitrator to act. AIR (V 24) 1937 All 582 : (1937) ALJ 651 : 1937 AWR 589 : 171 Ind Cas 398.

——Ss. 105, 151 — Order under S. 151, technically open to objection — When can be challenged in appeal — Upholding of the order on merits — Effect of.

On a suit for dissolution of a partnership and rendition of accounts being filed, the Subordinate Judge came to the conclusion that the suit should not have been for accounts but for a definite sum inasmuch as the account books were in the possession of the plaintiffs and ordered the plaint to be amended. On the date on which the amended plaint was to be filed, the plaintiffs applied under S. 151, for cancellation of the order for amendment. The application was rejected. The plaintiffs again applied for cancellation of the order to the successor of the Judge who passed the order. This was granted and a preliminary decree for rendition of accounts was passed. The defendants appealed. The District Judge agreed that the Subordinate Judge had no jurisdiction to upset the order of his predecessor, but that the order having been passed under S. 151, no appeal lay, and he upheld the preliminary decree on the merits.

Held, that even if the order passed under S. 151, was technically open to objection, the District Judge was not bound to set it aside in appeal; that the order could only be challenged in appeal under S. 105 if it affected the decision of the case on merits and that, having upheld the order appealed against on the merits the District Judge did not commit any error of law. AIR (V 21) 1934 Lah 312 : 35 PLR 266 : 147 Ind Cas 1013.

——S. 105, Sch. II, Para 15 — Order setting aside award — Whether one affecting the decision of the case.

When the Court orders the setting aside of an award and decides that the case should be tried by the Court the order is one affecting the decision of the case and can be challenged in appeal against the decree. AIR (V 20) 1933 Oudh 563 : 10 OWN 1177 : 147 Ind Cas 947 (DB).

——S. 105 — Interlocutory order — No appeal lies from an order passed between the preliminary and final decrees in a partition suit.

No separate appeal lies against an interlocutory order passed in a partition suit between the dates of the preliminary and the final decrees and which is not independent of the final decree and is meant to be embodied therein. The method of attack against such an order is not by an independent appeal but by an appeal against the final decree. AIR (V 17) 1930 Mad 988 : 60 MLJ 79 : 1930 MWN 644 (DB).

——S. 105 — Order setting aside award — Objection in appeal from final decree.

The decision by the trial Court setting aside an award is decision which affects the merits of the case inasmuch as the rights of the parties relating to the subject-matter of the suit will be differently settled if the award is allowed to stand. The Court of appeal can therefore on appeal from

the final decree enquire into the propriety of the order setting aside the award. 56 Cal 21: AIR (Vol 16) 1929 Cal 322 (DB).

——S. 105 — Defect in procedure — Objection in appeal.

Where service report showed that the notice of appeal was served on sons of the respondents on the identification of the serving peon himself, there was no other identifier but the person swore to an affidavit as to the service. The Court wrongly directed the appellants to file an affidavit in proof of service and dismissed the appeal as against these respondents for failure to file such an affidavit. The case was then transferred for hearing before other Court which dismissed the appeal as against all respondents on the ground that it had already been dismissed against some of the respondents. Against this order of dismissal there was second appeal which was objected to.

Held, that as the defect in procedure had affected the decision of the case, the appellant was entitled to raise the point as a ground of objection in memorandum of appeal. 120 Ind Cas 304 : 10 PLT 589 : AIR (Vol 16) 1929 Pat 609 (DB).

——S. 105 — Costs to unsuccessful party — Acceptance of costs — Appeal.

If an interlocutory order is made in favour of one party but for some reason costs are allowed unconditionally to the unsuccessful party, the unsuccessful party is not precluded from questioning the order on appeal by accepting the costs of the hearing. 104 Ind Cas 151 : 46 CLJ 51 : AIR (Vol 14) 1927 Cal 733 (DB).

——S. 105 — Order impleading a person.

An order impleading a person in appeal is not an appealable order, but can be challenged in the appeal from the order finally passed in the appellate Court. 88 Ind Cas 493 : 47 All 853 : 23 ALJ 757 : 6 LRA Civ 386 : AIR (Vol 12) 1925 All 768 (DB).

——S. 105 — Order superseding award — Objection in appeal.

An order made in a pending case, superseding an award and directing the suit to proceed on the merits can be questioned in an appeal from the decree passed in the suit. 89 Ind Cas 173 : 47 All 916 : 23 ALJ 656 : 6 LRA Civ 459 : AIR (Vol 12) 1925 All 566 (DB).

——S. 105 — Order setting aside abatement of appeal.

An order of lower appellate Court setting aside abatement of appeal caused by default of appellants to apply to bring legal representatives of a deceased respondent on record, is an order affecting the decision of a case within S. 105 (1) and can be set forth as a ground of appeal. 25 All 280 and 40 PR 1916, Diss. from. 71 Ind Cas 587 : AIR (Vol 10) 1923 Lah 230 (DB).

——S. 105 — No appeal — Objection in appeal from decree.

Any error in any order affecting the decision of the case passed in an unappealable interlocutory order before the decree may be set forth as a ground of objection in the appeal from the decree. 74 Ind Cas 804 : 16 MLW 297 : 43 MLJ 406 : 46 Mad 47 : AIR (Vol 10) 1923 Mad 147 (DB).

——S. 105 — No appeal — Objection in appeal from decree.

Where there is some unappealable interlocutory order, its irregularity or any defect in it, may be raised when the decree is appealed from, so far as it affects the decision of the case, although an appeal from the order may have been dismissed on the ground of its being unappealable. 66 Ind Cas 920 : 44 All 534 : 20 ALJ 349 : AIR (Vol 9) 1922 All 118 (DB).

——S. 105 — Interlocutory order.

Per Macleod, J.— Issues of law on which a case may be disposed of most often raise questions of jurisdiction or of limitation. But a finding that the Court has jurisdiction or that the plaintiff has brought suit within the time prescribed by the law of limitation does not determine the rights of the parties with regard to all or any of the matters in controversy in the suit; it merely enables the court to proceed to enquire into those rights. So, too, an issue of res judicata found in the plaintiff's favour enables the Court to deal with the merits of the case. It cannot be said that decisions in the plaintiff's favour on such issues as these determine his right to sue which is a matter of controversy in the suit, for there is no such right known to law as the 'right to sue'. A plaintiff in a suit claims to be entitled to remedial right on the consequences of an infraction of an antecedent right. (Holland's Jurisprudence, pages 290 and 291, Ref.) But an aggrieved party is not debarred from appealing at the end of the case from certain findings during the hearing of the case which merely decided that the suit must proceed or which decided questions without disposing whole or partially of the case. 60 Ind Cas 885 : 23 Bom LR 92 : 45 Bom 627 : AIR (Vol 8) 1921 Bom 220 (DB).

——S. 105 (1) — Interlocutory order, compliance with — Appeal.

The right conferred by S. 105 of the C. P. C., is unqualified. By complying with the directions or findings of an intermediate order a plaintiff is not deprived of the right to raise in appeal the question of the propriety of such order and to attack its correctness. 1 L 54 : 53 Ind Cas 644 : AIR (Vol 6) 1919 Lah 38.

——S. 105 (1), O. 22, R. 5 — Decision as to legal representative — Appeal whether lies.

An order under O. 22, R. 5 which brings on record two rival claimants as the legal representatives of a party to a suit, without adjudicating on the relative claims of both, though not in itself appealable, can be attacked in an appeal against the decree under S. 105, C. P. C., because it affects the decision of the suit. 27 B 162, Diss. 5 LW 266: (1917) MWN 148: 39 Ind Cas 371: AIR (Vol 5) 1918 Mad 1055 (DB).

——Ss. 105 and 115 — The Court will not interfere in revision in a case of those interlocutory orders against which though no immediate appeal lies a remedy is supplied by S. 105, which provides that they may be made a ground of objection in an appeal against final decree. 38 Ind Cas 206 : AIR (Vol 4) 1917 All 321.

——S. 105 — Ss. 115 and 105 (1) — Interference of High Court in revision — Order refusing to allow amendment of plaint — Revision if lies.

The High Court will not interfere in revision under S. 115 of the C. P. Code where a party has another effective remedy; an order refusing to allow amendment of a plaint can be challenged under S. 105 (1) of the C. P. C., and no revision to the High Court would lie. 14 MLT 588 : (1914) MWN 98: 22 Ind Cas 39: AIR (Vol 1) 1914 Mad 17 (DB).

——S. 105 — Amendment of plaint — Improper order — Appeal.

Though no appeal lies against an order allowing an amendment, objection to an amendment, can be raised on appeal against the decree. 8 SLR 69 : 27 Ind Cas 344 : AIR (Vol 1) 1914 Sind 70 (DB).

——S. 105 (1) — Final decree.

An appeal lies from a final decree though the sole ground is that the interlocutory order which was not appealed against was wrong. (1911) 34 Mad 228 : 1910 MWN 226 : 8 MLT 72 : 20 MLJ 805 : 6 Ind Cas 239 (DB).

(c) Where they could not be questioned.

——S. 105 — Appeal from order — Previous interlocutory order cannot be questioned. AIR (Vol 31) 1944 Pesh 33 : 1944 Pesh LJ 33 (DB).

——S. 105 — Order setting aside abatement — Objection in appeal.

Unless the interlocutory order affects the merits of the case it cannot be challenged in an appeal against the decree in the case. Where a final decree was challenged on the sole ground that the order setting aside the abatement of the suit which (the order) proceeded the decree was unjustifiable,

Held, that the order did not affect the merits of the case and that it could not be challenged in an appeal from the decree in the case. 87 Ind Cas 211 : 47 All 555 : 23 ALJ 444 : 6 LRA Civ 297 : AIR (Vol 12) 1925 All 426 (DB).

——S. 105 — Order setting aside abatement.

Order setting aside the abatement and allowing substitution of heirs of deceased party cannot be questioned in appeal from the decree in the suit whether such order is passed before, or simultaneously with the decree, such an order not being one which affects the decision of the case with reference to its merits within S. 105. 85 Ind Cas 100 : 40 CLJ 588 : AIR (Vol 12) 1925 Cal 473 (DB).

——S. 105 — Order setting aside abatement — Objection in appeal.

The order setting aside the abatement of a suit cannnot be questioned in appeal from the decree in suit, whether such order is passed before or simultaneously with the decree. 52 Cal 472: 29 CWN 675: AIR (Vol 12) 1925 Cal 766 (DB).

——S. 105 — Order refusing permission to withdraw.

The expression 'affecting the decision of the case' means affecting the decision of the case on its merits. Order refusing permission to the plaintiff to withdraw his suit with liberty to bring a fresh suit is not an order which affects the decision on the merits and does not fall within the provisions of S. 105, C. P. Code. The interlocutory orders which can be challenged in an appeal against the final decree are of such a nature as would or might have induced the Court to alter its decision for instance an order refusing to admit a document which is in law admissible, or to examine a witness or to issue a commission or some such act which is calculated ultimately to influence the decision of the Court on the merits. 86 Ind Cas 1029 : 41 CLJ 186 : AIR (Vol 12) 1925 Cal 711 (DB).

——S. 105, O. 41, R. 10 (Ss. 591, 558, old Code) — Order for re-admission of appeal dismissed for default — Not an order affecting the decision of the case. See (1902) AWN 136 : 24 A 464 (465).

5. Interpretation.

——S. 105 — "Affecting the decision of the case" in S. 105 — Meaning explained — Whether claim is barred by time or not, if decision on merits.

The words "affectng the decision of the case" in S. 105, Civil P. C., mean affecting the decision of the case on the merits and whether a claim is barred by time or not is a decision of the case on the merits. AIR (Vol 30) 1943 Oudh 288 : 1943 OWN 195 : 207 Ind Cas 38 (DB).

——S. 105 (1) — S. 105 (1), whether takes away rights of appeal conferred by S. 104.

Sub-section (1) of S. 105, confers additional rights in the case of appealable orders and does not take away existing rights. These additional rights are, however, cut down again in the case of the appealable orders referred to in sub-s. (2). AIR (Vol 27) 1940 Nag 104 : 1939 NLJ 514 : 188 Ind Cas 273 (DB).

——S. 105 — Order refusing to accept award of arbitrators on reference made by Court.

The words "affecting the decision of the case" in S. 105, Civil P. C., mean affecting the merits or affecting questions bearing upon the merits of the case, and an order setting aside an arbitrator's award on a reference made by the Court is one affecting the decision of the case within the meaning of S. 105, Civil P. C. AIR (Vol 26) 1939 Rang 164 : 181 Ind Cas 942.

——S. 105 (2) — Order refusing to set aside abatement, if can be challenged in appeal from decree.

Section 105, sub-s. (1), does not make any distinction between an appealable order and a non-appealable order. All that this section says is that if there is an order of remand made, that order cannot be challenged in an appeal against the decree. All other orders "affecting the decision of the case" passed in a suit can be challenged in an appeal against the decree whether those orders are appealable or not. An order refusing to set aside an abatement is an order which affects "the decision of the case". This order has the effect of dismissing from the suit the legal representatives of the deceased person, who are not brought in time; such order can, therefore, be challenged in an appeal from the decree in the suit in which this order is passed. (1936) 163 Ind Cas 700 : 39 CWN 1173.

——S. 105 — Matter of fact, if covered.

An error, defect or irregularity within the meaning of S. 105 must mean an error, defect or irregularity in procedure or in law and not in matters of fact. AIR (Vol 22) 1936 Nag 8 : 31 NLR 72 Sup : 160 Ind Cas 202.

——S. 105 — 'Affecting the decision of the case'.

'Affecting the decision of the case' within S. 105 means affecting the decision of the case on merits. 32 CWN 1020 : 115 Ind Cas 184 : AIR (Vol 16) 1929 Cal 26 (DB).

——S. 105 — If controlled by C. P. Code, S. 105 (2).

Article 15 of the Letters Patent is not controlled by S. 105, C. P. Code. And it is open to a person though he does not appeal against the order of remand, to attack it in his appeal against the final decree. 118 Ind Cas 291: 30 MLW 787: AIR (Vol 16) 1929 Mad 349 (DB).

——S. 105 — Sections 99 and 105 are not mutually destructive. 102 Ind Cas 379 : 5 Rang 80 : AIR (Vol 14) 1927 Rang 150 (DB).

——S. 105 — It is not necessary to read into S. 105, additional words on the merits. 102 Ind Cas 379 : 5 Rang 80 : AIR (Vol 14) 1927 Rang 150 (DB).

——S. 105 — 'Decision'.

Per Lindsay J.— The word "decision" in S. 105 (1) must necessarily be taken to mean the decision upon the merits. 34 A 592, Diss.

Per Daniels J.— An illegal order and in consequence the illegality committed in passing that order, affects the decision of the case, if the order passed by the trial Court is one "but for which the decision might have been other than it was." 90 Ind Cas 180 : 48 All 175 : 24 ALJ 56 : 6 LRA Civ 601 : AIR (Vol 12) 1925 All 610 (FB).

——**S. 105 — 'Final' — Applicability to P. C., appeals.**

S. 105 does not apply to appeals to His Majesty in Council and does not supply a guide to the interpretation of the word "final" in S. 109. 78 Ind Cas 938 : 19 MLW 458 : 34 MLT 112 : 1924 MWN 380 : AIR (Vol 11) 1924 Mad 701 : 46 MLJ 357 (DB).

——**S. 105 — 'Save as otherwise expressly provided'.**

The words "Save as otherwise expressly provided" in S. 105 of the Code would seem to directly contemplate appeals from orders of a character provided for elsewhere than in the Civil Procedure Code and to include appeals allowed under other laws such as the Probate and Administration Act. 2 Rang 117 : 80 Ind Cas 746 : AIR (Vol 11) 1924 Rang 237 (DB).

——**S. 105 — "Affecting the decision of the case".**

The words "affecting the decision of the case" mean affecting the decision of the case "with reference to the merits of it". 34 All 592, not Foll.

An order superseding arbitration is not one which affects the decision of the case with reference to the merits of it and even if the order is wrong the error cannot be made a ground of objection in the appeal from the final decree. 59 Ind Cas 676 : 3 LLJ 59 : 38 PLR 1921 : AIR (Vol 8) 1921 Lah 145.

——**S. 105 (1), O. 22, R. 9 (2) and O. 43 — Abatement — Defect or error — Irregularity.**

The words "error, defect or irregularity, in S. 105 mean error, defect or irregularity affecting the decision of the case on the merits and when an order of abatement was set aside under O. 22, R. 9 no appeal lies against that order. 14 ALJ 610 : 35 Ind Cas 209 : AIR (Vol 4) 1917 All 434 (DB).

——**S. 105 (1) — Affecting the decision of the case — Ex parte decree set aside.**

Under S. 105 (1) any error made by a Court in setting aside an "ex parte" decree is not an error "affecting the decision of the case" and cannot be set forth as a ground of objection in the memorandum of appeal. 133 PWR 1916 : 40 PR 1916 : 31 Ind Cas 914 : AIR (Vol 2) 1915 Lah 353.

——**S. 105 and O. 41, R. 23 — Punjab Courts Act (XVIII of 1884), Ss. 40 and 70 — Order of remand, when appealable.**

An order of remand is appealable only in cases where the decree which the Appellate Court would have passed, if, instead of remanding the case, it had decided it itself, is appealable under Punjab Courts Act, Ss. 40 and 70. But where it is impossible to say whether the order is or is not appealable, the order is presumed to be not appealable, no express provision for appeal having been made. 50 PR 1911 : 137 PWR 1911 : 210 PLR 1911 : 11 Ind Cas 315 (DB).

——**S. 105 — Decree, meaning of.**

The word "decree" in the section means a decree passed by the Court which made the order alleged to be defective, erroneous or irregular. (1909) 32 Mad 318: 5 MLT 75: 2 Ind Cas 225 (DB).

6. Irregularity.

——S. 105 — Trial Court holding that Civil Court has no jurisdiction and returning plaint for presentation to proper Court — Appellate Court remanding case holding Civil Court has jurisdiction — Suit decreed — Appeal dismissed — In second appeal question of jurisdiction raised :

Held, that no appeal lay from the order of the lower Appellate Court the first time, when the jurisdiction question came before it, but as the case had been concluded, a second appeal lay from the decree of the lower Appellate Court and hence under S. 105 (1) the question of jurisdiction could be raised in second appeal. AIR (Vol 25) 1938 All 511: (1938) ALJ 720: 1938 RD 714: ILR (1938) All 754: 1938 AWR 520: 177 Ind Cas 450 (DB).

——**S. 105 (1) — Appeal from order of remand — Appellant urging that order for substitution was irregular — Point, if can be taken in such appeal — Proper stage for raising the plea.**

Where in an appeal against an order of remand it is urged that the lower Appellate Court had no jurisdiction to entertain the appeal which had abated and the order for substitution of names was irregular :

Held, that in view of S. 105 (1), Civil P. C., these grounds were untenable in law as no decree had been passed by the lower Appellate Court, and the proper stage to raise these grounds would be in appeal from the decree itself and not in the appeal against the order of remand. (1936) 164 Ind Cas 730: (1936) ALJ 538: 1936 AWR 520 (DB).

——**S. 105 — Order setting aside award — Objection in appeal from decree.**

Order setting aside an award though not appealable can be taken as a ground in appeal if it amounts to a defect or irregularity affecting the decision of a case. AIR (Vol 8) 1921 Lah 145, Not foll. AIR (Vol 15) 1928 Lah 753: 110 Ind Cas 748.

6A. Powers of Court.

——**S. 105 — Re-opening of question decided before calling for finding.**

Though parties have no right to insist upon re-opening questions that had been decided before calling for a finding, yet it is open to the Court to do so if it thinks fit and it cannot be said to act without jurisdiction if it goes back upon the position taken by it previously so long as the case is not out of its hands. AIR (Vol 13) 1926 Mad 830: 94 Ind Cas 226 (DB).

——**S. 105 — Appeal from ex parte decree — Remand.**

When a suit is decided 'ex parte', an Appellate Court to which an appeal from the decree is preferred has jurisdiction to reverse the decree of the lower Court on the ground that such Court was wrong in proceeding to decide the case 'ex parte' and has also power to remand the suit for re-hearing.

The Code of Civil Procedure must in view of Ss. 100 (2), 105 (1) and (2) and S. 107, be held to permit a remand by an Appellate Court not in the particular case set forth in Order 41, rule 23, but also in all cases where there has been any error, defect, or irregularity which has vitiated the whole decision of the case, provided that procedure under Order 41, rules 24 and 25, does not meet the case.

But an order of remand cannot be made under rule 23 of Order 41 unless the case has been disposed of without entering into the full merits by reason of a decision on law or fact which has prevented the case from being tried to the end. AIR (Vol 10) 1923 Oudh 177: 73 Ind Cas 591: 26 OC 10: 10 OLJ 36.

——**Ss. 105 and 20 (b) — Order refusing leave.**

Though the Munsiff's order refusing leave to sue in his court is not appealable, still the District Judge can consider the question on the principle of S. 105. AIR (Vol 4) 1917 Mad 404: 4 LW 411: 35 Ind Cas 74.

——**S. 105 — Power of High Court.**

According to S. 578, C. P. C. 1882 the High Court can in second appeal enter into the

question of jurisdiction of the Appellate Court. S. 591, C. P. C. 1882 deals with order which the court is competent to make, but while making it, the Court has committed an error or an irregularity. (1910) 7 ALJ 675: 6 Ind Cas 464 (DB).

——S. 105 (2) — Old Code.

The appellate Court had jurisdiction under the old Code to set aside a preliminary decree even if there is no appeal against it and an application to vacate it under S. 108, C. P. C. 1882 had been dismissed for default. (1909) 9 CLJ 367: 13 CWN 493: 5 MLT 360: 1 Ind Cas 86 (DB).

7. Remand.

(a) General.
(b) Not binding (Illustrative cases).
(c) Binding (Illustrative cases).

(a) General.

——S. 105 — Code applies to suits and appeals under the Agra Ten. Act, 1926, except so far as it is inconsistent with the provisions of the Act (e.g., S. 264). Section 105 (1) allows a non-appealable order to be challenged in appeal from decree and is applicable to cases under Ten. Act. Section 105 (2) is not applicable as the Ten. Act does not allow appeal from the order of remand. AIR (Vol 25) 1938 All 37: (1937) ALJ 1237: 1938 RD 66: ILR (1938) All 79: 1937 AWR 1075: 172 Ind Cas 964 (DB).

——S. 105 — Inadmissibility of document consented to.

A party to an appeal consenting to an order of remand, being made to enable the other party to show that a certain document is admissible in evidence under some of the provisions of the Evidence Act, cannot object in second appeal that the document is not admissible in evidence by reason of S. 105 (2). AIR (Vol 13) 1926 Cal 509: 91 Ind Cas 287 (DB).

——S. 105 — Point of law decided in remand order.

In the case of keeping the appeal pending in the Appellate Court & remanding the case for further findings on an issue not decided, the Court, when the matter comes up for final consideration, can disregard the reasons given for remanding the case; but a decision on a point of law by a Court of co-ordinate jurisdiction is final in so far as it sets aside the decision of the lower Court and lays down the law to be followed by that Court on remand. AIR (Vol 10) 1923 Pat 226: 76 Ind Cas 136: 4 PLT 35 (DB).

——S. 105 — Point of law decided in remand order.

The same Appellate Court cannot pronounce (except where it is moved by an application for review) a different opinion on a relevant question of law from that which it held in a previous stage of the same case and on which earlier opinion it based its decision remanding the suit to the lower Court. (1921) 62 Ind Cas 703: 14 MLW 236: 40 MLJ 528 (DB).

——S. 105 — Points not raised before or decided by remand order.

Where a case comes up for final hearing after remand, points not raised when case was formerly before the Court cannot be raised. Also the lower Court cannot consider points that had been abandoned before the Appellate Court passing order of remand or had been decided by the order of remand. AIR (Vol 8) 1921 Nag 129: 61 Ind Cas 575.

——S. 105 — Plea not raised in Appellate Court.

The mortgagees sued on a mortgage; but their suit was dismissed on the ground that no consideration for the mortgage was passed. On appeal to the High Court, the consideration being held to be proved, the case was remanded under O. 41, R. 23 for a decision on merits. The defendants did not support the decision of the Lower Court on any other ground before the High Court; but raised the question of invalid attestation under S. 59 of the T. P. Act in the lower Court on remand. The Lower Court again dismissed the suit on that ground. Held (1) that the Lower Court could not frame a fresh preliminary issue when the case is remanded, as the effect of the remand order was to send back the case to the first court to try the remaining issues. (2) That the technical plea of attestation ought to be treated as raised for the first time in appeal. The defendants having failed to raise the objection before the High Court precluded themselves from raising it at the subsequent stage of the same litigation either as 'res judicata' or on the general discretion of the Appellate Court in dealing with substantially new pleading taken up in appeal for the first time and incapable of disposal without fresh evidence. AIR (Vol 3) 1916 All 213: 35 Ind Cas 571 (DB).

——Ss. 105 and 115 — Remand order — Power of High Court in revision.

The High Court should not in revision interfere with orders of remand. 50 PR 1911: 137 PWR 1911: 210 PLR 1911: 11 Ind Cas 315 (DB).

——S. 105 — Finding can be challenged in Lower Court.

Where in a remand order, the High Court found that certain 'kists' were barred, as it was not known that the lease was a registered one, held, the plaintiff could put in the registered lease and prove that the 'kists' were not barred. (1911) 11 Ind Cas 6 (Cal) (DB).

——S. 105 — Power of Chief Court on appeal on an order of remand.

The Chief Court can go into questions of fact in an appeal against an order of remand by the Lower Court. 8 Ind Cas 246: 86 PLR 1910.

——S. 105 (2) — Remand order, not appealed against — Effect.

Whether an order of remand on a preliminary point, not appealed against, can be objected to in appeal from final decree, was unsettled under Old Code. 32 M 318, doubted. (1910) 7 MLT 93: 5 Ind Cas 764 (DB).

——S. 105, O. 41, R. 23 (Ss. 591, 562 old Code) — 'Affecting the decision of the case' — Remand order — Semble.

An order of remand under S. 562, C. P. C., is an order affecting the decision of the suit on the merits. (1905) 9 CWN 895: 32 C 1023 (1028) (DB).

(b) Not binding (Illustrative cases)

——S. 105 — Order returning plaint — Second appeal.

An order returning the plaint under R. 10 of O. 7 is not a decision of the case on a preliminary point and an appeal is provided against such an order under O. 43, R. 1, Cl. (a) and as the order passed by the Appellate Court becomes final under S. 104, Cl. (2), S. 105 does not preclude the aggrieved party from disputing the correctness of the remand order in second appeal if he is otherwise entitled to do so. AIR (Vol 13) 1926 Mad 900: 1926 MWN 613: 97 Ind Cas 790: 24 MLW 630: 51 MLJ 119 (DB).

——S. 105 — Points not decided in remand order.

A remand judgment is not conclusive on points not specifically decided therein beyond possibility of revision. AIR (Vol 12) 1925 Oudh 527: 85 Ind Cas 468 (DB).

——S. 105 — Administration suit by widow — Plea of divorce by son — Remand by High Court holding divorce not proved — No appeal from remand order — Objection before Privy Council.

An administration suit by a Mahomedan widow against her son was dismissed by the Original

Court on the ground that she had been divorced. The High Court on appeal —

Held, that no divorce had been proved, and remanded the suit to the Original Court for decision on the merits.

Held, that the provisions of S. 105 (2) of the Code will not debar the son from raising the question before the Privy Council, when the whole case had been decided, though there had not been any appeal from the order of remand. AIR (Vol 12) 1925 Rang 147: 84 Ind Cas 519: 3 Bur LJ 248 (DB).

——S. 105 (2) — Remand order, whether can be ignored.

There is no appeal under the Letters Patent of the Patna High Court against an order of a Single Judge directing the trial of certain issue and a Judge before whom the case comes up for final hearing with the findings after remand can disregard the order of remand and dispose of the appeal on the original findings of the Appellate Court. AIR (Vol 5) 1918 Pat 680: (1917) Pat HCC 342: 2 Pat LJ 669: 2 Pat LW 71: 41 Ind Cas 337 (FB).

——S. 105 (2), O. 41, R. 23 and O. 43, R. 1 (4) — Remand — Appeal against — Decision of first court on remand order.

Where a Court of appeal, setting aside the decision of the first Court on a preliminary point, remands the case for decision on the merits and there is an appeal against the order of remand, the fact of the case being decided by the Court of first instance in accordance with the remand order before the appeal comes on for hearing is no bar to its being heard and disposed of. A Court hearing an appeal against an order of remand has power not only to decide whether the order of remand is in accordance with law or not but also whether the decision is correct or not and to dispose of the suit accordingly. (1912) 15 OC 33: 15 Ind Cas 181.

(c) Binding (Illustrative cases).

——S. 105 (1) — Remand after setting aside ex parte decree — Appeal against decree after restoration — Order of remand, if can be challenged.

An order setting aside an ex parte decree and remanding a case cannot subsequently be questioned under S. 105 (1), C. P. Code, in an appeal from the decree passed after restoration, as that order does not affect the decision of the case with reference to its merits. (1950) 1950 RD 4.

——S. 105 (2) — Order of remand not appealed against — Ground of remand cannot subsequently be challenged in appeal.

Where a case has been remanded on the ground that S. 47, Civil P. C., applied to the facts of the case and no appeal has been filed against the order of remand, the parties are precluded from disputing the correctness of the order under S. 105 (2) of the Code. AIR (Vol 30) 1943 Mad 706: 56 MLW 502: (1943) 2 MLJ 300: 1943 MWN 605: 210 Ind Cas 637.

——S. 105 — Appeal from decree on a preliminary issue — Case remanded for decision on merits — Decree passed on merits after remand — Order of remand appealable.

A suit was brought to recover damages upon the footing that the defendant had dispossessed the plaintiffs from the land of which the plaintiffs were entitled to possession. The trial Court held that the suit was not maintainable without the establishment of the plaintiffs' title to the property, and upon that preliminary issue passed a decree dismisisng the suit on the 6th November, 1925. The plaintiffs appealed, and by the order of 13th May, 1926 the appellate Court reversed the decree of the trial Court and remitted the case to the trial Court to be reheard upon the merits. The case having been returned to the trial Court was reheard on 7th August, 1926 and was contested by the parties on the merits. On 13th August, 1926 a decree was passed in favour of the plaintiffs. Thereafter, on 24th August, 1925, the defendant, preferred an appeal to the High Court from the order of remand which had been passed on 13th May, 1926.

Held, that it was not open to the defendant in the circumstances to prefer an appeal against the order of remand, inasmuch as that he did not take any objection to the order of remand and he did not prefer an appeal against the final decree.

Held further, that the 'ratio decidendi' of the above cases was not affected by the Code of 1908. AIR (Vol 15) 1928 Cal 325: 55 Cal 506: 110 Ind Cas 347 (DB).

——S. 105 — Appeal from order of remand — Scope of.

The provision in S. 105 (2) confines the scope of the appeal from an order of remand under O. 41, R. 23, to the question of the correctness of the order of remand, which may be impeached either on the ground that the remand itself was illegal as the decision of the first Court was not on a preliminary point or on the ground that the decision of the preliminary point by the appellate Court is erroneous. No other questions can be raised in such appeal, whatever bearing they may have upon the merits of the appellants' case. However, neither party will be precluded from raising any other question which may be legitimately open to him, if and when the case comes before the High Court subsequently. AIR (Vol 15) 1928 Mad 430: 27 MLW 483: 109 Ind Cas 130 (DB).

——S. 105 — No appeal against order of remand — Objections to grounds of remand — Maintainability in appeal from decree.

If the grounds on which an order of remand which has not been appealed against, are liable to be attacked on a second appeal against the decree passed after the remand, then the prohibition against disputing the correctness of the order of remand becomes meaningless. If, therefore, the correctness of the order cannot be challenged, the grounds on which it was based are equally immune from attack. AIR (Vol 15) 1928 Rang 297: 113 Ind Cas 803 : 6 Rang 506.

——S. 105 — Order returning plaint — Second appeal.

An order of remand in appeal from an order returning plaint under O. 7, R. 10, is not an order affecting the decision of the case within S. 105 (1) and therefore its propriety cannot be questioned in second appeal under S. 105 (1). AIR (Vol 13) 1926 Mad 900: 1926 MWN 613: 97 Ind Cas 790: 24 MLW 630: 51 MLJ 119 (DB).

——S. 105 — No appeal.

An appellant, who is aggrieved by an order of remand from which an appeal lies but who has not appealed therefrom is thereafter precluded from disputing its correctness. AIR (Vol 13) 1926 Nag 164 : 89 Ind Cas 1009.

——S. 105 — Point decided in order of remand.

A question once decided by the Appellate Court in the order of remand cannot be re-agitated in the stage of appeal after the return of the finding pursuant to the remand order. AIR (Vol 12) 1925 Mad 1019: 85 Ind Cas 996: 22 MLW 460.

——S. 105 — Points not decided in remand order.

The Trial Court dismissed the suit as barred by S. 33 of the Madras Act II of 1894. The appellate Court reversed this decision and remanded the suit. While doing so, the appellate Court also dealt with S. 27 (4) of the same Act and held that

the suit was not barred by it. There was no appeal from the Order.

Held, that in second appeal on decision after remand, the defendants could not raise the defence that S. 27 (4) was a bar to the suit. AIR (Vol 12) 1925 Mad 916: 86 Ind Cas 608.

——S. 105 — No appeal.

A party who accepts erroneous order of remand and does not appeal against it cannot afterwards change it. AIR (Vol 12) 1925 Nag 185: 80 Ind Cas 626.

——S. 105 — Finding in remand order.

Where the High Court remands a case to the lower Court for retrial and there is no appeal from the decision of the High Court, the finding of the High Court at the time of remand is binding in the appeal from the decision of the lower Court after remand. AIR (Vol 12) 1925 Pat 530: 88 Ind Cas 495: 6 PLT 805: 1925 PHCC 185 (DB).

——S. 105 — No appeal.

Section 105, sub-S. (2) provides that, notwithstanding the provision contained in sub-S. (1), where any party aggrieved by an order of remand made after the commencement of the Code, from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness. This provision was inserted to nullify the effect of decision of a Full Bench, 29 Cal 758, where it had been ruled by a majority that the validity of an order of remand or of a preliminary decree may be assailed either by a direct appeal or by way of an appeal against the final decree. That view was based on the opinion expressed by the Judicial Committee in the case. AIR (Vol 10) 1923 Cal 385: 72 Ind Cas 588 (DB).

——S. 105 — Points decided in remand order.

Points decided by remand order cannot be reconsidered at final hearing. AIR (Vol 10) 1923 Mad 67: 69 Ind Cas 673: 1922 MWN 657: 16 MLW 552: 31 MLT 465: 43 MLJ 340 (DB).

——S. 105 — No appeal.

Where on appeal by the plaintiff the case is remanded on the ground that the burden of proof was on the defendants and not on the plaintiff, S. 105 (2) precludes the defendants from questioning the correctness of that decision in second appeal. AIR (Vol 10) 1923 Nag 283: 82 Ind Cas 645.

——S. 105 — Point not raised before remand order.

Where a point which goes to the root of the suit is not argued before an appellate Court must be taken to have been abandoned and if an appeal is preferable and no appeal is preferred the party who abandoned the point should not be allowed to re-open it subsequently. AIR (Vol 10) 1923 Pat 45: 68 Ind Cas 363: 3 PLT 765: 1922 PHCC 321: 2 Pat 207 (DB).

——S. 105 — Finding in remand order — Objection in appeal from decree.

Neither the remand order nor the findings which are the basis of the remand order can be attacked in an appeal from the decree in pursuance of the order of remand. AIR (Vol 10) 1923 Rang 29: 70 Ind Cas 893: 4 UBR 93: 1 Bur LJ 231.

——S. 105 — Point raised but not referred to in remand.

Where a remand was ordered on one of the two points raised, any one of which would have been sufficient to dispose of the case, the remand order must be deemed to have confirmed the decision on the other point. AIR (Vol 9) 1922 PC 51: 74 Ind Cas 597: 26 CWN 739: 31 MLT 38: 16 MLW 447: 1922 MWN 671.

——S. 105 — No appeal.

Where an order of remand purports to be made under O. 41, R. 23, C. P. Code, it is the duty of a party adversely affected to appeal against the order. Otherwise the order would be final. (1922) 65 Ind Cas 745 (Lah).

——S. 105 — Remand order by single Judge of High Court.

A remand order under O. 41, R. 23, passed by a single Judge of the High Court in second appeal cannot be questioned subsequently in the appeal from the order passed after remand. AIR (Vol 8) 1921 All 276: 60 Ind Cas 975: 19 ALJ 139: 43 All 377 (DB).

——S. 105 — Appeal from decree after remand.

Where a decree after remand is appealed against, the appellant cannot question the correctness of the remand order. (1921) 63 Ind Cas 845 (Cal) (DB).

——S. 105 (2) — Remand — Order not appealed against — Finality of.

An order for remand is final if not appealed against and cannot be questioned by the Lower Appellate Court. AIR (Vol 7) 1920 Lah 193: 57 Ind Cas 52.

——S. 105 (2) — Remand — Decree after remand — Appeal from decree — If order of remand can be challenged.

In an appeal from a decree passed after a remand by the High Court, the order of remand cannot be challenged. AIR (Vol 5) 1918 Cal 182: 46 Ind Cas 816 (DB).

——S. 105 (2) — Order of remand — Propriety of, not to be questioned by lower Court — Waiver.

Under S. 105 (2) of the C. P. Code a lower court cannot treat an order of remand of the appellate court as a nullity owing to the want of jurisdiction in the latter to pass it. A party who omits to raise the question of the jurisdiction of the appellate court at the hearing of an appeal and to appeal from the decision reached, cannot be allowed to object to that decision in the subordinate court to which the matter in dispute is remanded. AIR (Vol 5) 1918 Nag 264: 47 Ind Cas 886.

——S. 105 (2) — Power to reconsider.

The court remanding the case after deciding certain points can afterwards refuse to re-consider those issues. AIR (Vol 4) 1917 Cal 701: 20 CWN 43: 32 Ind Cas 866 (DB).

[See also AIR (Vol 5) 1918 Nag 193: 46 Ind Cas 922.]

——S. 105, and O. 43, R. (1) (a) — Punjab Courts Act, S. 41 (3) — Remand order on a point of custom — Right of appeal.

No appeal from an order of remand as to the existence or non-existence of a custom lies. Where however parties are admittedly governed by customary law, the order of remand should be set aside and a decree must be passed by the Appellate Court for what the plaintiff was entitled to, by custom. AIR (Vol 4) 1917 Lah 392: 76 PWR 1917: 109 PLR 1917: 39 Ind Cas 775.

——S. 105, O. 41, R. 23 and Sch. II, Para 3 — Award — Supersession of — Merits, if affected — Remand, if valid.

The arbitrators signed the award in the evening of 19th December, the date fixed for submitting the award and filed it on 21st December. The court superseded and decided the case. In appeal the case was remanded. It was held that the award was in time though filed late and that the order of supersession by the Court was one affecting the merits of the case with S. 105 and that the order of remand was correctly made. AIR (Vol 3) 1916 Pat 21: 37 Ind Cas 844.

——S. 105 — Remand order — Not appealed against — If appellate court can go subsequently into the question.

Where an order of remand by the appellate court on the question of the maintainability of a

suit is not appealed against, the appellate court cannot subsequently go into the question of the form of suit as it is not open to discussion any longer. 302 PLR 1913: 210 PWR 1913: 20 Ind Cas 761 (DB).

——S. 105 (2) and O. 41, R. 23 — Scope — Decree by first Court — Appeal from remand order without appealing from decree.

Where a suit has been remanded on appeal, an appeal from the order after the suit has been finally disposed of is incompetent. 30 A 479 Diss. Section 105 (2) of the new C. P. C. has no bearing on this question but applies to the converse case. (1911) 15 CWN 830: 10 Ind Cas 514 (DB).

——S. 105 (2) — Remand — Final decree — Second appeal.

The validity of the order of remand cannot be questioned in second appeal against a decree passed after a remand under S. 562 of C. P. C. 1882 unless the appellant also challenges the validity of the final decree on grounds independent of those upon which the order of remand was based. (1910) 5 Ind Cas 677 (All).

——S. 105, O. 41, R. 23 (Ss. 591, 562 old Code) — "Decree", meaning of — Jurisdiction of lower appellate Court to review its own order of remand — Jurisdiction of second appeal Court to go into the legality of the order of remand, when it has become final.

"'Decree" in S. 591 means a decree passed by the Court which made the order alleged to be erroneous, defective or irregular, and consequently an order of remand cannot be questioned by the same Court when the case comes on a second time on appeal after a decision on remand; nor is the High Court competent to question the legality of the order of remand by the first appellate Court in second appeal from the final decree, the original order of remand not having been appealed against. (1908) 32 M 318 (319): 5 MLT 75: 2 Ind Cas 525 (DB).

8. Scope.

——S. 105 — Scope — Affecting the decision of the case — Meaning of — Order setting aside dismissal for default — If can be challenged in appeal from final decree or order.

Where the effect of an order is to prevent an inquiry into merits, such an order would come within the scope of S. 105, C. P. Code, as affecting the case on merits, but where the order does not affect the decision of the case on merits, it would not come within the scope of S. 105. An order setting aside a dismissal for default only reopens an inquiry and does not affect the decision of the case, and cannot therefore be questioned in an appeal from the final decree in the suit or final order in the proceeding. AIR (Vol 33) 1946 Mad 344 : 59 LW 139: 1946 MWN 121: (1946) 1 MLJ 216 (DB).

——S. 105 — Order having no separate existence — Appeal must be dismissed.

Where there is no separate existence for an order, the appeal against it must be infructuous and on that account must fail and must be dismissed. AIR (Vol 32) 1945 Sind 146: ILR (1945) Kar 116.

——S. 105(2) — Prohibition under S. 105(2), when exists.

The prohibition under S. 105(2), exists only if an appeal lay from the order of remand and where no appeal lies, there is no prohibition. AIR (Vol 22) 1935 All 553: (1935) ALJ 517: 1935 AWR 621 & 710: 1935 RD 256 (2): 157 Ind Cas 1119.

——S. 105 — Scope — Obiter.

The principle of S. 105 is applicable not only to decrees and interlocutory orders but also to orders and interlocutory orders leading to the final decree. AIR (Vol 4) 1917 Mad 404: 4 LW 411: 35 Ind Cas 74.

——S. 105(2) — Scope of.

S. 105(2) only prevents a party from agitating in an appeal a question which he could have objected to in the appeal against an order. The test is not whether a decision has been given upon the points raised in the appeal against the order. AIR (Vol 3) 1916 Mad 127: 29 MLJ 772: 2 LW 509: 29 Ind Cas 386 (DB).

——S. 105 — Scope — Incidental findings.

An order from which an appeal is allowed, but no appeal is lodged in time, is binding as also all the findings and decisions forming an essential part of the basis of that order but not those merely incidental thereto. AIR (Vol 1) 1914 Nag 58: 10 NLR 28: 23 Ind Cas 238.

——S. 105(2) — Applicability.

S. 105(2) does not apply to appeals to the Privy Council. (1911) 33 All 391: 8 ALJ 192: 9 Ind Cas 932 (DB).

——S. 105 — Compensation embodied in decree.

An order of compensation though embodied in a decree is not appealable. S. 105 does not apply to such a case. (1911) 9 MLT 216: (1910) MWN 675: 8 Ind Cas 164.

——S. 105(1) — Power of Court.

The section preserves to an Appellate Court the right to deal in an appeal from a decree, with an improper unappealable order, passed in the course of a suit by a Court competent to pass it. (1909) 2 Ind Cas 677 (All).

——S. 105 (S. 591, old Code) — Validity of order setting aside award challenged in final decree — Not the sole ground of appeal.

S. 591 contemplates two things: there being a regular appeal about something else, and in that appeal the insertion of a ground of objection under S. 591. A Munsif set aside an award on the ground that all the parties to the suit were not parties to the reference and tried and decreed the suit. The defendant challenged the Munsif's order setting aside the award in an appeal against the final decree and raised other grounds as well. Held, that the ground could be entertained. (1907) 5 ALJ 644: 4 MLT 400: 1908 AWN 242 (243) (DB).

9. Second Appeal.

——S. 105 — Though S. 105 refers only to decrees, the provisions of that section apply to appeals against orders as well. AIR (Vol 23) 1936 Mad 936: 168 Ind Cas 413.

——S. 105 — Partition suit — No appeal from preliminary decree — Objections in appeal from final decree.

It is not open to an appellant in an appeal against the final decree in a partition suit to attack preliminary decree, which might have been directly challenged by an appeal. An appellate Court, however, shall consider, in an appeal against the final decree in a partition suit, whether the preliminary decree was capable of enforcement; in other words, whether it afforded an adequate basis for the final decree as actually made. AIR (Vol 11) 1924 Cal 80: 75 Ind Cas 319: 38 CLJ 111 (DB).

——S. 105 — Custom — Punjab Courts Act, S. 40 — Appeal on certificate.

There can be no appeal from an order of remand under O. 41, R. 23 of the Code of Civil Procedure, where the question involved is one of custom. As the appellant would have a right of second appeal from the decree of the Appellate Court only if he were to obtain a certificate under Sub-s. (3) of S. 40 of the Punjab Courts Act, it could not be said definitely that an appeal would lie from the decree of

the Appellate Court. The question of custom therefore can be agitated in second appeal from the final decree if the certificate is obtained. AIR (Vol 10) 1923 Lah 535: 73 Ind Cas 650: 5 LLJ 392 (DB).

——S. 107.

See also Civil P. C., O. 41, Rr. 23 to 25, 27, 28 and 33.

1. Additional evidence.
2. Amendment.
3. Appreciation of evidence.
See also, Note 7.
4. Court-fee.
5. Discretion.
6. Duty of Court.
7. Finding of lower Court.
See also, Note 3.
8. Issues.
9. New point.
10. Parties.
11. Powers of Court.
12. Procedure.
13. Remand.
14 Return of plaint or memo.
15. Scope and object.
16. Subsequent events.
17. Withdrawal of suit.

1. Additional evidence.

——S. 107 — Evidence — Party deliberately losing opportunity cannot be again granted it.

Having had the opportunity to adduce available evidence and having deliberately let it go, a party cannot ask for a second opportunity once again at the appellate stage. AIR (Vol 31) 1944 Mad 175: ILR (1944) Mad 580: 1943 MWN 722: (1943) 2 MLJ 587: 56 MLW 722: 216 Ind Cas 197 (DB).

——S. 107 — An Appellate Court may refer to and consider a document which is not exhibited but is found on the record provided no party takes objection to this practice. (1940) 42 PLR 252.

——S. 107, O. 41, R. 27 — Appeal — Additional evidence, when to be admitted — Duty to record reasons — Power to be sparingly exercised.

The provisions of S. 107, Civil P. C., as elucidated by O. 41, R. 27, are clearly not intended to allow a litigant who has been unsuccessful in the lower Court to patch up the weak parts of his case and fill up omissions in the Court of appeal.

Under O. 41, R. 27 (b) it is only where the Appellate Court "requires" it (i.e., finds it needful), that additional evidence can be admitted and the legitimate occasion for the exercise of this discretion is not whenever, before the appeal is heard, a party applies to adduce fresh evidence, but "when on examining the evidence as it stands some inherent lacuna or defect becomes apparent". The defect may be pointed out by a party or a party may move the Court to supply the defect, but the requirement must be the requirement of the Court upon its appreciation of the evidence at it stands.

Whenever the Court adopts the procedure it is bound by R. 27 (2) to record its reasons for so doing and under R. 29, must specify the points to which the evidence is to be confined and record on its proceedings the points so specified.

Further, the power so conferred upon the Court by the Code ought to be very sparingly exercised, and one requirement at least of any new evidence to be adduced should be that it should have a direct and important bearing on a main issue in the case. AIR (Vol 18) 1931 PC 143: 61 MLJ 489: 33 Bom LR 1015: (1931) ALJ 513: 35 CWN 786: 34 MLW 76: 54 CLJ 1: 12 PLT 683: (1931) MWN 929: 10 Pat 654: 58 IA 254: 132 Ind Cas 721.

——S. 107, O. 41, R. 27 — Appeal — Additional evidence — Principles.

The Appellate Court has discretion to admit additional evidence for substantial cause. The power, however, should be used sparingly by the Courts and great caution must be exercised in admitting new evidence.

When a party could have applied to the lower Court for an adjournment to call further evidence but does not do so, and takes the chance of a judgment in his favour on the evidence then at his disposal, he will not be allowed to call it in the Appellate Court.

Where it is not impossible to decide the case without taking the additional evidence and there is no lacuna or defect to be filled up or remedied and no substantial cause for taking the additional evidence, the evidence so received in appeal should be left out of consideration in disposing of the case. AIR (Vol 18) 1931 Oudh 298: 8 OWN 627: 132 Ind Cas 259 (DB).

——S. 107 — The power to admit additional evidence should be exercised by a Court of appeal with much caution and only in suits where it is satisfied that in the interests of justice it should be exercised, and such additional evidence when admitted will be evidence which, if produced at the trial would have been admissible. AIR (Vol 13) 1926 P. C. 34: 51 MLJ 570: 49 Mad 435: 53 IA 84: 3 OWN 568: 1926 MWN 495: 24 MLW 115: 44 CLJ 67: 28 Bom LR 1391: 31 CWN 1: 94 Ind Cas 767.

2. Amendment.

——S. 107 — Plaintiffs asserting throughout that property was non-ancestral — Issue framed — Evidence led and finding recorded that property was non-ancestral — In appeal plaintiff seeking to amend plaint that property was ancestral:

Held, that the amendment could not be allowed as it would introduce entirely an inconsistent case. AIR (Vol 29) 1942 Lah 1: 43 PLR 737: ILR (1942) Lah 59: 198 Ind Cas 340 (FB).

——S. 107 (2) O. 41, Rr. 20, 33 — Amendment of memorandum of appeal and addition of person as party to appeal — Distinction — Addition of party after limitation for appeal, whether amendment of memorandum — Court's power to order addition.

The Civil P. C. draws a clear distinction between a mere amendment of pleading and the addition of a party. In the case of a plaint, the amendment of a plaint can be made by the Court under O. 6, R. 17, whereas addition of parties can be ordered under O. 1, R. 10. The two are not identically the same. The addition of a new person as a party is not and cannot be described as an amendment of a pleading. Similarly adding the name of a fresh person as a party to an appeal is not the same as a mere amendment of the memorandum of appeal. The amendment of a memorandum of appeal can be made by an Appellate Court by virtue of the powers conferred on it under S. 107 (2), Civil P. C., but the power of the Appellate Court to add a new party is subject to the limitation prescribed by the Code.

Order 41, R. 20, deals with such a power and an Appellate Court, when it appears to it at the hearing, that any person who was a party to the suit but who has not been made a party to the appeal and is interested in the result of the appeal, may direct that such a person be made a respondent. The object of that rule is not to empower an Appellate Court to implead a person who was interested in the decree of the Court below and against whom no appeal has been preferred and who has, therefore, acquired a substantive right and is no longer interested in the result of the appeal, to be impleaded so as to enable the Appellate Court to pass a decree against him afresh. The Court can-

not and it has no inherent power to add a person as a party to appeal after the expiry of limitation. AIR (Vol 24) 1937 All 243: (1937) ALJ 436: 1937 AWR 27: 169 Ind Cas 186.

——S. 107 — Although an appeal directed against a dead man is not appeal, if the name of such dead man appears on the petition of appeal instead of his legal representatives, through a 'bona fide' error the petition of appeal can be allowed to be amended under the provisions of O. 1, R. 10, read with Ss. 107 and 153. AIR (Vol 17) 1930 All 131: 123 Ind Cas 824.

——S. 107 (2) O. 22 R. 11 (S. 582 old Code) — Amendment — Appellate Court.

The appellate Court has power to allow an amendment of the plaint under S. 582, C. P. C., and order re-trial on such amended plaint. (1901) 5 CWN 273 (279) (DB).

3. Appreciation of evidence.

See also, Note 7.

(a) Interference.

(b) No interference.

——S. 107 — Where the findings of fact have been drawn from the testimony, oral and documentary, produced by a witness and depend upon the weight of evidence or inherent probabilities and not on credibility induced by his demeanour or manner of deposition, the trial Court is in no better position than the Appellate Court in discovering the truth, and the High Court is not bound by the view of the trial Court. AIR (Vol 32) 1945 PC 35: (1945) 1 MLJ 136: 1945 MWN 322: 47 Bom LR 603: 12 BR 231: 221 Ind Cas 451.

——S. 107 — Appreciation of oral evidence by trial Court.

Although the appreciation of oral evidence by the trial Judge is entitled to great weight by the Appellate Court, that appreciation must be tested by the other proved facts in the case, especially if the evidence is substantially corroborated by those facts. AIR (Vol 29) 1942 Bom 161: 44 Bom LR 295: ILR (1942) Bom 357: 201 Ind Cas 420 (DB).

——S. 107 — Opinion of trial Judge as to credibility of witnesses.

Suspicion, though a ground for scrutiny, cannot be made the foundation of a decision.

The opinion of the trial Judge who has seen and heard the witnesses, deserves great weight. Where the Appellate Court has disregarded the opinion of the Judge who saw and heard the witnesses and was in the best position to judge of their credibility and has reversed the finding on a mere surmise that fraud was practised on the party when there is no evidence to that effect and no plea of fraud is taken by such party in its pleadings, the decision of the Appellate Court cannot be upheld and must be set aside. 1941 NLJ 230: (1942) 197 Ind Cas 356.

——S. 107 — Trial Court's appreciation of evidence.

Where the trial Court, after a detailed examination of the evidence, comes to the conclusion that the evidence was true, the Appellate Court ought not to reverse this finding without stating its reasons. AIR (Vol 28) 1941 Mad 539: (1941) 2 MLJ 79: 1941 MWN 655: ILR (1941) Mad 785: 196 Ind Cas 406 (FB).

——S. 107 — The estimate of the evidence of a witness made by the trial Judge who had seen the witness is entitled to great weight. He has the advantage of seeing the witness. But that does not relieve the Appellate Court from examining the probabilities and circumstances of the whole case. In a case where the story told by the witness is highly improbable having regard to the circumstances in the case, the Court of appeal would be justified in rejecting his testimony. AIR (Vol 27) 1940 Cal 115: 70 CLJ 218: 44 CWN 38 (DB).

——S. 107 — Opinion of trial Court cannot be disregarded without strong grounds.

When the witnesses have been disbelieved by the Judge who saw them, it would require very strong grounds to disregard his estimate of them in second appeal. AIR (Vol 27) 1940 Nag 70: 1939 NLJ 573: ILR (1941) Nag 669: 188 Ind Cas 181.

——S. 107 — Issue simple and depending upon appreciation of oral evidence.

Where the issue is plain and simple and depends upon an appreciation of oral evidence in the case, the Appellate Court should be slow to reverse the decision of a Court which has seen and heard the witnesses. AIR (Vol 27) 1940 Pat 187: 7 BR 123: 5 CLT 69: 190 Ind Cas 665 (DB).

——S. 107 — Question of appraising oral testimony of witness — Opinion of trial Court, value of.

Where it is a question of appraising the oral testimony of a witness, the Court of appeal will no doubt attach a great deal of importance to the opinion of trial Judge regarding the value of such testimony unless facts and circumstances render it unsafe to do so. AIR (Vol 26) 1939 Cal 595: 69 CLJ 347: 185 Ind Cas 634 (DB).

——S. 107 — Evidence merely oral testimony.

Where the evidence consists merely of the oral testimony of the parties and the trial Judge who had the advantage of seeing the parties in the witness-box accepted the testimony of the respondent, before this decision can be varied. it must be shown that he was not justified in his conclusion. AIR (Vol 26) 1939 Mad 670: 49 MLW 705: (1939) MWN 480: (1939) 1 MLJ 905: 188 Ind Cas 857 (DB).

——S. 107 — Appreciation of, by Appellate Court.

If evidence on oath coming from the mouth of a witness whom the Judge has seen is such that he cannot believe it, and there is good reason for his disbelief, this makes no difference to the general principle that a Court of appeal will not prefer its own appreciation of the oral evidence to that of the trial Judge. AIR (Vol 26) 1939 Sind 234; ILR (1939) Kar 509: 183 Ind Cas 717 (DB).

——S. 107 — Finding of trial Judge based on credibility of oral evidence — Appeal — Right of Appellate Court to overrule findings on questions of fact.

As the trial Judge has the advantage of seeing the witnesses and watching their demeanour, his finding, so far as it depends upon the credibility of oral evidence, cannot be lightly interfered with. But the law gives a right of appeal from a judgment of a trial Court on questions of fact as well as on questions of law, and the Court of Appeal, after carefully weighing and considering the judgment, has to make up its own mind, and cannot shrink from overruling it, if, on a full consideration of all the materials, it is satisfied that that judgment is clearly wrong.

Held, on facts and evidence, that the plaintiff was validly appointed to the office of mutawali and also of sajjadanashin and that as the plaintiff had established his right to be the mutawalli of the wakf property, he was entitled to recover possession of the library, together with its appurtenances. (1937) 167 Ind Cas 8: 45 MLW 371: 1937 OWN 360: 3 BR 326: 39 PLR 240: 41 CWN 624: (1937) 1 MLJ 538: 1937 AWR 405: (1937) MWN 580: (1937) ALJ 585: 39 Bom LR 761: 65 CLJ 270: 31 SLR 213 (PC).

——S. 107 — Finding of fact based on credibility of witnesses.

Where the appellant is exercising a right of appeal which is his right, the Appellate Court cannot, merely because the question is one of fact, and because it has been decided in one

way by the trial Judge, abdicate its duty to review his decision, and to reverse it, if it deems it to be wrong. Nonetheless, the functions of a Court of appeal, when dealing with a question of fact, and a question of fact, moreover, in which, questions of credibility are involved, are limited in their character and scope.

In an appeal from the decision of a trial Judge based on his opinion of the trustworthiness of witnesses whom he has seen, the Court of appeal must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong. AIR (Vol 23) 1936 PC 154: (1936) MWN 432: (1936) ALJ 638: 1936 AWR 606: 44 MLW 67: 162 Ind Cas 426.

——S. 107 — Appeal — Appellate Court, when can differ from trial Court's view of evidence in case.

No doubt it is open to an Appellate Court to differ from the Court which heard the evidence where it is manifest that the evidence accepted by such Court of first instance is contradictory or is so improbable as to be unbelievable or is, for other sufficient reasons, unworthy of acceptance. But where no grounds exist justifying a conclusion as to credibility opposed to that of the Judge who had the very great advantage of both seeing and hearing the witnesses, the evidence was not contradictory or in any substantial degree shaken in cross-examination nor was it inherently improbable or unworthy to be accepted and the main drift of it which was to esblish a pedigree relied upon and annexed to the plaint was confirmed by various circumstances appearing from the evidence of the deponents and was also to some extent corroborated by evidence and circumstances external to and independent of the plaintiff's evidence and by evidence and documents adduced by the defendants, the view of the trial Court is to be preferred to that of the Appellate Court. AIR (Vol 23) 1936 PC 60: 1936 OWN 38: 40 CWN 257: 2 BR 215: 43 MLW 120: 38 PLR 69 (2): 1936 AWR 37: (1936) MWN 184: 70 MLJ 225: 19 NLJ 36: 38 Bom LR 344: 63 CLJ 42: (1936) ALJ 755: 160 Ind Cas 45.

——S. 107 — Effect of documentary evidence.

It is true that where the issue is a simple one, the Appellate Court should not very lightly discord the appreciation of evidence made by the trial Court which had the opportunity of seeing the witnesses, hearing them and watching their demeanour but where the weight of the admitted documents in evidence, or the documents in evidence which have been proved, is so great that the High Court is constrained to differ from the estimate of the evidence by the Subordinate Judge who has really belittled the effect of the documentary evidence, the High Court in appeal may draw its own conclusions. AIR (Vol 23) 1936 Cal 87: 63 CLJ 86: 161 Ind Cas 224 (DB).

——S. 107 — Appreciation of evidence by trial Court, when not binding on Appellate Court.

When a Judge hears and sees witnesses and makes a conclusion or inference with regard to what is the weight on balance of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the Judge makes any observation with regard to credibility or not. The principle, however, does not apply to a case which has professedly been decided on the probabilities of the case without reference to the inherent credibility of the witnesses and the conclusions of the trial Court are not binding on the Appellate Court. AIR (Vol 23) 1936 Rang 518: 167 Ind Cas 362 (DB).

——S. 107 — Failure to give due weight to evidence.

Although the trial Judge has certainly had the advantage of seeing the witnesses, but in a particular case he came to a wrong conclusion and failed to give due weight to parts of the evidence, the duty of an Appellate Court in these circumstances is for each Judge of it to put to himself, the question, "am I who sit here without those advantages, sometimes broad and sometimes subtle, which are the privileges of the Judge who heard and tried the case in a position, not having those privileges, to come to a clear conclusion that the Judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the Judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment". AIR (Vol 23) 1936 Rang 399: 164 Ind Cas 842 (DB).

——S. 107 — Credibility of witnesses depending on his demeanour.

When a Court has got to deal with a pure question of credibility of witnesses, great weight ought necessarily to be given to the judgment of the Judge, who saw the witnesses. But there may be other circumstances and facts, quite apart from manner and demeanour, which may show whether a statement can be believed or not. These circumstances and facts may justify the Appellate Court in differing from the trial Court even on a question of fact, turning on the question of credibility of witnesses whom the Appellate Court has not seen. AIR (Vol 22) 1935 Cal 80: 61 Cal 937: 155 Ind Cas 321.

——S. 107 — Appeal — Question of fact — Court of fact arriving at conclusion regarding law — Inference by Court of law.

The question whether a person is or is not a member of the joint undivided family is one of fact, but when the tribunal of fact states the circumstances on which it relies for its finding and those circumstances do not in law lead to the conclusion arrived at by the tribunal of fact, it is open to a Court of law to draw the proper inference from the circumstances stated. AIR (Vol 22) 1935 Pat 342: 16 PLT 351: 1 BR 578: 7 BR 685: 14 Pat 785: 156 Ind Cas 116 (SB).

——S. 107 — Secondary evidence — Admissibility of — Court of first instance deciding as to its admissibility — Decision, when can be overruled.

When a party fails to produce a document, it may be because he does not wish to produce it, or he may have really lost it. Before secondary evidence of the deed could be produced in Court, it is essential for the party to show that the document had been lost, and where this onus has not been discharged and the Judge of first instance decides the first point as to the admissibility of secondary evidence, his conclusion, except in case of miscarriage, should not be disturbed. AIR (Vol 22) 1935 Rang 502: 160 Ind Cas 701.

——S. 107 — Appellate Court — Credibility of witness — Appellate Court if can differ from original Court.

It is dangerous for an Appellate Court to differ from an original Court on the question of the credibility of witnesses and basing its opposite decision on mere inferences from the statements which the witnesses are recorded to have made, which an Appellate Court cannot make with such certitude as can the Court which originally heard the witnesses. AIR (Vol 22) 1935 Rang 39: 155 Ind Cas 511.

——S. 107 — **Investigation of facts for first time, when allowable.**

Although as a rule, the High Court will be reluctant to investigate facts for the first time in appeal, yet there is nothing in law to prevent such facts being investigated when the interests of justice so require. AIR (Vol 19) 1932 Pat 286: 11 Pat 513: 13 PLT 623: 139 Ind Cas 843 (DB).

——S. 107 — **Finding of trial Court, value of.**

When the issue is simple and the only question is which set of witnesses is to be believed, the verdict of the trial Court should not be lightly disregarded. AIR (Vol 18) 1931 Oudh 256: 8 OWN 131: 15 RD 80: 6 Luck 546: 132 Ind Cas 532 (DB).

(a) Interference.

——S. 107 — **Interference by High Court.**

It is very difficult to justify the action of the Appellate Court on a pure question of appreciation of evidence but where the trial Court failed to attach sufficient significance to the execution of the deed, the Appellate Court must be held to be right in reversing the trial Court's judgment. AIR (Vol 32) 1945 PC 111: 49 CWN 517: 12 BR 229: 221 Ind Cas 427.

——S. 107 — **Interference with appreciation of evidence.**

The first Appellate Court is entitled to examine the evidence and is not bound by the findings thereon of the trial Court, but an Appellate Court should be slow to interfere with the appreciation of evidence by the trial Court on a simple issue of fact. AIR (Vol 27) 1940 Sind 68: 188 Ind Cas 643 (DB).

——S. 107 — **Witness — Credibility — Interference by High Court.**

Where a Judge, especially a Judge on the Original Side of the High Court, has seen a witness and heard his evidence, and comes to a conclusion about his credibility, it requires circumstances of an exceptional character to justify the High Court in coming to a different conclusion. It is not a question of the weight of evidence but that of the attitude, and the trustworthiness of the witness, and the effect of his whole demeanour in the witness-box. It is not necessary that a Judge should always comment upon the demeanour of the witnesses in the box — but he may record the demeanour of the witnesses. AIR (Vol 25) 1938 Rang 248: 177 Ind Cas 312 (DB).

——S. 107 — **Trial Court's appreciation of evidence — Interference.**

Where there is an irreconcilable difference between the evidence of the opposite parties, and the trial Court accepts the evidence of one party and rejects that of the other so far as it is in conflict with that party's evidence, a Court of review should be slow to differ as to credibility from the opinion of the trial Court who has seen and heard the witnesses. AIR (Vol 24) 1937 Lah 324: 173 Ind Cas 937 (DB).

——S. 107 — **Reliance on burden of proof by opponent — Powers of Appellate Court.**

Where many issues were raised but not proved and inconsistent pleas were also raised and best documentary evidence presumably available and probably decisive one way or another was not produced.

Held, that the Appellate Court was justified in reversing the judgment of the trial Court since the conduct indicated a design of opponent to take advantage of the abstract doctrine of the burden of proof upon a plaintiff in ejectment. AIR (Vol 16) 1929 PC 95: 57 MLJ 565: 114 Ind Cas 592: 1929 ALJ 261: 49 CLJ 308: 33 CWN 430: 29 MLW 501: 6 OWN 423: 31 Bom LR 721: 11 PLT 101.

(b) No interference.

——S. 107 — **Appellate Judge should not, without good reasons, interfere with trial Court's conclusion on credibility of oral evidence.**

Unless good reasons are given, any interference with the conclusion of the trial Judge on the credibility of oral evidence must be deemed erroneous in law. AIR (Vol 28) 1941 Mad 393: 53 MLW 160: (1941) 1 MLJ 174: 1941 MWN 98.

——S. 107 — **Appellate Court's discretion.**

It is doubtless true that on appeal the whole case, including the facts, are within the jurisdiction of the Appeal Court. But generally speaking, it is undesirable to interfere with the findings of fact of the trial Judge who sees and hears the witnesses and has an opportunity of noting their demeanour, especially in cases where the issue is simple and depends on the credit which attached to one or other of the conflicting witnesses. Nor should his pronouncement with respect to their credibility be put aside on a mere calculation of probabilities by the Court of appeal. But the discretion of the Appellate Court in the consideration of evidence cannot be restricted. (1936) 165 Ind Cas 49: 1936 OWN 906.

——S. 107 — It is not the duty of an Appellate Court to scrutinize the evidence with the same elaboration of detail as is to be expected from a Court of first instance. AIR (Vol 21) 1934 Cal 633: 61 Cal 365: 152 Ind Cas 597.

——S. 107 — **Appellate Court — Interference with trial Judge's opinion on credibility of witnesses.**

Where there is an irreconcilable difference between the evidence of the parties and the trial Judge accepts the evidence of one party rejecting that of the other so far as it is in conflict with that party's evidence, the Court of appeal should be slow to differ from the opinion of the trial Judge as to credibility, and should not differ without convincing reasons. AIR (Vol 18) 1931 PC 265: 134 Ind Cas 321.

——S. 107 — **Appellate Court, functions of — Question of fact — Inferences from fact.**

A court of appeal ought never to reverse the judgment of an inferior Court unless quite confident that the judgment given in the court below is wrong. Where the case depends upon proper inferences to be drawn from facts indisputably established by the evidence an appellate court may be in as good a position to judge as the original tribunal. But where the case hinges on the question which of two conflicting stories is to be believed to which witnesses' credence is to be given the original tribunal is far better placed than the appellate court to correctly guage the truth. (1904) 6 Bom LR 1130 (1131) (DB).

4. Court-fee.

——S. 107 — **Excess court-fee — Refund.**

The High Court can make a declaration and assist the party to recover the excess court-fee paid by him, under its own order or under orders of Courts subordinate to it. AIR (Vol 29) 1942 Mad 464: 1942 MWN 206: 55 MLW 250: (1942) 1 MLJ 451: 202 Ind Cas 420.

——S. 107 — When a memorandum of appeal is insufficiently stamped, the Court should call upon the appellant to make good the deficiency

within a stated time under Order 7, Rule 2 (c) which, under Section 107, Civil P. C., is applicable to appeals. AIR (Vol 26) 1939 Pat 432 : 5 BR 488: 20 PLT 426: 180 Ind Cas 791 (DB).

5. **Discretion.**

——S. 107 — Appellate Court — Discretion of lower Court is not ordinarily disturbed.

Appellate Courts are always slow to reverse the decisions of Courts below made in the deliberate exercise of a discretion entrusted to them by law. AIR (Vol 31) 1944 Oudh 193: 1944 AWR 72: 1944 OWN 46: 216 Ind Cas 107.

——S. 107, O. 26, R. 9, O. 41, R. 27 — Commission for local inspection — Power to take additional evidence — Discretion — Interference.

A distinction has to be drawn between "jurisdiction" and "discretion" and when the first Appellate Court exercises its discretion, the Court of second appeal should always be most reluctant to interfere. In fact when a discretion is vested in a Court by the provisions of the Civil P. C., the Court is bound to exercise such discretion one way or the other and a refusal to exercise it or the non-existence of it amounts to a defect in procedure. The Court while exercising such discretion must do so judicially and on sound legal principles. It should not exercise it in a non-judicial manner or in an arbitrary manner. Where a Court has exercised a discretion in a judicial manner, there is no error either of law or of procedure, and consequently, such exercise of discretion should not be interfered with in second appeal. The interference in second appeal should only be made where the Appellate Court has not exercised the discretion in a judicial manner and in accordance with law.

Under Section 107, read with Order 26, R. 9, Civil P. C., Appellate Court has power to issue a commission for local inspection. It may take under Order 41, Rule 27 (1) (b), additional evidence only when it requires it to enable it to pronounce judgment, or for any other substantial cause. Under Rule 27 (2) of the same Order, wherever additional evidence is allowed to be produced by an Appellate Court, the Court has to record the reason for its admission. The Appellate Court is bound to exercise one way or the other, judicially and on sound legal principles, its discretion to admit additional evidence. The discretion should not be exercised arbitrarily. Judicial exercise of discretion cannot be interfered with in second appeal. AIR (Vol 29) 1942 Oudh 485: 1942 OWN 596: 1942 AWR 310 (2) : 18 Luck 464 : 204 Ind Cas 204 (DB).

(Reversing AIR (Vol 25) 1938 Oudh 135: 174 Ind Cas 394).

——S. 107 — Appellate Court will not ordinarily interfere.

When an order is purely discretionary, the Appellate Court, as a rule, will not interfere with the discretion of the Judge who passed it. AIR (Vol 22) 1935 Rang 389: 159 Ind Cas 495 (DB).

——S. 107 — Deliberate exercise by lower Court of discretion vested in it by law — Correct statement and appreciation of facts and law.

Where the Judge has correctly stated and appreciated the most material facts in the case and has not misunderstood or misapplied the law, it would not be right for the Appellate Court to interfere in the deliberate exercise of a discretion entrusted to him by law. AIR (Vol 28) 1941 Sind 178: ILR (1941) Kar 362: 197 Ind Cas 291 (DB).

——S. 107 — Appellate Court — Interference by, in matters within discretion of trial Court.

In matters which lie within the discretion of the trial Court, the Appellate Court should not interfere with the trial Court's discretion unless that discretion has been exercised illegally or improperly. AIR (Vol 26) 1939 Oudh 61: 1938 OWN 1153: 1938 AWR 127: 178 Ind Cas 725 (DB).

——S. 107 — Trial Court's presumption — Discretion regarding presumption as to genuineness of old documents — Appellate Courts, if can overrule it — Practice — Appeal.

Ordinarily it is not proper for the Appellate Court to overrule the discretion of the trial Court, but where it is constrained to do so, the party producing the document should be given an opportunity of supporting the presumption as to the genuineness of the document. AIR (Vol 22) 1935 Oudh 432: 1935 OWN 845: 156 Ind Cas 983.

——S. 107 — Interference with trial Court's discretion — Very strong grounds, necessity of.

An Appellate Court will not interfere with the trial Judge's discretion except upon very strong grounds. Where the Judge has proceeded upon no incorrect principle, the Court of appeal will not and ought not to interfere with his discretion. AIR (Vol 21) 1934 Cal 438: 61 Cal 22: 151 Ind Cas 432 (DB).

——S. 107 — Court using its discretion vested in it, one way — Presumption by Appellate Court.

Where a Court uses its discretion given to it, in one way, the Appellate Court must presume that the lower Court did not think it necessary to use the discretion the other way. AIR (Vol 21) 1934 Lah 438: 15 Lah 772: 37 PLR 36: 153 Ind Cas 772 (DB).

6. **Duty of Court.**

——S. 107 — Points to be put before itself by the appellate Court.

On appeal a Court has to put before itself the material pleading, the real matter at controversy, the issues arising for decision, the issues arising again for decision on appeal and the evidence on them. AIR (Vol 37) 1950 Kutch 67.

——S. 107 — Duty of Appellate Court — Appellate Court has to set right errors of first Court not applying C. P. and Berar Reduction of Interest (Amendment) Act, 1938 — Appellate Court is bound to apply it even if Act is no longer in force.

The Appellate Court has to set right errors of the first Court and not to decide a case afresh. The Appellate Court has consequently to do that which the first Court ought to have done. Where, therefore, the first Court did not apply the Reduction of Interest (Amendment) Act, which was in force at the time, as it should have done:

Held, that the Appellate Court was bound to apply it, even if the Act was no longer in force. AIR (Vol 33) 1946 Nag 336.

——S. 107 — Judge — Duty of Judge — Objection as to bias and want of impartiality — Effect.

The objection as to bias and want of impartiality on the part of the Judge is a very serious objection the effect of which, if it is sustained, is that the trial must be held to have been coram non judice and the judgment a nullity. The criterion for rejecting the objection is "not that any perversely minded person cannot suspect him but that he must bear such a relation to the matter that he cannot reasonably be suspected of being biased".

It is always highly desirable that any proceeding should be dealt with by persons who are above any suspicion, however unreasonable, of being biased. But where the proceedings have, in fact, been held, they cannot be set aside except on legal proof of bias.

It is a matter of public policy that justice should not merely be done but should appear to be done. Judges, however, are only human, and their patience is sometimes sorely tried by Counsel and litigants. It is always to be regretted if their patience even appears to give way. But the administration of justice depends on the co-operation of the Judges and the parties. Parties cannot complain whose improper or unreasonable conduct has led to a departure from the more regular course of procedure, so long as no substantial injustice is done. AIR (Vol 32) 1945 PC 38: (1945) ALJ 34: 1941 Pesh LJ (PC) 38: 221 Ind Cas 603.

——**S. 107 — Re-hearing, when may be allowed.**

The duty of an Appellate Court sitting on appeal from a Judge is not the same as that of an Appellate Court sitting on appeal from the verdict of a jury. In the former case, the appeal is made by the rules a rehearing; the Appellate Judges are Judges of fact. In the latter case, the Appellate Judges are not Judges of fact. AIR (Vol 32) (1945) PC 38: (1945) ALJ 34: 221 Ind Cas 603.

——**S. 107 — Judge must decide case according to his conception of law.**

(Per Bose, J.)— It is the duty of Judges primarily to decide cases in accordance with what they conceive to be the law. It does not matter what other persons, or, apart from precedent what other Judges think. That is what the judicial cath requires. AIR (Vol 31) 1944 Nag 44: 1944 NLJ 1: ILR (1944) Nag 342: 213 Ind Cas 241 (FB).

——**S. 107, O. 41, R. 27 — Attempt to produce witness given up in trial Court — No attempt in lower Appellate Court — Opportunity cannot be given in second appeal.**

Where the plaintiff gives up an attempt to produce in the lower Court the attesting witness and while the case was in the lower Appellate Court, no attempt is made by him to produce the witness or to get the case remanded to the trial Court for the evidence of an attesting witness, in these circumstances it would not be just to the opposite party to send back the case at the stage of the second appeal, for the evidence of this witness. Order 41, Rule 27 is clearly not intended to allow a litigant who has been unsuccessful in the lower Court to patch up the weak parts of his case and fill up omissions in the Court of appeal. AIR (Vol 28) 1941 Oudh 89: 1940 OWN 1077: 1940 AWR 446: 191 Ind Cas 215.

——**S. 107 — Appeal — Private report from lower Court cannot be called for by Appellate Court.**

An Appellate Court is not entitled to call for a private report from the lower Court for its information. An Appellate Court must decide an appeal upon the materials before it and if it cannot do so, it can only act in the manner provided by the Civil P. C. AIR (Vol 27) 1940 Pat 54: 6 BR 324: 18 Pat 649: 186 Ind Cas 291 (DB).

——S. 107 — The Legislature has thought fit to entrust to the first Appellate Court, the final decision of all matters of fact on which the disposal of the suit turns. Every officer in this position should realize that the confidence thus reposed in him implies a corresponding duty and trust, that he will to the best of his power weigh and balance the evidence, facts and considerations appearing on both sides. He should endeavour so to decide his cases that his judgment may carry a conviction, if not of its correctness, at least of a fair endeavour to place a correct valuation on the merits of the cases of both sides. He should never let it appear either to the public or to a superior Court that he has chosen to accept the evidence of one side or the other without due consideration of the salient facts established and contrary to the conclusion to which the outstanding facts point. arbitrarily or on patently inadequate grounds. AIR (Vol 27) 1940 Pat 33.

——**S. 107 — Appeal from decree or order passed by Judge on Original Side of High Court — Principles to be followed by Appellate Court.**

An appeal from decree or orders passed by Judges on the Original Side of the High Court ought not to be in the nature of a re-hearing without witnesses, or in other words, the Appellate Court should not try to reach from the written material available to it, a conclusion which is entirely independent of the Judge of first instance who saw and heard the witnesses. The Appellate Court has to see, first, whether the principles of law applicable to the case were appreciated and correctly applied; secondly whether there was evidence upon which the Court of first instance could find the facts as it did; thirdly, whether any mistake of fact or of inference, or any material oversight has occurred, any one of which might reasonably affect the result; and, fourthly, whether the weight of the evidence shows that the trial Court came to a right conclusion, bearing in mind that the Judge who saw and heard the witnesses is in a much better position to form an estimate of the worth of the testimony than the Appellate Court which has not that advantage. AIR (Vol 27) 1940 Rang 117: 1940 Rang LR 168: 188 Ind Cas 634 (DB).

——**S. 107 — Court of first appeal, duty of.**

The duty of the first Appellate Court is to determine all the questions of fact necessary for decision of the issues. It may think that on a particular issue, the burden of proof is on the plaintiffs or on the defendants and its view on that may affect its finding. Should that be so, it would do well to say what view it would take of the disputed question of fact had it placed the burden on the other party. In this manner it is possible for the Court of first appeal to avoid all the unnecessary harassment to parties which is involved when in second appeal it is found that there is no ascertained set of facts to which the law can be applied. AIR (Vol 25) 1938 Pat 71: (1937) PWN 578. 18 PLT 806: 4 BR 299: 173 Ind Cas 599.

——**S. 107 — Documents admitted to be genuine — Objection not raised as to admissibility of evidence in lower Court — Appellate Court satisfied as to its inadmissibility.**

When a party admits the genuineness of a document, he is bound by his admission and cannot be allowed in appeal to go back upon it. But the question as regards the admissibility of the document would still be open to him if there has been no contrary admission in express language and no waiver.

An Appellate Court which has the duty to weigh the evidence on both sides afresh and for its own satisfaction, is not bound to set upon inadmissible evidence merely because no objection to its admissibility was taken in ex-

press terms in the lower Court, it is its duty to ignore such a document if it is satisfied that it is not legally admissible. AIR (Vol 21) 1934 All 406: (1934) ALJ 318: 3 AWR 529: 56 All 766: 149 Ind Cas 781 (FB).

——S. 107 — Evidence on record — High Court, if should order re-trial.

The High Court will not order re-trial if all the available evidence is on the record and will decide the case itself. AIR (Vol 21) 1934 Pesh 126: 153 Ind Cas 90.

——Ss. 107 and 99 — Sch. II, part of the Code — Authority of Appellate Court to make reference.

An appellate Court is bound to refer matters in dispute to arbitration if the parties agree to do so; omission to do so is not cured by section 99. Schedule II is part of the Code itself. (1911) 33 All 645: 8 ALJ 678: 11 Ind Cas 935 (DB).

——S. 107 — Original decree, varying principle contained in.

The court will not generally depart from any principle contained in the original decree. But in applying this principle the Court must have regard to the special circumstances of the case. (1902) 4 Bom LR 857 (864) (DB).

7. Finding of lower Court.

See also, N. 3.

——S. 107 — Finding of fact — Interference — Powers of appellate Courts. AIR (Vol 37) 1950 Ajmer 50.

——S. 107 — Finding based on testimony of witness.

The opinion and finding of a Judge who sees the witnesses and hears their testimony are not lightly to be set aside by an Appellate Court which only considers the record of the evidence. AIR (Vol 29) 1942 Cal 412: ILR (1942) 1 Cal 100: 46 CWN 759: 203 Ind Cas 548 (DB).

——S. 107 — Quesion as to which set of witnesses to be believed.

Where the only question is, which set of witnesses is to be believed the findings of the trial Judge should not be lightly regarded on a mere calculation of probabilities by the Court of appeal. AIR (Vol 28) 1941 Cal 20: 72 CLJ 181: 45 CWN 96: ILR (1941) 1 Cal 457: 193 Ind Cas 82 (DB).

——S. 107 — Question of fact.

In a case involving a question of fact, the decision of which depends on the reliance to be placed on the testimony of witnesses, the view of the Judge who tried the case and saw the witnesses is entitled to great weight. AIR (Vol 28) 1941 Cal 20: 72 CLJ 181: 45 CWN 96: ILR (1941) 1 Cal 457: 193 Ind Cas 82 (DB).

——S. 107 — Finding based on inadmissible evidence.

Where the trial Court has acted upon evidence which was not legally admissible, its finding is vitiated. AIR (Vol 28) 1941 Rang 344: 198 Ind Cas 564 (DB).

——S. 107 — Finding of fact — Interference — Finding depending on credibility of witness — Subordinate Court having opportunity of seeing witnesses.

Held, that where in a suit for damages for malicious prosecution, the issues to be determined depended upon the credibility of witnesses, who were put up before the Sessions Judge in the alleged malicious prosecution, the Subordinate Judge was justified and it was natural, and certainly not wrong, for him to explain his reasons for believing these witnesses in contrast with the view of the Sessions Judge. In such a case, it was inevitable that reference should have been made to the decision of the Sessions Judge relating to the credibility of the witnesses.

Held, also that their Lordships were not satisfied with the reasons given by the High Court for making jettison of the findings of the Subordinate Judge, and examining the evidence themselves, and deciding questions of the credibility of witnesses whom they had not seen, in a case where the hearing of the witnesses, and particularly that of the parties was obviously of importance. AIR (Vol 26) 1939 PC 225: 1930 OWN 730: 1939 AWR 162: 5 BR 951: 50 MLW 414: (1939) ALJ 752: 20 PLT 721: ILR (1939) Kar (PC) 375: 183 Ind Cas 196.

——S. 107 — Appellate Court, whether can re-hear case on facts.

An Appellate Court, which is a Court of appeal on facts as well as law, so that the appeal is a re-hearing, may have to consider whether there are not such surrounding facts as make it impossible to accept the finding of the Judge. (1938) 174 Ind Cas 875: 4 BR 599: (1938) 2 MLJ 966: 32 SLR 765 (PC).

——S. 107 — Finding of fact opposed to evidence on record — Value of.

A finding which is not only unsupported by but directly opposed to the evidence on the record cannot be accepted as sound. AIR (Vol 26) 1939 Nag 156: ILR (1939) Nag 235: 1939 NLJ 205: 182 Ind Cas 573 (DB).

——S. 107 — Finding of fact, if can be reversed.

The reversal of the findings of fact of a Judge who has tried the case without the assistance of a jury is well within the competence of an Appellate Court, who is in fact re-hearing the case; but the presumption is that the decision of the trial Judge on the facts was right and that presumption must be displaced by the appellant. (1937) 172 Ind Cas 527: (1937) ALJ 1027: 1937 AWR 1155: 47 MLW 99 (PC).

——S. 107 — Evidence complete — High Court, if can come to finding of fact not arrived at by lower Appellate Court.

Where the evidence upon the record is complete, it is open to the High Court to find a fact where the lower Court has not done so. AIR (Vol 22) 1935 All 982: 1935 AWR 1118: (1935) ALJ 1158: 159 Ind Cas 616.

——S. 107 — Finding based on no evidence — Whether binding on Appellate Court.

A finding based on no evidence is not binding on the Appellate Court and must be set aside. AIR (Vol 22) 1935 Cal 648: 158 Ind Cas 512.

——S. 107 — Findings of Court of first instance not to be overlooked.

The High Court should not overlook or minimise in any way the effect of the findings of the Court of first instance which had an opportunity of seeing the witnesses for itself and for coming to a conclusion one way or the other as to whether or not the will had been executed in such circumstances as would entitle the applicant to obtain probabte. AIR (Vol 20) 1933 Cal 449: 57 CLJ 8: 145 Ind Cas 338 (DB).

——S. 107 — Competency — Finding of lower Court about sufficiency of security.

Where in pursuance of an order of the High Court permitting the respondent to draw moneys from Court on his furnishing security to the satisfaction of the lower Court, the lower Court recorded a finding to the effect that it was satisfied with the security offered no appeal is competent from that finding. AIR (Vol 18) 1931 Mad 38: 1930 MWN 1096: 32 LW 742: 59 MLJ 892 (DB).

——S. 107 — Findings of trial Court — Manifestly erroneous conclusions.

Though the Appellate Court will not ordinarily disturb findings of fact of the trial Judge, a manifestly erroneous finding will not be upheld.

When the Judge of the lower Court, instead of placing his reliance on the witnesses alone who were reliable and ascertaining what facts their evidence established, searches through a very voluminous record to ascertain what evidence there was in support of the various points which he discussed and owing to the enormous number of witnesses examined and the length of their examination and of the judgment, the procedure adopted by the Judge results in his coming to conclusions which are difficult to reconcile, his decision cannot be upheld. AIR (Vol 18) 1931 Sind 128: 25 Sind LR 511: 135 Ind Cas 260 (DB).

8. Issues.

——S. 107 — Second Appellate Court may frame a fresh issue and ask for a finding provided the facts had not already been found. But it cannot reject the finding already arrived at and then ask to reconsider them. (1934) 1934 MWN 411 (DB).

——S. 107 — The High Court has power in second appeal to frame issues and refer them for trial to the first Court. AIR (Vol 21) 1934 Nag 207: 154 Ind Cas 304.

——S. 107 — Pleader and client — Party not entitled to raise points not pressed by vakil in lower Court — See (1908) 18 MLJ 188 (188).

9. New point.

——S. 107 — Question of public policy.

It is open to the Appellate Court to raise the question of public policy for the first time. AIR (Vol 22) 1935 Pesh 121: 157 Ind Cas 736.

——S. 107 — Court deciding case on plea not raised by parties.

Certain properties were purchased by the appellants in December 1921. The respondents sued for specific performance alleging that the vendors had agreed to sell the same properties to them in June, 1921. The appellants in their written statement alleged a prior contract in May, 1921. The High Court found that the owners had contracted to sell the properties to the appellants in May 1921, but this contract had been rescinded by mutual consent. Neither in the plaint nor in the whole course of the proceedings was there any indication by the respondents of the plea of rescission. Even in the memorandum of appeal to the High Court, there was no indication of any such contention:

Held, that it was not open to the High Court to go into the question whether the contract of May had been rescinded and the judgment of the High Court could not be supported. AIR (Vol 18) 1931 PC 309 : 137 Ind Cas 332.

——S. 107 — Appeal — Suit for accounts — Both parties appealing — Point raised in appeal — Procedure.

Where the appeals by the plaintiffs and the defendants from the preliminary and final decrees in a suit for accounts have been heard together, any point raised may be dealt with as arising in one or other of the appeals as may seem appropriate. AIR (Vol 29) 1942 Mad 487: ILR (1942) Mad 562: 55 MLW 264: (1942) 1 MLJ 472: 202 Ind Cas 514 (DB).

——S. 107 — Case raised in plaint — No denial in written statement — Question not agitated in trial Court.

Where the case was clearly made out in the plaint that defendant had failed to deposit the balance of the purchase-money and there was no denial of the assertion in the written statement, the facts necessary to be established must be taken to be admitted facts. Consequently, the lower Appellate Court would be justified in considering the question and giving a decision thereon even though the question had not been agitated in the Court of first instance. AIR (Vol 28) 1941 Cal 85: 72 CLJ 129: 193 Ind Cas 390.

10. Parties.

——Ss. 107(2), 151, O. 41, R. 20 and O. 1, R. 10 — Adding party.

Party to suit not made party to appeal — Limitation expiring — He cannot be added as respondent under O. 41, R. 20 — It being special provision, general provisions of O. 1, R. 10 or S. 151 cannot be invoked. AIR (Vol 31) 1944 Lah 76: ILR (1945) Lah 18: 46 PLR 148: 213 Ind Cas 278 (FB).

——S. 107 — Reading O. 1, R. 10 along with S. 107(2) there is no doubt that the appellate Court has power to transfer a respondent to the array of appellants and pass a decree in his favour under O. 41, Rr. 4 and 33 in case it is just and equitable. AIR (Vol 17) 1930 All 786 (DB).

——S. 107 — Power of Appellate Court.

A person, who was not a party to the original suit, not only cannot be added as a respondent by the Appellate Court under O. 41, R. 20, but he cannot be so added even under S. 107, as that section being expressly subject to such conditions and limitations as may be prescribed, is subject to the conditions of R. 20, O. 41; 3 PLJ 409; 8 CWN 404, not Foll. AIR (Vol 16) 1929 Bom 353: 119 Ind Cas 654: 53 Bom 598: 31 Bom LR 672.

——S. 107 — The High Court has ample power in the interest of justice to add parties, or to transpose a party from one category to another; 10 Bom 227, not Foll. AIR (Vol 14) 1927 Cal 37 : 98 Ind Cas 822 : 44 CLJ 243.

——Ss. 107 and 151 — Adding parties in appeal — Inherent power.

An appellate Court has power under Ss. 107 and 151 to add a new party in an appeal. AIR (Vol 5) 1918 Pat 525: (1918) Pat HCC 276: 5 Pat LW 216: 3 Pat LJ 409: 46 Ind Cas 398 (DB).

——S. 107 — Burden of proof — Error as to.

Where the trial has ended, and where the plff. has led evidence on his own behalf, and undertaken the burden on his shoulders in the first instance, the contention that the onus of proof was wrongly thrown loses all its force in an appeal, because an Appellate Court has to see whether with regard to the evidence given by both parties the Lower Court's conclusion is shown satisfactorily by the appellant to be erroneous or not.

The question of onus becomes important and material in appeal only where the evidence is evenly balanced and conflicting. In such a case the party on whom the onus lay in the first instance must fail. (1910) 12 Bom LR 801: 7 Ind Cas 986 (DB).

——S. 107 — Different defences — Different grounds of appeal.

It is irregular for persons with different defences to a suit and with different reasons for appeal to join in a single appeal. (1901) 5 CWN 1: 10 MLJ 279: 2 Bom LR 971: 23 A 137: 27 IA 168 (172) (PC).

——S. 107 (2), O. 22, R. 11 (S. 582, old Code) — Appeal — Several respondents — Some dead — Representatives not brought on the record — Appeal should abate only as against respondents who had died. (1901) 3 Bom LR 736: 26 B 203 (206).

11. Powers of Court.

——S. 107 — Duty of Court — Limitation.

Courts have not been given power to devise their own technique for saving claims from the

bar which the statute of limitation creates. AIR (Vol 31) 1944 Nag 145: 1944 NLJ 200: ILR (1944) Nag 419: 217 Ind Cas 95.

——S. 107 — Settlement decree — Court, if can construe it as one obtained in representative capacity.

It is permissible for a Court to construe that a settlement decree obtained by a person was passed in his favour in a representative and in a personal capacity. AIR (Vol 30) 1943 Oudh 177: 1942 OWN 639: 18 Luck 439: 206 Ind Cas 94 (DB).

——S. 107 — Appellate Court — Powers of — Cannot decide point against appellant if there is no appeal or cross-objection on it by the respondent.

The Appellate Court cannot decide any material point against the appellant without either an appeal or cross-objection being preferred by the respondent against the decree in appeal. The Court of appeal has no power to vary the decree appealed against, in such a manner as to deprive the appellant of any benefit which he had derived under the same. Therefore, the judgment so far as it deprives the appellant of any benefit is ultra vires. (1940) 189 Ind Cas 308 (Bhopal).

——S. 107 — Ultimate Court of appeal has jurisdiction to do that which is competent for trial Court to do.

The ultimate Court of appeal must have jurisdiction to do that which it is competent for the trial Court.

Where therefore, a trial Court orders the plaintiff to pay certain amount to the defendant within a certain period and that on failure the suit would stand dismissed, and the defendant files an appeal against such order before the period granted for payment has expired and the first Appellate Court dismisses plaintiff's suit totally, the High Court in reversing the decision of the lower Appellate Court can give the plaintiff a fresh period for the payment of the amount to the defendant. AIR (Vol 25) 1938 Nag 470: ILR (1938) Nag 535: 179 Ind Cas 285.

——S. 107 — Calcutta High Court (Original Side), granting leave under Clause 12 of Charter to file suit — Specific defence to suit as to want of jurisdiction — Defendant absenting on date of trial.

It is entirely within the original jurisdiction of the Calcutta High Court to decide whether that Court has jurisdiction to entertain a certain suit on a hand-note after granting leave under Clause 12 of the Charter, and where the defendant takes a specific defence in such a suit but absents himself on the date of trial, the Calcutta High Court has a jurisdiction to decide whether it has jurisdiction to entertain the suit and pass a decree. AIR (Vol 25) 1938 Pat 272: 4 BR 341: 173 Ind Cas 786 (1) (DB).

——S. 107 — Under S. 107, what can be done by a Court of first instance in reference to a plaint may also be done by a Court of appeal as regards the memorandum of appeal. AIR (Vol 24) 1937 All 280: (1937) ALJ 171: 1937 AWR 113: ILR (1937) All 484: 168 Ind Cas 676.

——S. 107 — Person residing outside jurisdiction but within British India — High Court's power to hear notice of motion against him — Notice of motion.

If the Court has jurisdiction to make an order, it has necessarily jurisdiction to enforce the order and the law does not allow its machinery to be clogged in this respect.

Rule 340, Bombay High Court (Original Side) Rules, which is applicable to all notices of motion does not in terms provide that when the notice of motion is lodged with Prothonotary and Senior Master, it becomes a process of the Court. Therefore, in spite of the fact that a notice of motion is so lodged under this rule, it continues to be a notice given by one party to the other and it does not acquire the character of a process of the Court and require to be served accordingly.

The question of contempt is not a dispute which arises between the parties in respect of the dealings as contained in the pleadings, but is a matter to be adjusted between the Court on the one hand and the respondent on the other and that dispute may arise in respect of property which is outside the original civil jurisdiction of the Court. The High Court has, therefore, jurisdiction to hear a notice of motion for contempt against a person not residing within the ordinary original jurisdiction of the Court but is a resident in British India. AIR (Vol 21) 1934 Bom 452: 36 Bom LR 992: 59 Bom 10: 154 Ind Cas 162.

——S. 107 — Decision upon ground different from that given by trial Court.

It is open to the High Court in appeal to base its decision upon a ground different from that given by the trial Court, provided there is sufficient evidence on the record from which a finding could be arrived at. AIR (Vol 21) 1934 Bom 313: 58 Bom 544: 36 Bom LR 612: 155 Ind Cas 50 (DB).

——S. 107 — Where the Appellate Court hears an appeal from an order later in point of time, the Court has no jurisdiction to set aside the previous order which had become final or not being appealed from. Nor can it pass any order inconsistent with previous order. If any such order is passed, it can be reversed in revision. AIR (Vol 21) 1934 Lah 538: 35 PLR 466: 152 Ind Cas 693.

——S. 107 — Under S. 107 (2) and S. 75 (b), an Appellate Court has power to issue a commission for a local investigation. AIR (Vol 19) 1932 All 270: 135 Ind Cas 243.

——S. 107 — An Appellate Court has jurisdiction in an appeal pending before it to give leave to the plaintiff to withdraw from a suit with permission to bring a fresh 'suit' in respect of the same subject-matter. 44 Cal 367, Diss. from: AIR (Vol 8) 1921 Bom 278: 45 Bom 206: 59 Ind Cas 210 (DB).

——S. 107 — Interlocutory orders — Revision of.

Even where an appeal from the final decree lies interlocutory orders may be dealt with under the court's powers of superintendence and revision to avoid irreparable injury to the parties. 5 Pat LJ 550: 58 Ind Cas 281: AIR (Vol 7) 1920 Pat 131 (DB).

——S. 107 — Appellate Court — Power to examine parties.

The Judge of an appellate Court is competent to examine any of the parties for ascertaining the facts of the case, if he considers it necessary to do so for the ends of justice. AIR (Vol 6) 1919 All 49: 42 All 48: 17 ALJ 945: 52 Ind Cas 289 (DB).

——S. 107 and O. 41 — Scope of.

C. P. C., S. 107 does not confer powers not conferred by O. 41. Appellate court can entertain application to have 'ex parte' decree set aside, where the applicant is a party to appeal from the whole decree. AIR (Vol 5) 1918 Mad 665: (1917) MWN 808: 22 MLT 480: 7 LW 10: 42 Ind Cas 972 (DB).

——S. 107 (2) and O 39, R. 2 (3).

In spite of the words "the Court granting an injunction may order" in the wording of O. 39,

R. 2 (3) C. P. C. which were substituted for "in cases of disobedience, injunction might be enforced" the appellate Court can pass the order which the Court of first instance might have passed. AIR (Vol 4) 1917 Mad 448: 39 Mad 907: 3 LW 430: 30 MLJ 523: 19 MLT 314: (1916) 1 MWN 328: 34 Ind Cas 588 (FB).

——**S. 107 (2) (Ss. 582, 587, 590, old Code) — "Procedure" — "Powers" — Distinction between — Interim injunction — Jurisdiction of appellate Court to grant in appeal against order.**

Per Chief Justice and Subrahamanya Aiyar, J. (Davies J. Dissentiente) — An appellate Court has jurisdiction under the Code to pass an 'interim order of injunction before return of notice pending an appeal against the order of the lower Court refusing to grant a temporary injunction pending disposal of a suit for recovery of properties. The fact of the appeal not being against a decree does not prevent the appellate Court from exercising jurisdiction in the matter.

Per Chief Justice:— It would be anomalous to hold that the High Court in second appeal possesses powers which it does not possess in an appeal from an original order, and the want of uniformity in the language of Ss. 590 and 587, C. P. C., is no good reason for so holding.

Semble:— Even apart from the provisions of the Code, an appellate Court has inherent jurisdiction to grant such an 'interim' injunction.

Per Davies J.:— The term "procedure" in S. 590, C. P. C. is not intended to cover all the provisions of Ch. XLI of the Code and the term "powers," in S. 582 is pre-eminently not a point of "procedure" as used in S. 590. (1904) 14 MLJ 471 (473, 474) (DB).

12. Procedure.

——**S. 107 — Court can invent procedure not provided for unless it is expressly or impliedly prohibited from doing so (Obiter).**

Where the rules of procedure do not provide a course necessary for the final adjudication of questions involved in a suit and for avoiding multiplicity of proceedings, the Court is justified — perhaps obliged — to invent a procedure as long as it is not prohibited expressly or impliedly from doing so and to grant relief. AIR (Vol 28) 1941 Mad 364: 52 MLW 828: (1940) 2 MLJ 918: 1941 MWN 30.

——**S. 107 — Evidence — Municipal register produced by witness in trial Court proved in proper manner and exhibited as document by trial Court — Mere fact that it is returned to municipal office would not prevent Appellate Court from inspecting it without further proof.**

Where a municipal register is produced by a witness in the trial Court is and proved in proper manner and is a document exhibited by the Court, the mere fact that it has been returned to the Custody of the municipal office would not prevent the Appellate Court from inspecting it in the same way as it would inspect any document duly proved which had remained on the record. Where the Appellate Court inspects the document in such a way, there is irregularity in the procedure, and no objection can be raised subsequently when the procedure was not objected to before the Appellate Court. AIR (Vol 26) 1939 All 510: 1939 AWR 261.

——**S. 107 — Slip in — Appellate Court must refuse to do functions which are no part of its duties.**

An Appellate Court must refuse to undertake the task of performing functions which are no part of its duty because a slip, however unfortunate and easily to be understood, has been made in the procedure. AIR (Vol 23) 1936 Rang 507: 165 Ind Cas 803 (2) (DB).

——**S. 107 — Appellate Court — Karpardaz of decree-holder accepting money in full satisfaction — Execution sale set aside — Appellate Court doubting authority of karpardaz to accept money — Proper procedure — Restoration of sale on mere assumption that he had no authority.**

On behalf of the decree-holder, his 'karpardaz' who was in charge of his cases, agreed to accept payment made by the judgment-debtor in satisfaction of the decree, if the payment were made within certain number of days. On payment being made accordingly, the execution sale was set aside as the decree was fully satisfied. The District Judge on appeal doubting the authority of the 'karpardaz' to accept the money, restored the sale:

Held, that the District Judge could not assume that the 'karpardaz' had no authority to accept the money. The proper course for him would have been to order further inquiry on the basis of which a final order could have been passed. AIR (Vol 24) 1937 Pat 493: (1937) PWN 205: 3 BR 792: 171 Ind Cas 73 (DB).

——S. 107 — Rule 10 applies to appeals by virtue of S. 107. AIR (V 10) 1923 Nag 310 : 74 Ind Cas 93 : 8 NLJ 63.

——S. 107 (2) (S. 582, old Code) — A suit to set aside auction sale and for refund of purchase-money is not a suit of Small Cause nature: See (1901) 28 C 235 (237).

13. Remand.

——**Ss. 107, 151 and O. 41, Rr. 27 and 23 — Provisions are not to be used for patching up weak parts of party's case — Remand to take additional evidence and decide case.**

The provisions of S. 107, Civil P. C., as elucidated by O. 41, R. 27 are clearly not intended to allow a litigant, who has been unsuccessful in the lower Courts, to patch up the weak parts of his case and fill up omissions in the Court of appeal.

The powers given by O. 41, R. 27 are to be used sparingly and caution is to be exercised in admitting new evidence. Order 41, R. 27 cannot reasonably be invoked in a case in which a party has kept back evidence which he should have produced at the proper time, his conduct in this respect being found to be reprehensible.

Powers of Appellate Court as regards remand are not restricted to cases specified in O. 41, R. 23. But where particular provisions (e. g., O. 41, R. 27) are specifically applicable, the exercise of inherent jurisdiction is excluded and the Court cannot make a general order of remand ordering the lower Court to take additional evidence and decide the case. AIR (Vol 31) 1944 Sind 73: ILR (1943) Kar 429: 214 Ind Cas 256 (DB).

——**S. 107 — Pleadings and issues clear — Parties not producing evidence — Case, if to be remanded for rehearing.**

Where the pleadings and issues are clear and the parties cannot have failed to appreciate what the real issues were that fell for determination in the suit, but plaintiff has not produced evidence, the case should not be remanded to the trial Court for re-hearing. AIR (Vol 22) 1935 Rang 19 : 155 Ind Cas 10.

——**S. 107 — Proper issues not framed and decided — Remand for re-decision.**

Where, in a suit for a declaration that a sale in execution would not affect the plaintiff's reversionary rights, the lower Court has not framed issues on the point as to whether the house belonged to his father and whether the sale was with-

out necessity and the plaintiff did not pay proper court-fee:

Held, that the case should be remanded for redecision after framing issues on the above points. (1934) 152 Ind Cas 220 : 35 PLR 156.

——S. 107 — On appeal from order returning plaint on the ground that the trial Court had no jurisdiction to try it, the Appellate Court has jurisdiction to decide that the trial Court has jurisdiction and remand the case for trial to the trial Court. Appellate Court's order is not revisable. AIR (Vol 20) 1933 Lah 940 : 34 PLR 771 : 147 Ind Cas 229.

——S. 107 — Power of Appellate Court to direct fresh evidence to be taken.

Where a party in spite of his treatment by Court with indulgence has been persistently defying the orders of the trial Court in not personally appearing and in not adducing evidence there is no reason for remanding the case for fresh trial as no litigant can be allowed to abuse the process of Court. 116 Ind Cas 180 : 30 PLR 93 : AIR (Vol 16) 1929 Lah 444 (DB).

——S. 107 — An Appellate Court will not insist on deciding a case finally if the appellant is satisfied with the order of remand proposed by the Court, although it is possible for the Court to so decide the case. 7 Lah 179 : 27 PLR 50 : 8 LLJ 13 : 93 Ind Cas 344 : AIR (Vol 13) 1926 Lah 65 (DB).

——S. 107 — In a suit the trial Court found that the plaintiff had no cause of action and dismissed the suit. On appeal by the plaintiff the Subordinate Judge held that the principle of Tweedle v. Atkinson (30 LJ QB 265) would apply to the case and remanded it for trial by the first Court.

Held: A remand on the general ground that the trial Court had not considered all the circumstances of the case was not proper. 1926 MWN 5 : AIR (Vol 13) 1926 Mad 1065 (DB).

——S. 107 — Preliminary point — Power of Appellate Court.

Where the trial court held a certain piece of evidence irrelevant and the Appellate Court held it relevant and remanded the case, it was held that the remand was on a preliminary point. 69 Ind Cas 828 : 45 Mad 900 : 16 MLW 425 : 1922 MWN 589 : 31 MLT 208 : AIR (Vol 9) 1922 Mad 505 : 43 MLJ 354 (FB).

——Ss. 107 and 151 — Appellate Court — Inherent power to remand.

An Appellate Court has an inherent power to remand even in cases not coming within O. 41, R. 23 of the C. P. Code. 37 MLJ 536 : 10 LW 359 : 53 Ind Cas 417 : AIR (Vol 7) 1920 Mad 898 (DB).

——S. 107, O. 41, R. 23 — Remand — Powers of Appellate Court — (S. 562 of Code of 1882).

The powers of remand under the new Code are far wider than those conferred by the old Code. The power may be exercised when important questions were disallowed during examination of witnesses resulting in a want of trial in the first Court. 36 Ind Cas 813 : AIR (Vol 4) 1917 Cal 556 (DB).

——S. 107 — Power to remand of High Court.

The powers of the High Court as to remand are not restricted by the provisions of O. XLI Rr. 23 and 25 and the High Court can always make an order of remand if the exigencies of the case demand it. 43 Cal 1001 : 20 CWN 1192 : 34 Ind Cas 235 : AIR (Vol 4) 1917 Cal 269 (FB).

——S. 107 and O. 41, R. 23 — Scope.

A general power of remand cannot be inferred from the absence of S. 564 of the Old Code in the new; such a provision is out of place as the High Courts can under the present code make rules where necessary. 18 Bom LR 27 : 33 Ind Cas 576 : AIR (Vol 3) 1916 Bom 275 (DB).

——S. 107 (1) (b) — Remand — Onus of proof — Shifted by Appellate Court.

Where the first court placed the onus on the defendant who produced no evidence and the plaintiff also produced no evidence and the Chief Court on appeal shifted the onus on to the plaintiff. Held, that the case should be remanded to enable the plaintiff to produce further evidence. 131 PLR 1914 : 114 PWR 1914 : 24 Ind Cas 470 : AIR (Vol 1) 1914 Lah 448 (DB).

——S. 107 — Remand by consent of parties — Power of appellate court.

The appellate Court can pass an order of remand by consent of parties in excess of its powers under the Code. (1914) MWN 90 : 22 Ind Cas 41 : AIR (Vol 1) 1914 Mad 15 (DB).

——S. 107 (2) — Appellate Court — Power to add party and remand.

An appellate court has power to add a necessary party on appeal and remand the case. (1914) 18 CWN 259 : 26 MLJ 86 : 21 Ind Cas 928 (PC). **[Affirming (1908) 35 Cal 618 : 12 CWN 545 : 8 CLJ 168].**

14. Return of plaint or memo.

——S. 107 — Return of plaint in suit giving rise to appeal, for presentation to proper Court.

When an appeal is found incompetent as not lying to the Court to which it was preferred, that Court has no jurisdiction to pass any order with regard to the suit out of which the appeal arose and therefore, cannot direct the return of plaint for presentation to the proper Court if it is found that the trial Court had no jurisdiction to try the suit. AIR (Vol 31) 1944 All 60: ILR (1944) All 189 : 1944 AWR 6 : (1944) ALJ 6 : 1944 OWN 9 : 211 Ind Cas 621.

——S. 107 — A wrong order returning an appeal for presentation to proper Court is revisable. (1940) 42 PLR 364.

——S. 107 — Civil P. C., Ss. 107 (2), 149 and O. 7, R 11 — Memorandum of appeal improperly stamped — The Court cannot reject it in the first instance but should return it for proper stamping. (1932) 1932 MWN 104.

——S. 107 (2) and O. 7, R. 10 — Plaint returned for presentation to a proper court — Appeal — Whether lies — Revision.

No appeal lies against an order returning memorandum of appeal for presentation to proper court. Revision however is competent. 56 Ind Cas 865: AIR (Vol 7) 1920 Lah 120. —

15. Scope and object.

——S. 107 — Disposal of appeal — Procedure — Vague order — Intention of the order to be implemented.

Disposal of appeals is governed by the forms in S. 107, C. P. Code. Where an appellate order is vague but the intention is clear to remand the case, that intention has to be implemented. (1948) 1948 AWR (Rev) 38.

——S. 107, O. 41, R. 20 — Unsuccessful litigant in lower Court cannot be allowed to patch up weak parts in case and fill up omissions.

The provisions of S. 107, Civil P. C., as elucidated by O. 41, R. 23 are clearly not intended to allow a litigant who has been unsuccessful in the lower Court to patch up the weak part of the case and fill up omissions in the Court of appeal. AIR (Vol 28) 1941 Pesh 28 : 193 Ind Cas 871 (DB).

——S. 107, O. 41, R. 27 — The provisions of S. 107 as elucidated by O. 41, R. 27 do not allow an unsuccessful litigant in the lower Court to patch up

the weak parts of his case and fill up omissions in the Appellate Court. (1940) 42 PLR 261.

——**S. 107 — Decree, if can be declared void, because it is based on wrong principles.**

A decree is an adjudication of a Civil Court and is binding on the judgment-debtor and all those claiming from or through that judgment-debtor until it has been set aside, or shown to be void. A decree is void if the Court had no jurisdiction to pass it, or if it is passed against a dead person, or against a person who has never had an opportunity of appearing. It is voidable if it is obtained by fraud or collusion. A decree cannot be declared void because it was based on wrong principles. Such a decree can be corrected by a Court of appeal, but once the opportunity for appeal is past, it is as binding as a decree which is passed on the most clear and correct principles of law. AIR (Vol 24) 1937 Bom 458: 39 Bom LR 895: ILR (1937) Bom 906: 172 Ind Cas 184 (DB).

——**S. 107 — Court's power to decide question of jurisdiction — Such question decided, if could not be challenged subsequently — No such decision by Appellate Court.**

Every Court has jurisdiction to hear and determine a case, and when its jurisdiction is challenged, it is its duty to determine the actual existence of things on which alone it can assume jurisdiction. If it decides that it has jurisdiction, then that decision would be binding, as a Court has always the jurisdiction to decide rightly or wrongly, and it would not do to say that the conclusion was wrong. Where the Appellate Court had decided that the appeals were competent when they first came up for hearing, then that decision, unless set aside by any higher Tribunal, could not be attacked at a subsequent stage of the proceeding, even if the decision was wrong. But when there was no decision by the Appellate Court on this point, mere inaction or want of objection on the part of the parties would not prove the existence of things, the existence of which alone would make the appeals competent. AIR (Vol 24) 1937 Cal 427 : 41 CWN 958 : 172 Ind Cas 663.

——**S. 107 — Appeal — Appellate Court, when will interfere on ground of want of jurisdiction.**

Before an Appellate Court will interfere on the ground of the lower Court's want of jurisdiction, the defendant must show that he has been prejudiced by the trial being held within the particular jurisdiction. AIR (Vol 24) 1937 Mad 571 : (1937) MWN 303 : 45 MLW 616 : ILR (1937) Mad 990 : 170 Ind Cas 279 (DB).

——**S. 107 (2) — Court erroneously passing order under O. 17, R. 3 instead of O. 17, R. 2 — Appeal if lies — Appellant, if can apply for restoration under O. 9, R. 9 — Application, if can be considered under S. 107 (2).**

If a Court erroneously passes an order which may be of the nature of a decree, an appeal would lie to the High Court.

Hence, where the Court has erroneously passed an order under O. 17, R. 3 instead of under O. 17, R. 2, an appeal lies from such an order and the appellants are entitled to make an application under O. 9, R. 9 for restoration of the suit, a remedy which would have been open to them had the order been passed under O. 17, R. 2, and the Appellate Court can, under S. 107 (2), Civil P. C., consider whether in the circumstances of the case restoration of the suit can be made within the meaning of O. 9 R. 9, Civil P. C. (1936) 163 Ind Cas 556 : 39 CWN 859 (DB).

——S. 107 — Section 107, Civil P. C., merely refers to powers and duties of an Appellate Court and not to the effect of its orders. AIR (Vol 23) 1936 Pesh 140 : 163 Ind Cas 462 (DB).

——**S. 107 — Scope as to O. 41, R. 33 — Discretion of Appellate Court.**

Section 107 does not cut down the Appellate Court's discretionary power under O. 41, R. 33. AIR (Vol 20) 1933 Mad 529 : 37 MLW 798 : 65 MLJ 15 : 145 Ind Cas 289 (DB).

——**S. 107 and O. 41, Rr. 23 and 25 — Appellate Court, if may remand cases otherwise than under.**

The general power given by S. 107 of the Code, to the Appellate Court, of remanding cases for trial by the original Court is not governed or limited by O. 41 alone, but it is subject to such conditions and limitations as may be prescribed in the rules and orders, such as an amendment of a plaint and addition of parties in a Court of appeal. 43 Cal 938 : 20 CWN 547 : 32 Ind Cas 791 : AIR (Vol 3) 1916 Cal 283 (DB).

——**S. 107 (2), O. 22, R. 11 (S. 582 old Code) — Finality of decree — Powers and duties:**

The finality attaching to the decree of a Court is something distinct from the powers exercised and the duties performed by that Court. (1904) 8 CWN 390 (393).

16. Subsequent events.

——**S. 107 — Events happening after suit, power of Court to take notice of.**

Though it is a general rule that a Court of appeal should not take into consideration anything that may have happened subsequent to the institution of the suit or at any rate after the termination of the proceedings of the trial Court, there are cases in which this rule may and should be departed from. One justifiable reason for such departure is where it will shorten litigation and best attain the ends of justice by preserving the rights of both parties. AIR (Vol 18) 1931 Cal 45 : 34 CWN 634 : 57 Cal 1358 : 129 Ind Cas 566 (DB).

——S. 107 (2), O. 22, R. 11 (S. 582, old Code) — Death of defendant — Application for libel — No abatement of appeal — See (1902) 4 Bom LR 325 : 26 B 597 (605, 608).

17. Withdrawal of suit.

——S. 107 — Under S. 107 (2) an Appellate Court has power to allow withdrawal of suit under O. 23, R. 1, provided it sets aside the decree of the first Court. 95 Ind Cas 424 : AIR (Vol 16) 1926 Nag 444.

——**S. 107 (2) — Court of first instance, when can permit withdrawal of suit — Powers of Appellate Court to permit withdrawal.**

The power of an Appellate Court to allow withdrawal of the suit either with or without leave to institute a new suit on the same cause of action proceeds from S. 107 (2) of Civil P. C. It has the same power as of the trial Court and no more. The Court of first instance has jurisdiction to permit withdrawal of a suit only while the suit is pending before it, that is, at any time before it passes a decree. (1936) 163 Ind Cas 367 : 39 CWN 586.

——**S. 108.**

See also Civil P. C., O. 41 R. 1 and O. 43, R. 2.

——**S. 108 — Appeal — New point — Point of limitation.**

A point of limitation is prima facie admissible even in a Court of last resort although it has not been taken in the lower Courts. AIR (Vol 31) 1944 PC 24 : 57 MLW 235 : 48 CWN 304 : (1944) ALJ 143 : (1944) 1 MLJ 344 : 1944 MWN 346 : 10 BR 574 : 1944 AWR (PC) 24 : 1944 OWN 323 : ILR (1944) Kar (PC) 170 : 212 Ind Cas 525.

——S. 109.
See also Civil P. C. Ss. 110, 112 and O. 45.
1. Applicability and scope.
2. Certificate.
2A. Contempt proceeding.
See Note 1.
2B. Criminal matters.
See Note 1.
3. Decree.
3A. Interlocutory orders.
See Notes 1 & 4A.
4. Final order.
4A. Not final.
See also Note 10.
5. Fit Case.
6. Interpretation.
7. Leave to appeal.
8. On appeal.
9. Public and Private importance.
See also N. 5.
10. Remand order.
11. Right to appeal.
12. Substantial question of law.
See also N. 5 and S. 110.

1. Applicability and scope.

——Ss. 109 and 110 — Order under the Lunacy Act — Leave to appeal to Federal Court — If can be granted.

An order under the Lunacy Act cannot affect directly or indirectly any claim to property and so the case of an order passed on an application under S. 63 of the Lunacy Act would not fall under the second part of S. 110 of the C. P. Code to justify leave to appeal to the Federal Court being granted. AIR (Vol 37) 1950 All 242: 1949 ALJ 563: 1950 AWR 75 (DB).

——S. 109 (c) — Appeal to F. C. in case under Land Acquisition Act which may fall under S. 109(c) — Competency. See (1949) 2 MLJ 556 : AIR (Vol 37) 1950 Mad 201.

——Ss. 109 and 110 — Applicability — Declaration of decision under Bengal Money Lenders Act — Appeal to Federal Court — Competency. See AIR (Vol 36) 1949 FC 60: 1949 FLJ 73.

——S. 109 — Applicability to orders made in revision by the High Court — Decision of subordinate Court that loan is a "commercial loan" within the meaning of the Bengal Money-Lenders Act — Interference by High Court under S. 115, C. P. Code — Bengal Money-Lenders Act (X of 1940), S. 2(4) and (22) — Commercial loan — Onus — Suit or proceeding "pending" — Meaning of.

Orders passed in revision do not fall within S. 109 (a), C. P. Code.

Sub-section (c) of S. 109 is clearly wide enough to cover an appeal from an order made in revision.

Although error in a decision of a Subordinate Court does not by itself involve that the Subordinate Court has acted illegally or with material irregularity so as to justify interference in revision under sub-section (c), nevertheless if the erroneous decision results in the Subordinate Court exercising a jurisdiction not vested in it by law or failing to exercise a jurisdiction so vested, a case for revision arises under sub-section (a) or sub-section (b) and sub-section (c) can be ignored.

Where an application under sections 30 and 36 (6) (a) (ii) of the Bengal Money-Lenders Act, is dismissed by a Subordinate Court as it was of opinion that the loan in question was a "Commercial loan" within the meaning of the Act, it is open to the High Court to interfere in revision under sub-section (b) of S. 115, C. P. Code, with such an order where the High Court takes the view that the loan was not a "Commercial loan".

The question whether a loan is a "Commercial loan" has to be regarded from the point of view of the lender, and it has to be determined for what purpose the loan was advanced, the burden of proving that the loan was a commercial one being on the lender.

Where though a mortgage suit was filed long before 1st January, 1939, and possession in execution also had been given before that date, the suit would be pending within the meaning of S. 2 (22) of the Bengal Money-Lenders Act, if the right to obtain a personal decree exists on 1st January, 1939. AIR (Vol 36) 1949 PC 239: 1949 AWR 308: 51 Bom LR 964: 63 LW 6: (1949) 2 MLJ 6: 76 IA 131: 1949 ALJ 278: 1949 MWN 385: 53 CWN 562.

——S. 109 (c) — Applicability — Orders in revision.

Clause (c) of S. 109, C. P. Code applies to orders passed in revision as well as to orders passed in appeals. (1948) 1948 AWR (Rev.) 280: 1948 RD 406.

——S. 109 — Refusal to stay criminal complaint.

Where the High Court has refused to stay the criminal complaint, the jurisdiction it has exercised is of a criminal nature and S. 109 does not apply to an application for leave to appeal to the Privy Council. AIR (Vol 28) 1941 All 211: (1941) ALJ 265: 1941 OWN 455: 1941 AWR (HC) 120: ILR (1941) All 364: 194 Ind Cas 606 (DB).

——S. 109 — Contempt of Court.

The jurisdiction which the High Court exercises in proceedings for contempt of Court is a jurisdiction of a criminal nature and not of a civil nature at all. Where, therefore, the High Court has refused to punish a party for contempt, the provisions of S. 109, Civil P. C., have no application. AIR (Vol 28) 1941 All 211: (1941) ALJ 265: 1941 OWN 455: ILR (1941) All 364: 1941 AWR (HC) 120: 194 Ind Cas 606 (DB).

——Ss. 109 and 110 — S. 66, Income Tax Act (XI of 1922).

Appeals from orders passed by High Court under S. 66, Income Tax Act cannot be regulated by Ss. 109 and 110, Civil P. C. AIR (Vol 28) 1941 Pat 225: 22 PLT 341: 20 Pat 561: 7 BR 951: 195 Ind Cas 589 (SB).

——S. 109 — Deposit of security — Power of Court.

Extent of power of High Court to extend time fixed by O. 45, R. 7 and the applicability of R. 9, Privy Council Rules to High Courts and the extent of power of the Federal Court in the matter discussed. AIR (Vol 27) 1940 FC 26: 21 PLT 309: (1940) MWN 464: 71 CLJ 327: 42 PLR 321: ILR (1940) Kar (FC) 1: (1940) FCR 17: 187 Ind Cas 670 : 6 BR 543.

——Ss. 109 and 110 are not inconsistent with the U. P. Encumbered Estates Act. Section 45(5) of the U. P. Encumbered Estates Act does not bar an appeal to Privy Council. Hence the provisions of Ss. 109 and 110 are applicable when an application is made for leave to appeal to Privy Council against a decree under S. 45, U. P. Encum. Estates Act. AIR (Vol 27) 1940 Oudh 312: 1940 OWN 553: 1940 RD 293: 1940 AWR 280: 16 Luck 91: 188 Ind Cas 775 (DB).

——Ss. 109, 111 and 112 — Section 109 is qualified not only by its opening words and by S. 111 but also by S. 112. The discretion which S. 112 affirms and maintains applies to the rejecting as well as to the receiving of appeals and the prerogative is not wholly or finally concluded for either purpose by the provisions of S. 109. AIR (Vol 26) 1939 PC 122: 1939 OWN 471: 43 CWN 733: 5 BR 570: 14 Luck 252: (1939) 2 MLJ 181: 70 CLJ 66: 1939 AWR 76: 66 IA 160: 41 Bom LR 1036: ILR (1939) Kar (PC) 234: 180 Ind Cas 1001.

——**S. 109 (c) — Interlocutory order.**

Section 109 (c), Civil P. C., applies even to an interlocutory order. AIR (Vol 24) 1937 Sind 217: 171 Ind Cas 630 (DB).

——**Ss. 109, 110, 112 — Proceedings for contempt for publication of article in newspaper by Advocate.**

Where the High Court took cognizance of contempt committed by the publication of an article in a newspaper by an Advocate and ordered notice to be issued to the writer, editor and printer and publisher to show cause why they should not be convicted and punished for contempt, the proceedings are in the exercise of the inherent jurisdiction of the High Court and of a criminal nature. A mere misdescription in the notice issued by the office will not make the proceeding one of a civil nature. Nor can it be said that merely because the Advocate was an officer of the Court, the proceeding against him was of an administrative character. The conviction and the fine imposed are themselves sufficient to show at least that the proceeding was not of a civil nature. The matter is of an exclusive jurisdiction and the order is final.

Section 110, Civil P. C., has no application to such a case. Nor is S. 109 applicable and S. 112, sub-s. (2) expressly makes the Code inapplicable to matters of criminal jurisdiction. Further, as the question for consideration being not so much of jurisdiction as of an interpretation of the passage objected to, the case cannot be certified as being otherwise a fit one for appeal to His Majesty in Council. AIR (Vol 22) 1935 All 811: (1935) ALJ 810: 1935 AWR 669: 57 All 910: 155 Ind Cas 188 (DB).

——**S. 109 — Income-tax.**

Quaere.— Whether an appeal lies to the Privy Council from an order of the High Court refusing to require the Commissioner of Income-tax to state a case to the High Court. AIR (Vol 20) 1933 PC 198 (2): (1933) MWN 889: (1933) ALJ 1258: 37 CWN 1133: 65 MLJ 335: 14 Lah 682: 34 PLR 1090: 60 IA 325: 144 Ind Cas 686.

——**S. 109 — Oudh Courts Act (IV of 1925), S. 12(1) — S. 12 (1), whether overrides S. 109.**

The general provisions in respect of the procedure of appeals to His Majesty in Council enacted in S. 109 are controlled by the special provisions of S. 12 (1) of the Oudh Courts Act, 1925 in respect of appeals from decrees or orders made by a Single Judge of the Chief Court of Oudh. AIR (Vol 19) 1932 Oudh 163: 8 OWN 1207: 134 Ind Cas 1017 (DB).

——**S. 109 — Criminal matters.**

Section 109 (c) does not apply to criminal matters and orders under S. 237, Companies Act are more of criminal than of civil nature. AIR (Vol 18) 1931 Sind 120: 132 Ind Cas 474.

——**S. 109 — Scope.**

The powers granted under S. 109 (c) should be sparingly used. AIR (Vol 14) 1927 Pat 363: 6 Pat 282: 8 PLT 615 (DB).

——**S. 109 (S. 595 old Code) — Final decree — Appeal from order under S. 562, C. P. C.**

An order under S. 562 is not ordinarily capable of being the subject of an appeal to His Majesty in Council though it may possibly be so, if the order in question has the effect of deciding finally the cardinal point in the suit. (1903) 1903 AWN 159 (159): 25 All 629 (DB).

2. Certificate.

(a) Award.

(b) Judicial discretion.

(c) Review.

——**S. 109 (c) — Leave to appeal — Procedural defect acquiesced in.**

Where a party has not raised any objection to any procedural defect (if any), there is no reason to certify that case as a fit one to appeal under Section 109 (c) on the ground of that alleged defect. AIR (Vol 37) 1950 Ajmer 33.

——**S. 109 (c) — Certificate of fitness under — When could be granted.**

As a case falling under Section 109 (c) of the Code is not restricted by the general conditions regarding valuation, etc., a most exceptional case has to be made out before a case is certified to be a fit one for appeal to the King in Council under that provision of law. For a case to be so certified, the matter involved must be of great general or of great private importance and must not be measurable in terms of money. (1949) 1949 RD 143.

——**S. 109 (c), O. 44, R. 2 — Appellate Court directing enquiry into pauperism by Subordinate Court but rejecting its finding.**

The question as to whether the Appellate Court has power after directing an enquiry into the pauperism of the applicant by the Subordinate Court to reject its finding, is not a substantial question of law justifying the granting of a certificate of fitness under Section 109 (c), Civil P. C. AIR (Vol 29) 1942 Oudh 422: 1942 OWN (CC) 305: 1942 AWR (CC) 209: 200 Ind Cas 426 (DB).

——**S. 109 (c) — Only question involved in case whether Court was justified in dismissing appeal for want of prosecution.**

Where the only question involved in a case is whether in the circumstances of the case the Court was justified in dismissing an appeal for non-prosecution, no question of public importance is involved and the case cannot be certified to be a fit one for appeal under Section 109 (c), Civil P. C. AIR (Vol 29) 1942 Oudh 362: 1942 OWN 206: 1942 AWR 156: 199 Ind Cas 835 (DB).

——**S. 109 (c) — Interlocutory orders.**

Clause (c) of Section 109, Civil P. C., applies even to interlocutory orders and in appropriate cases such orders can be made the subject of an appeal to His Majesty in Council. The mere fact that the order superseding the arbitration passed by the Court below was an interlocutory order cannot therefore be a bar to the application for leave to appeal to His Majesty in Council. But before the application can be granted, the High Court must be satisfied that the case is otherwise a fit one for appeal to His Majesty in Council. A case cannot be certified as a fit one for appeal on the mere ground that it raises a substantial question of law. One of the matters to be taken into consideration in this connection must invariably be whether the permission to appeal is or is not calculated to unduly delay the disposal of the substantive dispute between the parties on its merits. If the interlocutory order, the validity of which is sought to be tested by an appeal to His Majesty in Council, is one that is not calculated to prejudicially affect the right of either party to the litigation to have the substantive matters in dispute in the litigation decided by a competent Court, ordinarily leave to appeal ought not to be granted. AIR (Vol 27) 1940 All 38: (1939) ALJ 919: 1939 AWR 806: ILR (1940) All 11: 185 Ind Cas 854 (DB).

——**S. 109 (c) — Trial Court refusing to dispose of certain issues as preliminary before going into other issues on facts — Revision dismissed on ground that Court had jurisdiction — Certificate under S. 109 (c).**

In a suit after the framing of the issues, the defendants applied that the Court should hear and dispose of certain issues as preliminary is-

sues before it should try the issues on facts. The trial Court held that it was not a case in which he ought to direct that these issues be disposed of before going into the merits of the whole case. The High Court in revision against this order declined to interfere on the ground that the trial Court had jurisdiction in the matter and had not acted illegally or with material irregularity. The defendants preferred an application praying for a certificate under Section 109 (c), Civil P. C., that the case was fit one for appeal to the Privy Council:

Held, there was nothing in the refusal of the High Court to entertain the revision application which gave rise to any point of importance or difficulty which would warrant the Court certifying under Section 109 (c) that the case was a fit one for appeal. AIR (Vol 26) 1939 Pat 564: (1939) PWN 341: 181 Ind Cas 644 (DB).

——S. 109 (c) — Execution sale set aside on consideration of facts.

No certificate under Section 109 (c) can be granted for preferring an appeal to Privy Council when an order setting aside execution sale is made on consideration of facts. AIR (Vol 26) 1939 Pesh 26: 183 Ind Cas 169.

——S. 109 (c) — No inconsistency in rulings of Court — Other High Court holding divergent view.

The fact that different High Courts in India have held divergent views in respect of matters similar to those before the Court in the case in which leave to appeal to the Privy Council is sought is no reason for certifying the case as a fit one for appeal to His Majesty in Council when there is no inconsistency in the rulings of the High Court concerned. AIR (Vol 23) 1936 Pesh 194: 167 Ind Cas 165.

——S. 109 (c) — Question whether interest paid to partner on capital is allowable under S. 10 (iii), Income Tax Act (XI of 1922) — Question, held not of great public or private importance.

Before granting leave to appeal to the Privy Council, the High Court should be satisfied that the case is a case of such importance as would warrant a certificate under Section 109, clause (c). The reference submitted by the Income-tax Commissioner under Section 66, clause (2), as to whether in a particular case the interest paid to a capitalist partner on the capital borrowed from him is an allowable deduction from the profit earned, under Section 10 (2) (iii) of the Income Tax Act and the decisions given by the Court, are prima facie not of public importance, much less of great public importance or of great private importance especially when the amount by which the assessee has benefited is only about Rs. 300.

The advisability of conferring a power upon the High Courts to impose a condition in fit case, at the time of granting leave to appeal to the Privy Council, (at any rate in cases falling under Section 66-A (2), Income Tax Act) whatever may be the result of the appeal, the appellant should pay the costs of the other party as between solicitor and client, suggested. AIR (Vol 23) 1936 Sind 68: 163 Ind Cas 275 (DB).

——S. 109 (c) — Conditions.

In deciding whether a certificate of fitness for appeal to the Privy Council should be granted in a case governed by Section 109, Civil P. C., it is not enough to find that the order sought to be appealed against involves a substantial question of law. One of the tests usually applied to determine the fitness is to see whether the point involved is of great public or private importance. Another consideration which the Court must keep in view in granting the certificate is that the legislation is not made oppressively expensive and the elucidation of the real issues in the case by a trial of the suit is not unduly postponed or delayed. AIR (Vol 21) 1934 Pat 564: 1 BR 44: 152 Ind Cas 301 (DB).

——S. 109 (c) — Difficult question of law.

The existence of a question of law of some difficulty is not a sufficient ground for certifying a case to be a "fit one" for appeal to the Privy Council unless it is of general and public importance. AIR (Vol 18) 1931 Mad 642: (1931) MWN 760: 132 Ind Cas 290 (DB).

——S. 109 — High Court affirming judgment of lower Court — High Court ignoring rule regarding recitals in ancient documents.

Where High Court affirms the judgment of lower Court and gives a finding against a party in respect of the existence of necessity for the alienations of lands made by a Hindu widow without advertence to the rule regarding recitals in ancient documents laid down by the Judicial Committee, a petition praying for a certificate under Section 109 (c) may be granted, as the point raised is one of law. AIR (Vol 16) 1929 Mad 827 (DB).

——S. 109 — Point not of public or private importance — If otherwise fit — Determination by Board of two Abidi years to be previous year for assessment — Objection to such order but not showing that there were other assessees making similar account — Leave to appeal.

The Central Board of Revenue determined the period of the two Abidi years which ended during one calendar year to be the previous year for the purpose of assessment. It was contended by the assessee that it was not within the competence of the Board to pass such an order. The sum in dispute was about Rs. 20,000. It was not shown that there were other assessees who took as their previous year a year which is consistently less than calendar year.

Held, that the point in dispute was not of great public or private importance and the case could not be certified to be otherwise fit for appeal to Privy Council. AIR (Vol 16) 1929 Nag 336: 120 Ind Cas 409 (DB).

——S. 109 — Law already settled by Privy Council.

When there is a Privy Council decision settling the law on a point the case cannot be certified as a fit case involving a substantial question of law. (1926) 92 Ind Cas 1013 (DB).

——S. 109 — Question of great importance.

For the grant of a special certificate the questions involved must be not merely substantial but must be of great public or private importance. The powers of co-heirs and the doctrine of lis pendens are not matters of such importance as to make the case a fit one for appeal. AIR (Vol 10) 1923 Rang 71: 68 Ind Cas 690: 11 LBR 335: 1 Bur LJ 62 (DB).

——S. 109 Cl. (c), (Ss. 595, 600 old Code) — Privy Council, leave to appeal to.

Where the amount or value of the suit and of the matter in appeal to the Privy Council was more than Rs. 10,000 and the decree of the High Court appealed from affirmed the decision of the Court immediately below the High Court which passed the decree, and a certificate is given for leave to appeal to the Privy Council stating that the case was otherwise a fit one for His Majesty in Council, such

a certificate it correct in form and satisfies the provisions of the law. Such certificate is given pursuant to Section 595, Clause (c) and the latter alternative of Section 600, C. P. C. (1903) 13 MLJ 389: 5 Bom LR 838: 8 CWN 41: 30 IA 238: 31 C 57, (74) (PC).

(a) Award.

——S. 109 (c) — Question of public importance.

A case should be certified to be a fit one to appeal to His Majesty in Council under cl. (c) of Section 109, Civil P. C., only when it is of wider importance and the principle, when finally decided by their Lordships of the Privy Council, would be of benefit not only to the people who were directly involved in the litigation but also to the public at large, that is to say, the matter must be one of wider public importance and not a matter only of importance to the parties concerned.

Where the point for decision before the Privy Council will not be the general point but only the question whether or not a revision lay to High Court in the circumstances of the particular case, that is, whether the application in revision was rightly held by the High Court to raise a question of jurisdiction, the decision on that point would not be a decision on a matter of general public importance, and therefore this particular ground is not one on which the Court should be justified in granting a certificate.

Where the decision at which the High Court arrived was that none of the points stated in Para. 14 of the Second Schedule, Civil P. C., were present so as to clothe the Court with jurisdiction to remit the award, and that his order remitting the award was an order made without jurisdiction. The decision being not on a question of public importance, no certificate under clause (9) can be granted. AIR (Vol 28) 1941 Oudh 245: 1941 OWN 130: 1941 AWR (CC) 63: 192 Ind Cas 778 (DB).

——Ss. 109 and 111 — Award — Decree of High Court in accordance with — Certificate of leave to appeal — Privy Council.

The certificate cannot be refused on the ground that no appeal lies against a judgment pronounced in accordance with an award and a decree following it. Schedule II, Para. 21 (2) of the C. P. Code does not affect appeals to the Privy Council. (1912) 15 OC 55: 15 Ind Cas 2 (DB).

——S. 109 — Order as to — Validity of order of lower Court recording compromise — Issue of, if justified.

An order made by the High Court after contest by both the parties, which decides one way or the other whether an order by a lower Court recording a compromise agreement was a valid order is not an order by consent, and therefore a certificate can issue as to the fitness of the case to be taken to the Privy Council. AIR (Vol 9) 1922 Pat 256: 62 Ind Cas 235: 3 Pat LT 61: 6 PLJ 171: 1921 PHCC 193 (DB).

(b) Judicial Discretion.

——Ss. 109 (c) and 110 — Order on preliminary issue as to jurisdiction — Appealability — Inadequacy of certificate — Power of Court to grant special leave.

Fazal Ali, J.— An order deciding a preliminary issue as to jurisdiction and remanding a suit for disposal is certainly not a decree and it is also not a final order because it has not finally disposed of the rights of the parties, since the suit has been remanded to the trial Court to be decided on merits and is not appealable under Section 110, C. P. Code.

No doubt when the High Court grants a proper certificate under Section 109 (c), C. P. Code, an appeal will be entertained by the Federal Court even against an order which is not final.

When a certificate purports to have been granted by the High Court under Section 110, C. P. Code, it is open to the Federal Court to see whether the case fulfils all the requirements of that section. If it is found that the case does not fulfil any of the requirements the Federal Court may refuse to entertain the appeal in spite of the certificate. When a certificate is intended to be given by the High Court under Section 109 (c) of the Code, there must be some indication in the certificate or the order granting leave to appeal, of the nature of the question involved in the appeal and it must show that the judicial mind of the Court has been applied to determine that though the case does not fulfil the requirements of Section 110 it is still a fit case for exercising the discretion conferred on the High Court by Section 109 (c).

The objection based on the inadequacy of the certificate is more than a technical objection and constitutes a serious obstacle to the entertainment of an appeal.

Though in a proper case when the interests of justice so demand, the Federal Court can entertain an appeal after granting special leave, even though the certificate granted by the High Court is defective, where parties are fighting on a very unreal issue, it is hardly a fit case either for granting special leave or for invoking the discretionary jurisdiction of the High Court to grant a certificate under Section 109 (c) of the Code.

Mahajan, J.— It is not possible to dismiss this appeal on the ground that a proper certificate under Section 109 (c) of the Code has not been granted by the High Court. Even if the certificate is defective, the Federal Court has ample power to grant special leave and in this case such leave can be granted because of the admitted diversity of judicial opinion on the meaning of the expression "suit for land" in clause 12 of the Letters Patent. AIR (Vol 37) 1950 FC 83: 1950 SCJ 51.

——S. 109 (c) — Certificate under, when can be given.

For granting a certificate under Section 109 (c) there must be a question of great public or private importance. It is not enough for the purpose of exercising the discretion under that section that there is only a substantial question either of fact or of law.

A proposed appeal against an order of the High Court refusing review cannot be certified as a fit case under Section 109 (c) merely because the application was rejected on a misapprehension. AIR (Vol 33) 1946 Cal 10: 49 CWN 758: 222 Ind Cas 475.

——S. 109 (c) — Special power — When can be exercised.

The special power of certifying a case to be a fit one for appeal under Section 109 (c) has been conferred on the High Court to meet particularly hard cases, and on such a special certificate being given, the appeal to His Majesty in Council becomes competent. AIR (Vol 21) 1934 All 198: (1934) ALJ 1166: 4 AWR 1598: 147 Ind Cas 1067 (DB).

——S. 109 — Ordinary case of redemption — Value less than Rs. 10,000 — Issue, if justifiable.

The High Court may be able to certify, in exceptional circumstances, under Order 45, R. 3 appeals from its final decision which are of value less than Rs. 10,000. But in an ordinary case of redemption involving a question of no general principle, as to whether certain terms of a mortgage-deed constituted a clog on the equity of redemption a certificate cannot be granted there being no exceptional circumstances to justify it. AIR (Vol 16) 1929 Oudh 243: 6 OWN 211: 116 Ind Cas 208 (DB).

——S. 109 — Power to issue — Limitations.

Where the property involved is of large value and the decree of the High Court reverses findings of the trial Court on questions of fact and where the evidence relied upon by the High Court was not before the trial Court and where a question of procedure with somewhat unusual character is involved and it is possible that a higher tribunal might take a different view in respect thereto, held, that in these circumstances the High Court ought to certify the case as fit one for appeal. Section 109 (c) imposes no limitations on the power of the Court to certify a case as a fit one though the power ought to be used very sparingly. AIR (Vol 11) 1924 Pat 468: 75 Ind Cas 58: 5 PLT 17: 2 Pat LRA Civ 48 (DB).

——S. 109 — Value of appeal — Certificate how far conclusive.

The ruling provision as to certificates of value applicable, at the time the appeal was filed, was No. 2 of Schedule to Order in the Council of 10th April, 1838, which was to the effect that the certificate should be deemed conclusive of value and not liable to be questioned on appeal by any party. AIR (Vol 9) 1922 PC 257: 43 MLJ 323: 74 Ind Cas 584: 16 MLW 18: 45 M 475: 31 Mad LT 31: 49 IA 211: 27 CWN 1: 20 ALJ 937: 36 CLJ 450.

——S. 109 — Grant based on exercise of discretion — Contents of certificate.

Certificates, when they are made in exercise of the discretion conferred, should make plain upon their face that the discretion has in fact been exercised. AIR (Vol 8) 1921 PC 128: 62 Ind Cas 320: 13 LW 365: 1921 MWN 87: 2 PLT 132: 29 MLT 156.

——S. 109 — Grounds of issue — Mention of.

When any certificate is granted under O. 45 it is of the utmost importance that the certificate should show clearly on the face of it upon which ground it is based or if it is intended to come under Section 109 (c), that the discretion conferred by Section 109 (c) was invoked or was exercised. AIR (Vol 8) 1921 PC 25: 40 MLJ 229: 44 Mad 293: 48 IA 31: 19 ALJ 161: 23 Bom LR 718: 33 CLJ 277: 25 CWN 630: 13 MLW 321: 1921 MWN 119: 60 Ind Cas 85: 29 MLT 418.

——S. 109 (c) — Fit case.

Clause (c) of Section 109 is intended to cover special cases and the discretion to be used for granting the certificate is judicial discretion. (1911) 13 CLJ 507: 10 Ind Cas 439 (DB).

——Ss. 109, 110; O. 44, R. 3 (Ss. 595, 596, 600, old Code) — Privy Council, leave to appeal to — Certificate.

On an objection being taken that the appeal was not properly admitted, the amount being under the appealable value and there being a special certificate, Held, that the case fell within the rule laid down in 30 I. A. 238 and that the certificate was sufficient. (1903) 31 C 305 (310): 31 IA 24: 8 CWN 225 (PC).

——S. 109 — Certificate, propriety of — Judicial discretion — Right of Privy Council to declare improper. (1901) 5 Cal WN 689 (692): 3 Bom LR 469: 28 IA 182: 23 All 415 (PC).

(c) Review.

——S. 109 (c) — Issue must be of general importance.

In order to certify a case as being a fit one for appeal to the Privy Council the issue involved must be one of general importance.

Where the defendant was unable to plead before the High Court that he had discovered new and important matter, and this was one of the grounds on which the application for review was dismissed:

Held, that certificate that the case is a fit one for appeal to His Majesty, should not be be given. AIR (Vol 22) 1935 All 424: (1935) ALJ 233: 1935 AWR 115: 157 Ind Cas 614 (DB).

——S. 109 — Decree not open to objection under O. 47, R. 7.

Where a decree passed by the High Court on review was not open to objection on some ground recognised by O. 47, R. 7 the case cannot be certified as a fit case under C. P. Code, S. 109 (c). AIR (Vol 13) 1926 Oudh 17: 90 Ind Cas 332 (DB).

2A. Contempt proceeding.

See Note 1.

2B. Criminal Matters.

See Note 1.

3. Decree.

——S. 109 (a) — Letters Patent Bench holding that pleas of want of jurisdiction in executing Court and limitation could not be raised, setting aside sale and remanding case to executing Court for fresh sale:

Held, the order of the Letters Patent Bench was not a decree within the meaning of S. 109 (a), Civil P. C. AIR (Vol 30) 1943 Lah 140 : 208 Ind Cas 89 (FB).

——S. 109 — High Court's order, held was preliminary decree and decree within S. 109.

By its appellate judgment which was not a judgment in affirmance, the High Court conclusively determined as far as it was concerned all the rights in controversy and ordered that the plaintiff-appellant would be entitled to recover possession of certain properties in suit valued at more than Rs. 10,000 upon payment of a sum of money to the defendant, the amount of which was left to be determined by the Courts of first instance according to the directions given in the High Court's judgment and decrees:

Held, that the order of the High Court was a preliminary decree and a decree within the meaning of S. 109, Civil P. C. AIR (Vol 29) 1942 Cal 537 : 46 CWN 857 : 203 Ind Cas 518 (DB).

——S. 109, O. 41, R. 23 — Order under O. 41, R. 23.

An order under O. 41, R. 23, Civil P. C., is neither a decree nor a final order as is contemplated by S. 109, Civil P. C., as the suit does not terminate but is still kept alive. Consequently, the case cannot be certified as fit for appeal to Privy Council. (1935) 158 Ind Cas 1117 (Lah).

——S. 109 — Decree of High Court under S. 91 (3) of Rangoon City Municipal Act — Appeal to Privy Council — Appeal against decisions of special tribunals — Limitations.

In the case of special and often technical enactments, if a person or a Court is specifically designated to determine disputes arising out of the application of such enactments, the Court or person is not functioning in an ordinary, but in an extraordinary manner and parties to any litigation arising thereunder will not be permitted to appeal further than these specially appointed persons or

tribunals. A decree of the High Court under S. 91 (3) of the Rangoon City Municipal Act is not a final judgment, decree or order within the meaning of Art. 37 of the Letters Patent or S. 109 of the C. P. Code and is not appealable to His Majesty in Council. 4 Rang 508 : 6 Bur LJ 1 : 99 Ind Cas 994 : AIR (Vol 14) 1927 Rang 88 (DB).

——S. 109 — Testamentary case — Appeal to Privy Council.

A decree of the High Court in a testamentary matter is appealable to His Majesty in Council when the case is that if it were an ordinary civil case it would be appealable under S. 109. 10 LBR 22, Not foll. 49 Mad 954 : 1926 MWN 931 : 97 Ind Cas 836 : AIR (Vol 13) 1926 Mad 986 : 51 MLJ 299 (DB).

——S. 109 — Order directing final decree to be passed in accordance with the preliminary decree passed by the Privy Council — Appeal to Privy Council — Maintainability.

An order of the High Court passed on an application to pass a final decree according to the preliminary decree of the Privy Council, or to transfer it to the sub-Court for passing a final decree, is not a final judgment within the meaning of S. 109 of the C. P. Code, and therefore no appeal lies to the Privy Council from such order. Such order is also of course not a final decree. 20 MLW 753 : AIR (Vol 12) 1925 Mad 187 (DB).

——S. 109 — Final order — Dismissal for default — Dismissal of application for restoration — Appeal.

Order, dismissing application for restoration of the appeal dismissed for default, is not a decree or final order passed in appeal nor an order passed in the exercise of the original civil jurisdiction of the High Court and so no appeal lies to Privy Council from the order. 2 Bur LJ 294 : 79 Ind Cas 504 : AIR (Vol 11) 1924 Rang 208 (DB).

——S. 109 — Decision on cardinal issue.

The decision of the High Court on a cardinal issue in the suit is a final decree within S. 109. Where the High Court held that the suit was not barred by res judicata as had been decided by the lower Court and recommended the case and where from the pleadings it appeared that if the Judicial Committee were to uphold the decision of the first Court it would finally dispose of the main issues in the suit even though there might be subordinate enquiries to be made in the suit.

Held, that the decision of the High Court was a final decree within S. 109. 25 CWN 896 : 62 Ind Cas 776 : AIR (Vol 8) 1921 Cal 177 (DB).

——S. 109 — Final order.

An order of the High Court remanding a case for trial with the direction that a person should be sued as a residuary legattee, is not a final decree or order within the Code. 22 CWN 640 : 46 Ind Cas 681 : AIR (Vol 5) 1918 Cal 878 (DB).

——S. 109, Cl. (a) — Privy Council appeal to — Decree or final order: an order remanding a suit for taking accounts, if.

An order setting aside the decision of the court of first instance as to the respective shares of parties in a partnership and directing fresh accounts to be taken is such a final decision on the points in issue between the parties as to amount to a decree in the suit within the meaning of S. 109, Cl. (a), C. P. C. (1911) 15 CWN 60 (61) : 7 Ind Cas 622.

——S. 109 (S. 595 old Code) — "Final decree" — Order of remand — Suit to annul incumbrances — Bengal Tenancy Act, S. 267 — Notice — Dismissal of suit on the ground of non-service of notice — Appellate Court holding service proved and remanding case.

Where a suit to annul incumbrances by the purchaser of a putni at a sale for its own arrears was dismissed by the Subordinate Judge on the ground that the plaintiff had failed to prove the service of notices under S. 167 Bengal Tenancy Act, but the High Court on appeal held that the service of notices was proved and remanded the suit for the trial of other issues in the case:

Held—that though the order of the High Court was in form an order of remand, it finally decided the cardinal point in the case, viz., whether the notices were properly served or not. The order was therefore a "final decree" within the meaning of S. 595 of the Civil Procedure Code. (1908) 12 CWN 545 : 35 C 618 (619) : 8 CLJ 168 (DB).

——Ss. 109, 115 (Ss. 595, 622, old Code) — Leave to appeal to Privy Council — Letters Patent, S. 39 — Order of the High Court under S. 622, C. P. C., allowing a party to sue in forma pauperis — Power of High Court to grant certificate:

An order passed by the High Court under S. 622, C. P. C., deciding that a party should be allowed to sue in forma pauperis is not a final decree passed in an appeal within the meaning of S. 595, C. P. C. (1904) 8 CWN 296 (297) (FB).

——S. 109 (Ss. 592, 595, old Code) — Appeal to Privy Council — Civil Procedure Code, Ss. 594, 595 — "Decree" — "Fit":

The term "decree" in S. 594 includes an order passed by the High Court under the Memorandum of Association Act, 1895, or under the Companies Act, 1882. The High Court granted leave to appeal to the Privy Council on the grounds that the questions involved might seriously affect the financial and commercial possession of the company in question, and that it was of importance to Indian companies generally that their rights should be precisely defined in relation to the point that arose in the case. (1903) 5 Bom LR 348 : 27 B 415 (417, 418); also 1907 AWN 291 (291) : 5 All LJ 57 (DB).

3-A. Interlocutory orders.

See Notes 1 and 4-A.

4. Final order.

——S. 109 (a) — Final order — Order dismissing appeal for default.

An order dismissing an appeal for default is a final order within the meaning of S. 109 (a), C. P. Code. It has the effect of terminating the appeal. AIR (V 35) 1948 All 375 (DB).

——S. 109 — Restitution order in summary proceeding.

An order cannot be said to be final unless it finally disposes of the rights of the parties. A restitution order passed in a summary proceeding when the rights of the parties have not been finally determined thereby but the suit for determining the final right is still pending, is not a final order or judgment within the meaning of S. 109. AIR (Vol 33) 1946 Pat 141 : 24 Pat 614.

——S. 109 — "Final order" — Meaning of — Order, held "final".

Obiter.— It cannot be said that an order cannot be regarded as 'final' if it does not completely dispose of the suit. It would not be considered as 'final' if the rights of the parties were left still to be determined. If the rights of the parties to the suit had been determined and the suit was not "finally" disposed of in the sense of its being finally determined in the Courts of India, because certain subordinate matters of detail have not been disposed of, the order would still be regarded as final within the meaning of S. 109. (The order was held to be final.) AIR (Vol 29) 1942 Cal 537 : 46 CWN 857 : 203 Ind Cas 518 (DB).

——S. 109 — "Final order" — Test.

The true test of finality of an order is whether the order finally disposes of the right of the parties. The finality must be a finality in relation to the suit. If, after the order, the suit is still a live suit in which the rights of the parties have still to be determined, no appeal lies against it under S. 109 (a) of the Code. The fact that a cardinal point in the suit has been decided is immaterial. AIR (Vol 20) 1933 PC 58 : 10 OWN 195 : 37 MLW 331 : (1933) MWN 166 : (1933) ALJ 244 : 64 MLJ 307 : 11 Rang 58 : 35 Bom LR 331 : 37 CWN 405 : 57 CLJ 136 : 60 IA 76 : 142 Ind Cas 328.

——S. 109 — Order setting aside ex parte decree, whether final order.

A final order within the meaning of S. 109, Civil P. C., need not be a final order passed in the suit itself but may be a final order in any other proceeding or case arising subsequent to the suit. If that order finally terminates that proceeding and determines the rights of the parties so far as the question in controversy between the parties in that proceeding arose, it is a final order within the meaning of that section.

Where an appeal from an order rejecting an application to set aside an ex parte decree is allowed by the High Court, the ex parte decree is thus set aside and the suit restored, the order of the High Court is a final order within the meaning of S. 109, Civil P. C., and hence appealable to the Privy Council. AIR (Vol 20) 1933 All 15 : (1932) ALJ 838 : 54 All 941 : 143 Ind Cas 450 (DB).

——109 — Obiter: In a case, where the Appellate Court has determined that the plaintiff has a good and subsisting cause of action, and it only remains to work out certain subsidiary questions consequent upon the final determination of the liability of the defendant, the order is in substance as in effect a final order notwithstanding that part of the rights or liabilities have still to be ascertained. AIR (Vol 19) 1932 Rang 137 : 10 Rang 335 : 140 Ind Cas 420 (DB).

——S. 109 — Order extending time for appeal.

Order extending the time for presenting an appeal to the High Court under S. 5 of the Limitation Act, and thus admitting the appeal is not a final order within the meaning of S. 109, C. P. Code, though an order refusing such extension would amount to a final order. 7 PLT 256 : 90 Ind Cas 723 : AIR (Vol 13) 1926 Pat 102 (DB).

——S. 109 — Suit for dissolution of partnership and accounts — Liability to account declared by High Court — Appeal.

An order is final under S. 109, if it finally disposes of the right of the parties to the action though it may not formally conclude the proceedings. Where the High Court finally decided the plaintiff's right to obtain an account between the parties and ordered the lower Court to pass a preliminary decree and take further proceedings according to law, the order is final within the meaning of S. 109 and not merely 'interlocutory'. 71 Ind Cas 334 : 16 MLW 718 : 31 MLT 385 : AIR (Vol 9) 1922 Mad 510 : 43 MLJ 758 (DB).

——S. 109 — "Decree or order."

The words "any decree or order" in S. 109 (c) of the C. P. Code do not mean any decree or order other than the decree or final order passed on appeal by a High Court or by any other court of final appellate jurisdiction. 6 OLJ 664 : 54 Ind Cas 828 : AIR (Vol 6) 1919 Oudh 7 (DB).

——S. 109 — Final order — Prob. and Admn. Act, S. 86 — Order by High Court on appeal.

An order passed by the High Court upon an appeal made to it under S. 86 of the Prob. and Admn. Act is final and is not open to further appeal to the Privy Council. 12 Bur LT 87 : 10 LBR 22 : 51 Ind Cas 596 : AIR (Vol 6) 1919 Low Bur 104 (DB).

——S. 109 — "Final order" under S. 109 is one which finally decides any matter directly at issue in respect of the rights of the parties. (1911) 13 CLJ 90 : 15 CWN 848 : 9 Ind Cas 183 (DB).

4-A. Not final.

See also Note 10.

(a) General.
(b) Compromise.
(c) Review.

(a) General.

——S. 109 (a) — Order deciding that certain person is entitled to be substituted in place of deceased.

An order is not a final order within the meaning of S. 109 (a), Civil P. C., unless it finally disposes of the rights of parties in relation to the suit. Hence an order deciding that a certain party is entitled to be substituted in place of a deceased party is not a final order within the meaning of S. 109 (a). AIR (Vol 29) 1942 Oudh 283 : 1942 OWN 100 : 1942 AWR 75 : 1942 RD 173 : 198 Ind Cas 658 (DB).

——S. 109 — Bhopal Civil Procedure Code, S. 106 (1) — Appeal to His Highness in Council — 'Final order' — Suit on two mortgages executed on different dates in respect of different properties — Trial Court ordering separate trials under O. 2, R. 6 and returning plaint for splitting it up into two suits and presenting in proper Court — High Court setting aside order and directing reinstatement of suit and trial of two causes of action as sub-suits — Order of High Court, held neither decree nor final order and appeal, held incompetent.

Section 106/1, Bhopal Civil P. C., virtually embodies all the provisions of Ss. 109 and 110 of the British Code, and has been so framed as to exclude all orders other than 'final' from the category of appealable orders.

The plaintiff filed a suit on the foot of two mortgage-deeds executed by the defendant on different dates in respect of different houses. The defendant objected to the suit on the ground of multifariousness. The District Judge, holding that the causes of action joined in the suit could not be conveniently tried together, ordered separate trials under R. 6 of O. 2, Civil P. C., and returned the plaint directing that the suit should be spilt up into two distinct suits and filed in the proper Court. The High Court in appeal set aside the order returning the plaint and directed the District Judge to reinstate the suit to its original number & try the two causes of action as subsuits. From this order the defendant applied for leave to appeal to His Highness in Council:

Held, that the order of the High Court was neither a decree nor a final order within the meaning of S. 106/1, Bhopal Civil P. C., and no appeal was competent. (1940) 190 Ind Cas 28, (Bhopal).

——S. 109 — Appeal dismissed as premature.

Dismissing an appeal as premature cannot be said to be a final order within the meaning of S. 109 of the Civil P. C. AIR (Vol 25) 1938 Oudh 107 : 1938 OWN 331 : 1938 AWR 26 : 1938 RD 405 (2) : 14 Luck 132 : 173 Ind Cas 865 (DB).

——S. 109 (a) — Remitting issue to determine whether certain presumption has been rebutted — Order, whether 'final' within S. 109 (a).

An order of an Appellate Court is not a final order within S. 109 (a), unless it finally disposes of the rights of the parties in relation to the whole

suit. Where the Court holds that there was a presumption that the family custom of single heir succession, which is applicable to the estate, is also applicable to the movable property in suit and that the presumption is rebuttable and remits the issue to the trial Court to determine whether the presumption has been rebutted, the order is not a 'final order' within the meaning of S. 109 (a), Civil P. C. The order does not finally determine the rights of the parties and the suit still remains a live suit. AIR (Vol 23) 1936 Oudh 205 : 1936 OWN 218 : 160 Ind Cas 811 (DB).

——S. 109, O. 45 — Appeal to Privy Council — High Court holding certain document admissible and leaving decision as to its effect, to the discretion of lower Court — Appeal from such order to Privy Council, if lies.

The order from which an appeal to His Majesty in Council is permitted must be one which can be termed "final", and unless this is so, no certificate under the Code can be granted. Where the High Court merely holds that a certain document which was sought to be proved and was not allowed to be proved can be legally proved and it is altogether silent as to what its effect would be even if the document was proved and leaves the discretion of the Court below quite unfettered in this matter, this order of the High Court cannot be designated "final" & no appeal to His Majesty in Privy Council lies from such an order. AIR (Vol 22) 1935 Lah 458 : 154 Ind Cas 942 (DB).

——S. 109 — Suit not finally decided — High Court passing interlocutory order — Appeal to Privy Council, if lies.

The plaintiff's suit was in the alternative for a specific sum or, failing that, for a decree for dissolution of partnership and for accounts. The High Court set aside the decree granted by the trial Court for part of the specific sum claimed, but it granted him the alternative relief claimed by him, with the result that the question of the amount payable to him was under investigation. Leave to appeal to the Privy Council was sought from this order:

Held, that as there was no final decision of the suit, the order passed by the High Court on appeal being of an interlocutory kind, the question of appeal to the Privy Council would arise only when the suit was finally decided. AIR (Vol 21) 1934 Lah 26 : 35 PLR 347 : 148 Ind Cas 54 (2) (DB).

——S. 109 (a) — Order appointing Receiver — High Court setting aside the order — Whether 'final order'.

An order by which the High Court sets aside an order of the lower Court appointing a Receiver, is not a final order within the meaning of S. 109 (a), Civil P. C.

The appointment of a Receiver is in the discretion of the Court and such an order is an interlocutory order which in no way decides any cardinal point arising for decision between the parties in the suit. AIR (Vol 20) 1933 Pat 293 : 14 PLT 302 : 12 Pat 723 : 144 Ind Cas 457 (DB).

——S. 109 — Final order — Forma pauperis — Refusal of leave to appeal.

An order refusing leave to appeal 'in forma pauperis', is not a final order within the meaning of S. 109 (a). 6 Pat 67 : 100 Ind Cas 886 : AIR (Vol 14) 1927 Pat 175 (DB).

——S. 109 — Final order — What is not — Scheme suit — Defendant trustee dying — Order holding the suit not to abate as regards settling of scheme.

Pending a suit for the removal of the defendant trustee from his alleged trusteeship and for framing a scheme, the trustee died and it was held that the whole suit abated. In appeal to the High Court, it was held that so far as the removal of the alleged trustee was concerned, the suit must abate on the death of that trustee, but in so far as the suit was for the framing of a scheme, the suit did not abate and could be continued against the succeeding trustee.

Held, that the order was not a final order under S. 109. 23 MLW 695 : 94 Ind Cas 966 : AIR (Vol 13) 1926 Mad 743 : 50 MLJ 552 (DB).

——S. 109 — Final order — Refusal to appoint receiver — Maintainability of.

In a mortgage deed, the mortgagee was given the right in the event of suit being filed, to apply for the appointment of a Receiver to take possession of the land and the deed provided that he might do that without any further consent on the part of the mortgagor. Owing to certain complications due to other legal proceedings, the High Court on appeal refused to appoint a Receiver in the mortgage suit by the mortgagees.

Held, that this was not a final order within the meaning of Section 109 (a) of C. P. Code. The appointment of a Receiver is in no way a matter which finally determines the rights of the parties. The fact that a Receiver had already been appointed by another High Court and that therefore if another Receiver were appointed according to the mortgagee's wishes, there would apparently be conflict of jurisdiction between the two Courts and therefore a question would arise as to what was to be done in such contingency was held to be not in itself sufficient to require the exercise of jurisdiction under Section 109 (c). 82 Ind Cas 178 : 6 PLT 119 : AIR (Vol 12) 1925 Pat 173 (DB).

——S. 109 — Refusal of leave to appeal.

Order rejecting an application to appeal as pauper is not a final order as it is even then open to the applicant to file the appeal on payment of court-fees. 88 Ind Cas 575 : 2 OWN 393 : AIR (Vol 12) 1925 Oudh 548 (DB).

——S. 109 — Order refusing to set aside order restoring suit to file.

An order passed by the High Court refusing to set aside an order of the Court below restoring to file a suit is not a final order within the meaning of S. 109. 78 Ind Cas 938 : 19 MLW 458 : 34 MLT 112 : 1924 MWN 380 : AIR (Vol 11) 1924 Mad 701 : 46 MLJ 357 (DB).

——S. 109 — Order in civil extraordinary application — No final disposal of rights.

The substantial portion of the order which the applicants complained of in their petition for leave to appeal to His Majesty in Council was really passed on the Civil Extraordinary application, but did not finally dispose of the rights of the parties and the suit was left at practically the stage at which it was when filed.

Held, it cannot be said that this is a final order within the meaning of S. 109 (a) or that it is a final judgment within the meaning of Cl. 39 of the Letters Patent. 79 Ind Cas 210 : AIR (Vol 10) 1923 Bom 39 (DB).

——S. 109 — Order holding that a person is competent to apply for probate — Appeal to Privy Council.

An order is final within the meaning of S. 109 of the Civil Procedure Code if it finally disposes of the rights of the parties. An order which merely decides that an incorporated body is a juridical person legally competent to discharge the functions of an executor and as such to apply for probate but which leaves outstanding the question

whether being competent to apply it is entitled to grant of probate is not a final order within the meaning of S. 109 of the Civil Procedure Code. 23 OC 324 : 60 Ind Cas 208 : AIR (Vol 7) 1920 Oudh 268 (DB).

——Ss. 109 (a), 2 and 47 — Final order — Decision on jurisdiction of Court to execute decree, if a final order — Leave to appeal.

An order of the High Court, holding that the court below had jurisdiction to execute a decree and directing the subordinate court to proceed with the execution is not a final order nor is the order a decree under Ss. 47 and 2, C. P. C. 4 Pat LJ 461 : 52 Ind Cas 461 : AIR (Vol 6) 1919 Pat 383 (DB).

——S. 109 (a) — Final order — Appeal.

An order refusing to extend time for deposit of court fees in an appeal is not a final order under S. 109, C. P. C. and hence not appealable. 17 ALJ 443 : 50 Ind Cas 79 : AIR (Vol 5) 1918 All 331 (DB).

——S. 109 (a) — Final order.

A final order in S. 109 (a) means an order which finally decides any matter directly at issue in the case in respect of the rights of the parties. An order appointing a receiver is not a final order. (1911) 13 CLJ 507 : 10 Ind Cas 439 (DB).

——Ss. 109 and 110 and O. 41, R. 10 — Order affirming final order.

Order rejecting an appeal for not furnishing security for costs under O. 41, R. 10 is not an order affirming the decision of the lower court under S. 110 nor is it a "final order" under S. 109. (1910) 13 OC 59 : 5 Ind Cas 940 (DB).

(b) Compromise.

——S. 109 — Order setting aside compromise decree — Appeal.

Order directing that a compromise decree passed under O. 23, R. 3 be set aside and the suit proceeded with, from the stage at which the compromise was filed, is not a final order. Case-law discussed. 6 Pat 282 : 8 PLT 615 : (AIR Vol 14) 1927 Pat 363 (DB).

——S. 109 — Final order — Interlocutory — Order setting aside compromise.

An order by which a Court sets aside a compromise is an interlocutory and not a final order within S. 109. Appeals on matters interlocutory in their nature should be allowed to be preferred to His Majesty in Council only when their decision will practically put an end to the litigation and finally decide the rights of the parties. 48 All 329 : 24 ALJ 831 : 92 Ind Cas 1027 : AIR (Vol 13) 1926 All 311 (DB).

——S. 109 — Order not to record alleged compromise but to proceed with suit.

An order that an alleged compromise should not be recorded and that the suit should proceed in the usual way is not a "final order".

Per Rankin J.— Whether the character or finality can be rightly claimed in respect of an order must be determined with reference to the precise relation in which it stands to the proceeding before the Court. 89 Ind Cas 94 : 29 CWN 832 : AIR (Vol 12) 1925 Cal 857 (DB).

——S. 109 — Order setting aside — Decree on compromise and directing lower Court to try suit on merits — Appeal if lies.

The trial Court in this case passed a decree upon a certain compromise which was arrived at between the plaintiff and defendant No. 2. On appeal by defendant No. 1 the decree was set aside by High Court and the lower Court was directed to proceed with the suit in the ordinary course, as if there had been no compromise. Plaintiff asked for a certificate for leave to appeal to His Majesty in Council from the order.

Held, the order is not a final order within the meaning of S. 109 but only an interlocutory order. The word 'final' is used in its ordinary sense and therefore means an order which puts an end to the litigation between the parties or at all events disposes so substantially of the matters in issue between them as to leave merely subordinate or ancillary matters for decision. 69 Ind Cas 80 : 47 Bom 106 : 24 Bom LR 925 : AIR (Vol 9) 1922 Bom 383 (DB).

(c) Review.

——S. 109 (a) — Order rejecting review application.

Order of the High Court refusing review is not a final order passed on appeal. No appeal lies to the Privy Council from such an order. AIR (Vol 33) 1946 Cal 10 : 49 CWN 758 : 222 Ind Cas 475.

——S. 109 (a), O. 47, R 7. — Order granting application for review, whether 'final order'.

An order made on an application for review of judgment does not finally dispose of any case but re-opens the decree that was passed originally by the Court and consequently, the order for review does not constitute a final order within the meaning of S. 109 (a), so as to be appealable to the Privy Council. AIR (Vol 19) 1932 All 318 : (1932) ALJ 235 : 54 All 401 : 140 Ind Cas 110 (DB).

——S. 109 — Order granting review.

An order granting a review is not final order, and no leave to appeal to His Majesty can be granted from such an order. 69 Ind Cas 977 : 16 MLW 623 : 1922 MWN 731 : 32 MLT 98 : AIR (Vol 10) 1923 Mad 57: 43 MLJ 559 (DB).

5. Fit case.

(a) General.

(b) Not measurable in money.

(a) General.

——S. 109(c) — Fit case for granting leave to appeal — Case not considered even fit for admission on revisional side.

Where a case was not considered even fit for admission on the revisional side, and is dismissed there is certainly no case fit for leaeve to appeal to the Privy Council or, in the alternative, to the Federal Court under S. 109(c), C. P. Code. AIR (Vol 37) 1950 Ajmer 31 (2).

——S. 109(a) and (c) — "Final order" — Meaning of — Leave to appeal against order dismissing as not maintainable on appeal against order removing a receiver — If can be granted.

A final order as contemplated by S. 109(a) of the C. P. Code must be one which affects finally the rights of parties. An order removing or appointing a receiver does not affect at all the rights of the parties; it is merely an order making provision for the due preservation of the estate during the pendency of the suit. As a general rule and in the absence of special circumstances or some unusual occasion for its exercise, the power of making interlocutory orders is one which is not a suitable subject for review by the Federal Court.

The question whether one person or the other should be appointed as receiver cannot ordinarily be of any great practical importance. Accordingly an order dismissing as not maintainable an appeal against an order removing a receiver is not a fit one for the granting of certificate for appeal to the Federal Court. AIR (Vol 37) 1950 Mad 212: 1949 MWN 699: 62 LW 792: (1949) 2 MLJ 601 (DB)..

——Ss. 109(c) and 110(2) — Case, held fit one for leave.

In a suit by the plaintiff, it was held by the High Court reversing the decision of the trial Court that one D was the son of the father of the plaintiff. From this decision leave to appeal to the Privy Council was granted. In another suit by the plaintiff, the same question about the paternity of D was in issue and in appeal in that suit, the High Court again held that D was the son of the plaintiff's father. The appeal to the High Court was connected with the appeal in the former case and disposed of by different judgments. Against the decision in the latter case, the plaintiff sought leave to appeal to the Privy Council :

Held, that the decision of the second appeal seriously affected the appeal about to go to the Privy Council. The case, therefore, fell under cl. (2) of S. 110 and also S. 109(c) and was a fit one for leave. AIR (Vol 33) 1946 All 184: (1945) ALJ 545: 1945 AWR (HC) 383.

——S. 109 — Controversy about items of accounting.

Controversy relating to ordinary items of accounting in the taking of accounts between a principal and his agent do not form proper subject-matter for an appeal to His Majesty in Council. AIR (Vol 32) 1945 PC 35: (1945) 1 MLJ 136: 1945 MWN 322: 12 BR 231: 47 Bom LR 608: 221 Ind Cas 451.

——S. 109 — Order of High Court directing restoration of application to its original number and ascertainment of amount due to decree-holder under S. 8, U. P. Debt Redemption Act — Application against, for leave to appeal to His Majesty in Council — Case, held was pending and did not fulfil requirements of S. 109, cls. (a) and (c).

An application for leave to appeal to His Majesty in Council was filed against the order of the High Court by which it directed "that the application of the judgment-debtor under S. 8 of the U. P. Debt Redemption Act be restored to its original number and the amount due to the decree-holders under S. 8 of U. P. Debt Redemption Act be ascertained and the decree be amended and after the decree had thus been amended, execution should proceed in due course of law" :

Held, that the application for execution remained a subsisting application and the execution remained pending. The proceedings which had given rise to the application for leave to appeal to His Majesty in Council remained live proceedings and the case did not fulfil requirements of S. 109(a) or of S. 110 of the Civil P. C

Held, also that the application had no merits under S. 109(c) of Civil P. C. and hence, was not a proper case in which a special certificate under S. 109(c) could be granted. AIR (Vol 32) 1945 All 401: ILR (1945) All 443: (1945) ALJ 448: 1945 AWR (HC) 347 (DB).

——S. 109 — Privy Council — Appeal — Proper subject-matter — Ordinary items of partnership account.

The questions relating to exclusion or inclusion of ordinary items of accounting in the taking of a partnership accounts are not the proper subject-matter of appeal to the Privy Council. AIR (Vol 31) 1944 PC 87: 48 CWN 829: 71 IA 149: 11 B R 137: 216 Ind Cas 178.

——S. 109 — Application under S. 4, U. P. Encumbered Estates Act — High Court holding debt extinguished under S. 13 of Encumbered Estates Act — Procedure and decree of lower Court held not in accordance with law — Case remanded — Leave against remand order applied for — Case, held not "fit" — Order, held not "final"

In an appeal to the High Court by the landlords from the decision of the Special Judge on their application under S. 4, U. P. Encum. Estates Act, the High Court held in concurrence with the lower Court that the debts of the creditors (respondents) were not extinguished under S. 13 of the Act. The High Court, however, accepted the contention of the appellants that the procedure followed by the Special Judge and the actual decree passed by him were not in accordance with law. The appeal, therefore, was allowed and the case remanded. The landlords applied for leave to appeal to the Privy Council against the order of remand :

Held, that in the circumstances of this case, the point that the debt had been extinguished under S. 13 of the Act was in the nature of a preliminary point. The order of the High Court may have decided an important, and even a vital issue, but it left the suit alive, and provided for its trial in the ordinary way. It could not, therefore, be regarded as a 'final order' within the meaning of S. 109, Civil P. C.

Held, also that nor could the case be certified as "otherwise a fit case" for appeal to His Majesty in Council within the meaning of cl. (c) of S. 109, Civil P. C., in view of the amendment of S. 9, U.P. Encum. Estates Act, by Act XI of 1939, made before the appeal giving rise to the petition for leave to appeal which was heard by the High Court which was influenced by the change in the law when it passed the order of remand. AIR (Vol 28) 1941 All 333: 1941 RD 656: ILR (1941) All 573: 1941 AWR (HC) 219 & 585: 1941 OWN (HC) 674: 196 Ind Cas 340 (DB).

——S. 109, O. 41, R. 10 (3) (added by Allahabad High Court) — Second appeal rejected under R. 10 (3) and dismissed for want of prosecution — Subsequent application for restoration also dismissed — Application for leave to appeal from subsequent order — Order, whether final — Case, whether fit — Order, whether one passed in appeal.

Under O. 41, R. 10, proviso, Civil P. C. (which has been added by Allahabad High Court), the appellant was called upon to furnish security for the costs of the appeal. He failed to furnish the security within the required time and the appeal had to be rejected under sub-r. (3) made by the Allahabad Court, and was, therefore, dismissed for want of prosecution. Subsequently, an application was made for the restoration of the appeal on the ground that the appellant had not sufficient information of the time allowed. This application for restoration was also dismissed by the same Bench. An application was filed for leave to appeal from the last order, since the application for leave to appeal against the first order was already barred :

Held, that no cardinal point between the parties was decided by the order. Nor had the rights of the parties in the case itself been adjudicated upon in that order. Therefore, the order in question was not a final order within the meaning of S. 109(a). Nor was this a fit case in which the Court should grant a certificate under cl. (c) of that section.

Held, further, that the order was not an order passed in appeal, but that it was an order passed in the exercise of appellate jurisdiction. AIR (Vol 24) 1937 All 566: (1937) ALJ 796: 1937 AWR 695: 171 Ind Cas 29 (DB).

——S. 109 — Full Bench of one High Court differing from Full Bench of another — Whether sufficient to make case fit for appeal.

The fact that a Full Bench decision of one High Court differs from a decision of a Full Bench of another High Court is not in itself sufficient ground to make a case a fit one for appeal to the Privy Council under the provisions of S. 109(c), Civil P. C. AIR (Vol 24) 1937 Sind 217: 171 Ind Cas 630 (DB).

—S. 109 — Contempt by scandalising Court — Not fit case for leave to appeal to Privy Council. (1936) 63 Ind Cas 287: 39 CWN 823.

——S. 109 — Proceedings under Bar Councils Act.

Proceeding under Bar Councils Act in respect of alleged misconduct of Advocate — Jurisdiction of the High Court to grant leave to appeal to Privy Council and the conditions for such leave discussed. [The case was held to be fit one for a certificate under S. 109(c) or at any rate under cl. 30, Letters Patent (All)]. AIR (Vol 21) 1934 All 898: (1934) ALJ 722: 56 All 702: 4 AWR 1129: 150 Ind Cas 699 (DB).

——S. 109 — Question of right to open two small windows.

A case which relates to the right to open two small windows in a loft or gallery in a house cannot be said to be a fit case to be certified under S. 109(c) AIR (Vol 16) 1929 Bom 341: 119 Ind Cas 782: 53 Bom 552: 31 Bom LR 632 (DB).

——S. 109 — Meaning of — No merit in appeal — Third party's rights affected.

Under S. 109(c) the High Court must be satisfied that the case is a fit one for appeal; that means that the High Court must be satisfied that having regard to all the circumstances of the case it is right and proper to grant the certificate of leave. The mere fact that the point raised in the appeal affects third parties is no ground for enabling a person, whose case is devoid of merit, to further agitate the question. AIR (Vol 16) 1929 Mad 696: 119 Ind Cas 595 (DB).

——S. 109 — Point of law settled by Full Bench.

Where a point of law has been settled by a Full Bench so far as the Court in which leave for appeal is prayed, the fact that there is conflict between that Court and some other High Court does not render the case fit one for appeal to Privy Council. AIR (Vol 15) 1928 Mad 448: 109 Ind Cas 167 (DB).

——S. 109 — Question as to necessity of registering document containing option of re-purchase.

A case involving the question as to the necessity of registering the documents giving an option of repurchase was held a fit case for appeal to Privy Council as the execution of documents with an option of repurchase is very common, and a considerable amount of litigation comes before the Courts in connection with them and the law on the question of necessity of registering such documents has not been clear in view of conflicting decisions. AIR (Vol 14) 1927 Bom 19: 100 Ind Cas 143: 50 Bom 753: 28 Bom LR 1437 (DB).

——S. 109 — Order refusing application under S. 45, Specific Relief Act.

An appeal lies to Privy Council from an order refusing an application under S. 45, Specific Relief Act of the Special Bench of the High Court. AIR (Vol 8) 1921 Bom 278: 64 Ind Cas 959: 23 Bom LR 1132 (DB).

——Ss. 109 and 110 — Consent decree.

An appeal being allowable only in case of decrees made against the consent of the parties, a consent decree is not appealable to His Majesty in Council. AIR (Vol 7) 1920 Pat 721: 5 Pat LJ 388: 57 Ind Cas 245 (DB).

——Ss. 109 and 110 — Fit case — Appeal — Valuation of suit above Rs. 10,000 — Appeal valued at less than Rs. 10,000 — Leave — Question of law.

If the original valuation of a suit exceeded Rs. 10,000 but on appeal by one of the defts. to the High Court, the contest was for a sum less than Rs. 10,000, the case for the purpose of leave of appeal to His Majesty in Council does not come within S. 110, C.P.C. The question whether the omission to implead one of the plffs. as party in an appeal to the High Court, is fatal to the appeal, is not a question of law to justify a certificate that the case is otherwise a fit one for appeal to His Majesty in Council. AIR (Vol 6) 1919 All 104 : 54 Ind Cas 450 (DB).

——S. 109(c) — Fit case — Different conclusions on vital matters — Leave to appeal.

Under S. 109(c), C.P.C. a High Court can, if convinced that a case is a fit one for appeal to the Privy Council, grant leave to appeal in any case even upon a question of fact. Where two Judges have arrived at diametrically opposite conclusions on the vital question on which the suit should be decided, the case is a fit one for appeal. AIR (Vol 6) 1919 Oudh 7 : 6 OLJ 664 : 54 Ind Cas 828 (DB).

——S. 109(c) — O. 45, R. 3 — Fit case — P. C. Appeal.

Where the High Court decided that an interpretation of a decree given by the Court previously, operated as res judicata. Held, that this did not make the case a fit one for appeal to His Majesty in Council. (1910) 8 Ind Cas 485 (All) (DB).

(b) Not measurable in money.

——S. 109 — Name of Pleader struck off for misconduct — Allahabad practice is to treat the order as one under S. 109(c) — Calcutta and Patna have taken different view — But the certificate has to be granted if the case is otherwise "fit" not as a matter of course. Where the point in dispute is naturally not measurable by money and is of great private importance to the applicant and there are some points of law raised in the case, the case can be certified as "fit" one under S. 109(c). AIR (Vol 24) 1937 All 167 : (1936) ALJ 1272 : 1936 AWR 1007 : 38 Cr LJ 410: 167 Ind Cas 666.

——Ss. 109(c), 110, O. 45, R. 4 — Appeals disposed of by one judgment on common grounds — One appeal valued above Rs. 10,000 and other below it— Latter case, if can be certified as fit one — O. 45, R. 4, whether applies.

Two appeals were filed arising out of the same suit and were disposed of by one judgment, and the ground on which the Bench had proceeded was a common one. The value of the subject-matter in dispute in one case was in excess of Rs. 10,000, but that in the other case was less :

Held, that the High Court could certify under S. 109(c) that the latter case is a fit one for appeal to His Majesty in Council, although the requirements of S. 110 were not fulfilled. Order 45, R. 4 does not in terms apply to such a case. AIR (Vol 23) 1936 All 832: (1936) ALJ 1025: ILR (1937) All 105 : 1936 AWR 883 : 166 Ind Cas 283 (DB).

——Ss. 109, 110 — Loss or detriment suffered by passing of decree not capable of being estimated in money — Case involving determination of rights of large body of persons — Leave — Whether should be granted.

Where it is impossible to estimate in money or by any pecuniary standard, the loss or detriment which the applicant has suffered by the passing of the decree from which it is sought to obtain leave to appeal to His Majesty in Council, the case does not fall with the ambit of S. 110. But where the dispute involves the determination of the rights of a large body of persons in connection with the management of a mosque, and the construction of a deed is also involved and question as to what, upon a true construction of the trust deed, the term "Nursapuri" as used therein means, appears to be, if not an unmixed question of law, certainly not an unmixed question of fact, then the case is a fit one for appeal to the Privy Council under S. 109(c), Civil P. C. AIR (Vol 22) 1935 Rang 113: 13 Rang 123: 156 Ind Cas 472 (DB).

——S. 109(c) — Special cases.

Section 109(c) is intended to meet special cases such as those in which the point in dispute is not measurable by money, though it may be of great public or private importance. The clause applies to cases, "in which it is impossible to define in money value the exact character of the dispute as for example, those relating to religious rights and ceremonies, to caste and family rights, of such matters as the reduction of the capital of companies as well as questions of wide public importance in which the subject-matter in dispute cannot be reduced into actual terms of money". The section does not apply in cases not satisfying the conditions so laid down. AIR (Vol 21) 1934 Lah 515 (2): 35 PLR 546: 152 Ind Cas 684 (DB).

——S. 109 — Questions of public importance or private importance to both parties — Mere question about construction of agreement.

What is contemplated by S. 109(c), is a class of cases in which there may be involved questions of public importance, or which may be important precedents governing numerous other cases, or in which, while the right in dispute is not expressly measurable in money, it is of great public or private importance to both parties. General questions connected with the mere construction of agreements, which do not raise either far-reaching questions of law or matters of dominant public importance are not allowed to be the subject of appeal to Privy Council. Dispute between two rival temples belonging to two different sections of the Hindu community about the right of one of them to hold their processions in the streets of Madras turning on the construction of an agreement between the temples made many years ago was held to render the case a fit one. AIR (Vol 11) 1924 Mad 231: 76 Ind Cas 811: 18 MLW 348: 1924 MWN 3: 45 MLJ 514 (DB).

6. Interpretation.

——S. 109 (a) and (b) — "Final order" — Test — Order refusing to appoint provisional liquidator.

A "final order" within the meaning of S. 109 (a) and (b), C. P. Code, is one deciding finally any question at issue in the cause of the rights of any of the parties. An order appointing or refusing to appoint a provisional liquidator does not decide the rights of the parties, although the decision of that question will have an effect upon the liquidation proceedings. Such an order is not final but only an interlocutory order. AIR (Vol 36) 1949 EP 261 (DB).

——S. 109 — "Decree or final order" — Test — Interlocutory order in execution proceedings.

An order can be a "decree" only if it conclusively determines the rights of the parties and not when it merely determines an incidental question. An interlocutory order in the course of execution proceedings which decides, for instance, a point of law arising, interlocutory or otherwise, is not a decree. Judged in the light of this test, interlocutory orders which decide merely that pleas of want of jurisdiction and limitation cannot be allowed to be taken up at a late stage and that the proclamation of sale was properly prepared, cannot be regarded as a "decree" within the meaning of the expression as used in S. 109(a), C. P. Code. Nor can such orders be regarded as a "final order" within the meaning of that section. The test to find out whether an order is a final one is not whether the point decided thereby is a cardinal one, but whether the rights of the parties are finally disposed of. The orders in question do not finally dispose of the execution application which is a live application and still awaits decision. AIR (V 36) 1949 EP 222 (DB).

——Ss. 109(c) and 110 — Leave to apeal to Federal Court — Substantial question of law — Meaning — Question of admissibility of a document by Courts below — Not a substantial question of law.

Every question of law is not substantial. "Substantial" in the context in which it is used in S. 110 of the C. P. Code means substantial as between the parties and not necessarily of general importance to the public; but it does not make it any the less essential, that the question should be substantial, that is to say, it must have some substance in it.

It cannot be said that whenever a question as to the admissibility of any document is raised in an appeal and that question is decided in one way, it follows ipso facto that there is a substantial question of law, which would justify the grant of a certificate under S. 100 of the Code.

Where the only question which arose for decision in an appeal was whether a lady, the mother of the plaintiff was one of the daughters of one T and the lower Courts answered it in favour of the plaintiff which later on was confirmed by the High Court, in an application for leave to appeal to the Federal Court under Ss. 109 and 110 of the C. P. Code on the ground of an improper admission of a particular document:

Held, that the decision as to the admissibility of a document pertaining to the said relationship raised no substantial question of law within the meaning of S. 110 of the C. P. Code. The fact that there was an objection to the admissibility of a particular document. however important it might be, would not make it any other than a question of fact. AIR (V 36) 1949 Mad 156 : (1948) 2 MLJ 109 : 61 LW 508 : 1948 MWN 512.

——S. 109— Final decree, what is.

The expression 'final order' in S. 109 (a) means a final order passed in a suit or a proceeding known to law.

The order of the Appellate Court setting aside an order passed by the Court below on review under O. 47, Rr. 1, 2 & S. 151 setting aside its decree

passed on compromise is not a 'final decree' within the meaning of S. 109 (a). AIR (Vol 32) 1945 Pat 149: 23 Pat 903.

——S. 109 — Question depending on interpretation of document.

The question whether a transaction can be split into two separate leases which depends merely on the interpretation of the document cannot be said to be a question of any general or wide importance. AIR (Vol 21) 1934 All 58: (1934) ALJ 219: 3 AWR 339: 56 All 277: 147 Ind Cas 376 (DB).

——S. 109 — Final order — Meaning of — Order of remand.

Whether the order of remand passed by High Court in any particular case operates as final order or not depends on its own facts. The test question to be asked is: Does the order of remand finally dispose of the rights of the parties? Leave cannot be granted in a case where the order of remand decides an important point of law but leaves another equally important point undecided. It is not the order of the lower Court but of the High Court that must be looked at for the purpose of determining whether it finally disposed of the right of the parties. AIR (Vol 17) 1930 Sind 254: 123 Ind Cas 231 (DB).

——S. 109 — Redemption decree — Appellate Court fixing a later date — Appellate decree if one of reversal.

A decree of a High Court affirming a decree for redemption passed by a lower Court but fixing a later date for redemption and allowing the interest at bond rate to run from the expiry of the date fixing by the lower Court till the date fixed by the High Court, does not make the decision one of reversal. AIR (Vol 15) 1928 Pat 190: 106 Ind Cas 243: 9 PLT 393 (DB).

——S. 109 — Final order, what is — Determining factor whether the order decides the cardinal issues in the suit — Matter of procedure if can be a cardinal issue.

The determining factor is not the effect on the suit, a decision in favour of the applicant would have, if the proposed appeal to the Privy Council were successful, but the immediate effect on the suit of the order sought to be appealed against. An order is a "final order" within the meaning of S. 109 (a) only if it decides, or has the effect of deciding the cardinal issue in the suit (that is an issue going to the foundation of the suit) and thus disposes of the rights of the parties in the litigation, it being permissible to examine not only the order, but the circumstances of the case with a view to ascertaining the effect of the order on the suit. It is the nature of the order sought to be appealed against, that determines the right to appeal, and an order is a "final order" within the meaning of S. 109 (a) only if it puts an end to the litigation between the parties or disposes so substantially of the matters in issue between them as to leave merely subordinate or ancillary matters for decision.

Held, the order of the High Court did not amount to a "final order". The test is not whether the decision of the trial Court, if restored by the Privy Council, would put an end to the suit altogether. The determination of the matter depends not only upon the nature of the issue itself, but also upon its importance as compared with that of the other points arising in the suit. The test laid down by the Privy Council in 47 C 918 is by no means a certain one; a matter of procedure can never be treated as a cardinal point in the suit. Nor can an issue, which does not dispose of the rights of the parties belong to that category. There may, however, be other issues in a case which deal with the rights of the parties, but every one of them cannot be held to be a cardinal point. It is impossible to lay down any hard and fast rule which would solve the problem in every case, and it is the duty of the Court to determine in each case whether the order sought to be appealed against, comprises a decision on a crucial issue which goes to the root of the case or whether it is a mere interlocutory order. AIR (Vol 11) 1924 Lah 571: 80 Ind Cas 366: 5 Lah 329: 6 Lah LJ 240 (FB).

——S. 109 — Issue of, when justified — Case of public or private importance or general interest.

Clause (c) of S. 109, C. P. Code, was intended to meet special cases, such, for example, as those in which the point in dispute was not measurable by money, though it might be of great public or private importance. To determine whether a case is of great public or private importance, though it is left entirely in the discretion of the Court, is a judicial process, which could not be performed without the special exercise of that discretion evinced by the fitting certificate. The discretion thus vested in the Court, has been always very sparingly used. AIR (Vol 11) 1924 Oudh 81: 10 OLJ 289: 71 Ind Cas 339 (DB).

——S. 109 — Income-tax Act (1918), S. 51 — Order under S. 51 — Appeal to Privy Council — General right — Principles discussed.

No statute, Imperial or Indian, is to be found, giving expressly, or by implication, a right of appeal, either with or without the leave of the High Court of Bombay, to His Majesty in Council from a decision or order made or judgment given by the High Court under the provisions of the 51st section of the Indian Income-tax Act of 1918, neither can any such Statute be found giving a general right of appeal to His Majesty in Council from the orders or judgments of any class of Courts, as the 3rd section of the English Appellate Jurisdiction Act, 1876 gives a general right of appeal to the House of Lords from the judgments or orders of the Courts therein mentioned. The words "original jurisdiction" in Cl. 39 of Letters Patent (Bombay) are only used in contradiction to the words "made on appeal" mentioned earlier in the clause. The appeal is competent if the decision and order of the High Court under S. 51 of the Income-tax Act are within clause 31 of the Letters Patent. It must be either a final judgment or a final decree or a final order. A final judgment as understood in English litigation is nothing more than that there should be a proper 'litis contestatio' and a final adjudication betwewn the parties to it on the merits. When a case is stated for the "opinion" of the Court, that would serve 'prima facie' to indicate that the order made by the Court was only advisory. Where the case is referred for the "decision" or "determination" of a question, there is a 'prima facie' difficulty in holding that the order embodying this determination or decision is advisory, but the use of these words or one of them is not decisive. The decision, judgment or order made by the Court under S. 51 of the Income-tax Act is merely advisory and not in the proper and legal sense of the term final, and an appeal from it is incompetent. AIR (Vol 10) 1923 PC 148: 45 MLJ 95: 74 Ind Cas 469: 4 LRPC 170: 1923 MWN 603: 25 Bom LR 908: 21 ALJ 675: 50 IA 212: 18 MLW 372: 47 Bom 724: 39 CLJ 16: 28 CWN 307: 33 MLT 301.

——S. 109 — Interlocutory order of general importance.

The "order" is obviously intended to be not merely a final "order", and the expression is wide enough to include any order. Where there is involved a matter of real importance namely, as to

whether the Court has jurisdiction to make an order, the case is a fit one for appeal to His Majesty in Council under S. 109 (c). AIR (Vol 9) 1922 Cal 130: 70 Ind Cas 519: 26 CWN 819 (FB).

——**S. 109 — Final order — Meaning of — Order refusing to stay proceedings under S. 19 of the Arbitration Act — Not appealable.**

In a suit for damages under contracts (which contained an arbitration clause) appellants applied to the Court under S. 19 Indian Arbitration Act (1899) to stay the proceedings in order to refer the issues to arbitration under the clause. The Appellate Court refused to stay but granted leave to appeal to His Majesty in Council holding that their order refusing to stay was a "final order" within S. 109 (a) C. P. C.

Held, that an order is final only if it finally disposes of the rights of the parties and as the order refusing a stay did not finally dispose of those rights, but left them to be determined by the Courts in the ordinary way, it was not 'final'. AIR (Vol 7) 1920 PC 86: 47 IA 124: 24 CWN 721: 18 ALJ 591: 22 Bom LR 606: 39 MLJ 27: 12 LW 15: 2 UPLR (PC) 94: (1920) MWN 407: 28 MLT 87: 56 Ind Cas 302.

——**S. 109 — Final order — Decision as to competency of applicant for probate.**

A final order under S. 109 is one which finally disposes of the rights of the parties. An order holding that an applicant for probate was competent to apply and remanding the application for disposal on the merits is not a final order and leave to appeal to the Privy Council cannot be granted. AIR (Vol 7) 1920 Oudh 268: 23 OC 324 (DB).

7. Leave to appeal.

(a) General.
(b) Letters Patent.
(c) Limitation.

(a) General.

——**S. 109 (c) — Petty litigation — Grant of certificate by High Court — If justified.**

The High Court will not be justified in granting a certificate for leave to appeal to His Majesty in Council in a petty litigation where the subject-matter in dispute is only 13 marlas of land, although it raises an important question of general importance, as it would be wrong to put the respondent to the expenses of the appeal. AIR (Vol 34) 1947 Lah 304: ILR (1947) Lah 696 (FB).

——**Ss. 109 (c), 110 (second part) and O. 45, R. 3 — Two inter-connected appeals — Leave to appeal to Privy Council granted in one — Leave should also be granted in another because the position of the party is likely to be imperilled if no such leave were granted to him.**

Where the decision of an appeal not only decides the fate of that appeal but also seriously affects the other appeal which is inter-connected with it and in which leave to appeal to Privy Council has already been granted, the case clearly comes under second part of S. 110. The case also comes under cl. (c) of S. 109 as the position of the party seeking leave to appeal to Privy Council in the other appeal is likely to be imperilled if no such leave were granted to him. Such a case, therefore, is fit for granting leave to appeal to Privy Council. AIR (Vol 33) 1946 All 184: 1945 ALJ 545.

——S. 109 — Leave to appeal in respect of questions which have already been dealt with by the Privy Council should not be granted. AIR (Vol 31) 1944 Oudh 238: 1944 OWN 129: 1944 AWR (CC) 91: 218 Ind Cas 338 (DB).

——**S. 109 (a), (b), (c) — Orders in question, held not orders passed in appeal — Order does not fall within S. 109 (b).**

On an application to excuse the delay by deducting the time taken in appeal A on the file of the High Court, in computing the time for application for re-hearing of an appeal B on the file of the High Court, the High Court passed the following order "We see no reason to interfere. Dismissed":

Held, that the orders in question were not orders passed on appeal within the meaning of S. 109 (a) and they also did not fall under S. 109 (b).

Held, also that it was not a fit case in which the High Court could grant certificate for leave to appeal to the Privy Council under S. 109 (c). AIR (Vol 29) 1942 Mad 357 (1): 1942 MWN 142: 55 MLW 163: (1942) 1 MLJ 291: 202 Ind Cas 75 (DB).

——**S. 109 — Question involved not of public importance — Leave under S. 109 (c) can only be granted when matter in dispute cannot be valued in money.**

When the question involved is not of public importance, leave to appeal can be granted under S. 109 (c) only in special cases in which the matter in dispute cannot be valued in money. AIR (Vol 29) 1942 Oudh 283: 1942 OWN 100: 1942 AWR (CC) 75: 1942 RD 173: 198 Ind Cas 658 (DB).

——**S. 109 — Appeal to Privy Council — Leave to appeal from decision of Federal Court.**

In case leave to appeal to the Privy Council from the decision of the Federal Court is to be granted, it is necessary to show some special circumstances justifying grant of such leave; those special circumstances would depend upon the merits of each case.

(In this particular case the leave was refused.) (1939) MWN 616: 40 Cr LJ 599: 5 BR 771: 71 CLJ 390: (1939) 181 Ind Cas 947 (FC).

——**S. 109 (b) — High Court refusing to issue writ of certiorari to Revenue Board against enhancement of rent under Chap. XI, Madras Estates Land Act (I of 1908).**

In proceedings under Chap. XI, Mad. Estates Land Act, rent was enhanced. The High Court refused to issue a 'writ of certiorari' to the Revenue Board:

Held, that the applicant could apply for leave to appeal to His Majesty in Council because the decision of the High Court was in exercise of its original jurisdiction which meant original civil jurisdiction in contrast to original criminal jurisdiction. AIR (Vol 25) 1938 Mad 722: (1938) MWN 706: 48 MLW 107: (1938) 2 MLJ 154: ILR (1938) Mad 816: 182 Ind Cas 784 (DB).

——**S. 109 — Both Judges of High Court affirming lower Court's judgment on merits — Difference of opinion between them on question having academic interest.**

Where both the Judges of the High Court affirm the judgment of the Court below on merits, though there is a difference of opinion between them on a certain question having only an academic interest, no leave to appeal to His Majesty can be granted. (1938) 178 Ind Cas 203: 5 BR 72.

——S. 109 — Where, in a suit involving the claim to receive the royalty from mining lease, exceeding Rs. 10.000, the liability being of a recurring nature and the lease being for 999 years, the claim is opposed by the defendant on the ground of want of title in the plaintiff and also non-liability under the lease and the claim is decreed in appeal as regards the claim to royalty was concerned but on the question of title, an adverse finding was given. and leave to appeal to Privy Council is granted to the defendant, and there is a substantial question of law involved, leave to appeal against the adverse finding on question of title, should be granted to the plaintiff, as a fit and proper case for certificate under S. 109 (c), Civil P. C. (1936) 163 Ind Cas 731: 62 C 992.

——S. 109 — Where the most that could be said with regard to an order passed on an application under O. XXI, R. 100, Civil P. C., was that the Court did in fact anticipate a state of affairs which would have obtained had the writ of delivery of possession been given effect to on behalf of the petitioner and another but it did not strictly come under R. 100 and the High Court in revision held that there was no ground for interference:

Held, that that would not entitle the High Court to hold that the case was of such importance that leave to appeal under S. 109, cl. (c), should be given. AIR (Vol 23) 1936 Pat 465: 2 BR 733: 17 PLT 760: 15 Pat 659: (1936) PWN 656: 164 Ind Cas 287 (DB).

——S. 109 — Under S. 109, High Court can give leave to appeal to the Privy Council against an order passed in revision. (1934) 1934 MWN 5 (DB).

——S. 109 — Insolvency proceedings — Remand order — Application for leave to appeal — Dismissal of, for want of final order — No order on remand — Application to revive application for leave to appeal.

An application for leave to appeal to the Privy Council from an order of remand in insolvency proceedings was dismissed on the ground that there was no final order as contemplated by S. 109 (a), Civil P. C. In the meantime the remand order reached the lower Court which held that as the insolvency proceedings had been annulled, the Court was 'functus officio' and could not pass any order. The application for leave to appeal was sought to be revived on the ground that as the lower Court had finally disposed of the case, the order of remand had become a final order:

Held, that the application for leave to appeal could not be revived and that no leave could be granted on it. AIR (Vol 20) 1933 Lah 82: 145 Ind Cas 131 (DB).

——S. 109 — Plaintiff knowingly valuing claim at certain figure — Court-fee paid on that basis in all the courts — Increased value — Proof of — Leave to appeal.

Where the plaintiff was aware that a large sum was due to him but all the same valued his claim at Rs. 2,500 and paid court-fee on that basis in all the courts, held, that he could not apply for leave to appeal to the Privy Council on the footing that the suit did in fact involve a claim for more than Rs. 10,000. AIR (Voi 17) 1930 Cal 737: 34 CWN 671 (DB).

——S. 109 — Question of law — Subject-matter not capable of being valued in money.

The mere existence of a substantial and important question of law does not justify certification under S. 109 (c). Leave to appeal under that section can be granted when the subject-matter in dispute is also such as cannot be reduced into actual terms of money. AIR (Vol 17) 1930 Nag 91: 12 NLJ 170: 123 Ind Cas 430 (DB).

——S. 109 — Order of High Court refusing to require Commissioner to state a case.

Proceedings connected with the assessment of income-tax normally and mainly are concerned with issues of fact and where neither the Commissioner nor the High Court is of opinion that any question of law has arisen in the course of the assessment, it may be that the legislature did not think it convenient or desirable that the Judicial Committee should be called upon to review, an order which in the opinion of the High Court turned solely upon questions of facts. Therefore, the High Court has no jurisdiction to grant leave to appeal to His Majesty in Council from an order of the High Court under S. 66 (3) refusing to require the Commissioner to state a case. AIR (Vol 17) 1930 Rang 274 (DB).

——S. 109 — Forma pauperis.

An application for leave to appeal to Privy Council in 'forma pauperis' is not maintainable. (1929) 115 Ind Cas 832 (Mad) (DB).

——S. 109 — Appeal against final decree — Objections to points decided in order of remand.

A suit claiming a right of pre-emption was dismissed on the ground that the right of pre-emption could not be claimed under Mahomedan law in Burma. On appeal the High Court held, on 13th October, 1925, that under Mahomedan law the right of pre-emption did exist and remanded the case. The case then went for trial on the merits and was eventually decreed in favour of the plaintiff, and after considering the case on the merits, the High Court dismissed the appeal on the 23rd May 1927. The application for leave to appeal was filed not only on the points decided in May 1927 but also on the points decided in October 1925.

Held, that it was not competent for the petitioner to challenge the correctness of the order of October 1925 and that leave to appeal on this ground could not be given. AIR (Vol 15) 1928 Rang 132: 6 Rang 169: 110 Ind Cas 386 (DB).

——S. 109 — Decree generally not appealable.

Where a decree passed by the High Court is such that had it been passed by a Subordinate Court, no appeal would have laid to the High Court, no leave would be granted for an appeal to His Majesty in Council against such a decree of the High Court. AIR (Vol 13) 1926 Oudh 17: 90 Ind Cas 332 (DB).

——S. 109 — Leave to appeal from a non-existent suit not to be granted.

A suit was decreed by the trial Court but in appeal it was dismissed. An application for review of the appellate decree was successful and thus the suit was again decreed. In an appeal to the Privy Council from that decision, it was held that the decree of the High Court in appeal should be restored and the suit dismissed with costs throughout. The plaintiffs then applied for leave to appeal to Privy Council which was granted by the High Court holding that the order of Privy Council merely held the review application to be incompetent.

Held, that the appeal to Privy Council must be dismissed as it was an appeal from a non-existent suit. AIR (Vol 12) 1925 PC 174: 6 LR PC 128: 26 PLR 226: 89 Ind Cas 185.

——S. 109 — Final order — Order adding joint decree-holders as parties to execution — Maintainability of appeal.

Where an execution case was started by one of several decree-holders, and the others thereupon applied to be added as parties and the execution Court made an order that they should be added as executing decree-holders in the case together with the appellant and the High Court upheld the decision in revision,

Held, the order sought to be appealed from was not a final order determining the rights of the parties in any matter in controversy in the suit. The right of the parties in so far as their claim to share in the benefit of the decree itself was in their favour jointly. The order was one which related to procedure only. No leave cou'd be granted to appeal to His Majesty in Council. AIR (Vol9) 1922 Pat 611: 1922 PH CC 296: 3 Pat LT 781: 67 Ind Cas 991 (DB).

——S. 109 — Madras Estates Land Act (1908), S. 52 (3) — Contention that 'decreed' means decreed under Act.

The contention that 'decreed' in S. 52 (3) of the Madras Estates Land Act (1908) means decreed under that Act, and that no former decree could have any operation. is not of sufficient weight to

justify granting leave to appeal. AIR (Vol 8) 1921 PC 25: 40 MLJ 229: 29 MLT 418: 44 Mad 293: 19 ALJ 161: 23 Bom LR 718: 33 CLJ 277: 25 OWN 630: 13 MLW 321: 1921 MWN 119: 48 IA 31: 60 Ind Cas 85.

——S. 109 — Construction of section of a Tenancy Act — Decision affecting incidentally rights of holders of tenures.

It is not enough for granting special leave to appeal under S. 109 that a decision upon the construction of a section of a Ten. Act such as Bengal Tenancy Act or Orissa Tenancy Act or any other, will affect incidentally the rights of those who have holdings or tenures subject to one or other of those Acts. AIR (Vol 8) 1921 Pat 33: 2 PLT 657: 6 PLJ 125: 61 Ind Cas 663 (DB).

——S. 109 — Final order — Remand by High Court — Judgment, final as regards one of the properties only — Leave, if can be granted.

When the High Court on appeal remanded a suit to the Lower Court for further trial on the merits, it would not amount to a final judgment within S. 109 cl. (a) to enable leave being granted to appeal to the Privy Council. When every issue of fact has been found by the Appellate Court and the remand is directed solely with a view to give the consequential reliefs dependent upon the conclusions of the Appellate Court, the judgment would be final but it will not necessarily be final though the remand is not on a preliminary point. Leave will not be granted when the judgment is final only regarding one set of properties in dispute but not about the other. AIR (Vol 6) 1919 Mad 893: (1918) MWN 844: 48 Ind Cas 132 (DB).

——S. 109 — Final order — Refusing to restore, a dismissed appeal.

A High Court's order refusing to entertain an application for restoring an appeal which was dismissed for default, is not appealable to His Majesty in Council. AIR (Vol 4) 1917 All 313: 37 Ind Cas 832 (DB).

——S. 109 — Final order — Remand order — Preliminary point — Leave to appeal to Privy Council — If could be given.

Where the High Court remanded a case as having been decided on an erroneous view of the pleading and another on account of a wrong application of O. 2, R. 2, C. P. C. both were remand orders on a preliminary point. There being no final orders, leave to appeal to Privy Council was refused. AIR (Vol 2) 1915 Mad 423: 38 Mad 509: 14 MLT 560: (1914) MWN 64: 26 MLJ 96: 21 Ind Cas 842 (DB).

——S. 109 (c) — Fit case — C. P. C. (1882) S. 600 Privy Council, leave to appeal to.

Where the Lower Court dismissed a suit on the ground that it had no jurisdiction but the Chief Court held, that it had, and sent the case down to be tried on the merits and the applicant applied for leave to appeal to the Privy Council against the Chief Court's decision.

Held, that no leave could be granted as the lower Court might on the merits still dismiss the suit in which case the granting of the certificate might put the applicant to needless expense. (1910) 3 Bur LT 93: 8 Ind Cas 1189 (DB).

——Ss. 109; 110 (Ss. 595, 596 old Code) — Leave to appeal to Privy Council — Certificate — Valuation.

Except where special leave is granted, no leave to appeal to the Privy Council should be granted unless the subject-matter of the suit is more than Rs. 10,000 in value. The fact that the appeal involves a point of law does not justify leave being given where the value involved is less than Rs. 10,000. Where special leave is asked for, the Court must exercise its judicial discretion in granting it. (1901) 23 A 415 (419): 28 IA 182: 5 CWN 689: 3 Bom LR 569 (P.C.).

——S. 109 (S. 595 old Code) — Order refusing to vary or discharge report of Registrar — Belchambers Rules and Orders, No. 617 — Substantial question of law — Valuation of appeal in three similar but consolidated suits.

Whert a court under Rr. 615 and 617 of Belchambers Rules and Orders (2nd ed.) merely refused to reopen a Registrar's report.

Held, that such decision is not a final decree within the meaning of S. 595, and that it does not impose any pecuniary liability on applicant. Where an application for leave to appeal to the Privy Council is made in three separate suits, which are not consolidated, though the questions to be decided are the same in all of them, it is necessary to show that in each of the suits the amount or value of the matter in dispute in the appeal to the Privy Council is Rs. 10,000 or upwards. (1902) 6 CWN 41 (42) (DB).

(b) Letters Patent.

——Ss. 109 and 110 — Lahore High Court Rules and Orders, Vol. II, Chap. I, R. 25, Vol. V, Chap. VIII, R. 1 — Companies Act, Ss. 167 and 246.

Application for leave to appeal to Privy Council against winding up order — Application not containing names of respondents but entitled "In the matter of the Indian Companies Act, VII of 1913 and of the People's Bank of Northern India Limited, (in liquidation), Lahore":

Held, (Per Young, C. J. and Addision, J., Tek Chand, J. contra.) —An application for leave to appeal to Privy Council is not a proceeding in winding up as contemplated by Rules and Orders of the High Court. Even assuming that it was a petition for winding up, R. 95, Vol II, of Rules and Orders of the High Court would apply. In either case application should conform with R. 1, Chap VIII of Vol V, which has the force of law, and should contain particulars mentioned therein. The petition, therefore, should be dismissed. AIR (Vol 23) 1936 Lah 322: 165 Ind Cas 568 (FB).

——S. 109 (c) — Letters Patent (Allahabad), cl. 30 — Legal practitioner — Punishment for contempt of Court.

Where a legal practitioner was punished by a Bench of the High Court for contempt of Court for certain remarks, which were held to be derogatory to the High Court, made by him as a party to a suit and was later on suspended from practising for six months under the Legal Practitioners Act and he made an application for leave to appeal to the Privy Council against the order:

Held, that leave to appeal might be granted under S. 109 (c), Civil P. C., or under cl. 30 of the Letters Patent:

Held, also, that he should furnish security as in appeals in ordinary civil cases. AIR (Vol 20) 1933 All 225: (1933) ALJ 273: 55 All 246: 145 Ind Cas 853 (DB).

——Ss. 109 (c), 151 — Order suspending Advocate — Leave to appeal to Privy Council — Inherent jurisdiction to order suspension to remain in abeyance till disposal of appeal.

Where an Advocate has been granted leave to appeal to the Privy Council against an order of suspension passed against him by the High Court, it is open to the High Court by virtue of the inherent jurisdiction of the Court, to let the order of suspension remain in abeyance until the appeal is disposed of by the Privy Council. AIR (Vol 20) 1933 All 18: (1932) ALJ 861: 143 Ind Cas 480 (DB).

——S. 109 — Leave to appeal, when will be granted under cl. 15, Letters Patent (Bom) indicated. AIR (Vol 19) 1932 Bom 218: 34 Bom LR 398: 138 Ind Cas 454.

——S. 109 — Disciplinary proceedings — Suspension of Vakil from practice.

No leave to appeal to His Majesty in Council can be granted against an order suspending a Vakil from practice, which is disciplinary matter and not a judgment. AIR (Vol 9) 1922 Mad 440: 43 MLJ 382: 31 MLT 173: 16 MLW 328: 1922 MWN 530: 69 Ind Cas 290 (FB).

——S. 109 — Order refusing to enrol person as legal practitioner — Legal Practitioners Act, S. 13.

An order of High Court refusing to enrol a person as legal practitioner comes under its disciplinary or administrative powers and no leave to appeal to His Majesty can be granted. AIR (Vol 9) 1922 Pat 603: 4 PLT 229: 1 Pat 590: 70 Ind Cas 172 (DB).

——S. 109 — Disciplinary proceedings — Letters Patent (Cal) cls. 10 and 39.

S. 39 Letters Patent empowers the High Court to declare the fitness of an appeal in a non-criminal matter, if it is a final judgment or order, of the Court, made on appeal or in the first instance. A proceeding under cl. 10, Letters Patent does not fall under any of the jurisdictions specified in the Letters Patent, cl. 39, and therefore no leave to appeal could be granted. AIR (Vol 1) 1914 Cal 557: 41 Cal 734: 19 CWN 593: 15 Cr LJ 52: 22 Ind Cas 324 (DB).

(c) Limitation.

——S. 109 — Limitation — Exclusion of time.

Application for leave to appeal to Privy Council — Time requisite for obtaining copy of decree and copy of judgment can be excluded under S. 12 (3), Lim. Act, in computing limitation. AIR (Vol 28) 1941 Oudh 247: 1941 AWR (CC) 106: 16 Luck 638: 1941 OWN (CC) 352: 193 Ind Cas 295 (DB).

——S. 109 (a), (c) — Order refusing to admit an appeal on the ground that it was time-barred — — Whether final order — Leave under cl. (a) or (c) — Leave under S. 109 (c) — Conditions.

An order of the High Court refusing to admit an appeal on the ground that it was time-barred is not a decision on the merits and not a final order passed on appeal by a High Court or any other Court of final appellate jurisdiction. Consequently, leave to appeal to His Majesty in Council from the order cannot be granted under S. 109 (a), Civil P. C., nor does the application for leave to appeal against the order come within the purview of S. 109 (c), as it is only when a case is of considerable importance and the principle, when finally decided by their Lordships of the Privy Council, would be of benefit, not only to the people who are directly involved in the litigation, but to a considerable body of other people, that leave to appeal should be granted under that clause. AIR (Vol 23) 1936 Oudh 110: 1935 OWN 1252: 11 Luck 599: 159 Ind Cas 483 (DB).

——S. 109 — Final judgment on receipt of finding — Leave to appeal — Limitation Act (IX of 1908), Sch. I, Art. 179.

Where the High Court passed an interlocutory judgment and remitted an issue for finding to the lower Court and on receipt of the finding, passed a final judgment:

Held, that an appeal to the Privy Council lay against the final judgment and that an application for leave to appeal could be made within ninety days of the final decree. AIR (Vol 20) 1933 Bom 251: 35 Bom LR 415: 145 Ind Cas 258 (DB).

——S. 109, O. 45, Rr. 3, 4 — Two decrees — Joint application for leave to appeal — Competency of.

There is no provison of law authorising one application for leave to appeal in two separate suits and appeals, though they might have been for the sake of convenience disposed of by the same judgments. Whether the two appeals to the Privy Council can and ought to be so consolidated is a matter which ought to come up for consideration after the necessary certificate has been granted by the High Court.

Where the original application which was made in time has not been dismissed, it is open to the party to amend it to make it in conformity with the order of Court. AIR (Vol 19) 1932 Lah 441: 33 PLR 455: 140 Ind Cas 70 (DB).

8. On appeal.

——S. 109 (a) — Decree or final order "passed on appeal" — Order rejecting application for admission of appeal or if necessary for extending time under S. 5, Limitation Act.

An order of High Court rejecting an application for admission of an appeal, or, if found necessary, for extending the time for preferring the appeal under Section 5 of the Limitation Act, is neither a decree nor a final order "passed on appeal", and the High Court has therefore no jurisdiction to grant leave to appeal under Section 109 (a), C. P. Code. AIR 1926 Pat 102, AIR 1917 Lah 448, and 4 R 265, Not Foll. (1948) ILR (1948) 2 Cal 202 (DB).

——S. 109 (a) — Application to High Court to review its decision in appeal before it — Order rejecting application is not "passed on appeal" within S. 109 (a).

Proceedings by way of review are independent proceedings and an order by the High Court refusing an application made to it to review its decision in an appeal before it is not an order 'passed on appeal' within the meaning of Section 109 (a). AIR (Vol 33) 1946 Cal 10: 49 CWN 758: 222 Ind Cas 675.

——S. 109 — Order by High Court in exercise of revisional powers — No appeal to Privy Council lies.

There is a difference in the meaning of the expression "passed on appeal" and "made in exercise of appellate jurisdiction". All orders passed on appeal are obviously passed in the exercise of appellate jurisdiction, but it does not necessarily follow that every order made in exercise of such jurisdiction is an order passed on appeal.

An order passed by the High Court in exercise of its revisional powers under Section 115 cannot be said to be 'an order passed on appeal' within meaning of Section 109 and no appeal lies to Privy Council from such an order. AIR (Vol 33) 1946 Oudh 101: 21 Luck 43: 222 Ind Cas 308 (DB).

——S. 109 (a) — Order dismissing appeal for want of prosecution — Whether final order.

An order dismissing an appeal for want of prosecution is not a final order passed on appeal within the meaning of Section 109 (a), Civil P. C. AIR (Vol 29) 1942 Oudh 362: 1942 OWN 206: 1942 AWR (CC) 156: 199 Ind Cas 835 (DB).

——S. 109 (a) — Order passed after calling for records under S. 34, N.-W. F. P. Courts Regulation — Whether appealable under S. 109 (a).

Orders passed after calling for the records under Section 34 of the N.-W. F. Province Courts Regulation are not passed on appeal — They are passed in exercise of the power of superintendence vested in the Court by this provision of law. Such an order is not, therefore, appealable to His Majesty in Council under Section 109 (a), Civil P. C. AIR (Vol 26) 1939 Pesh 26: 183 Ind Cas 168.

——S. 109 (a) — "Appellate jurisdiction" — District Court sitting in appeal under S. 75, Provincial Insolvency Act, if Court of final appellate jurisdiction.

There is no essential difference between a remedy by way of appeal and by way of revision. The term "appellate jurisdiction" in S. 109, Civil P. C., is "both grammatically and logically" wide enough to comprehend the power of the High Court exercisable under Section 115. A District Court, therefore, sitting in appeal under Section 75, Provincial Insolvency Act, is not a Court of final appellate jurisdiction as the High Court has revisional powers over it.

Section 75, Prov Insol. Act, is all comprehensive and self-contained. Section 75 seems to be deliberately framed and it would appear to be the intention of the Legislature that the findings of the District Judge, whatever the subject-matter, are to be subject only to the revisional powers of the High Court there given. There is further a right of second appeal in matters coming within the provisions of Section 4, Prov. Insol. Act. No appeal, therefore, lies to the Privy Council from the order of the District Court whatever be the value of the subject-matter. AIR (Vol 24) 1937 Mad 930: (1937) MWN 762: 46 MLW 416: 177 Ind Cas 177 (DB).

——S. 109 (a) — Judgment on Appellate Side and final order on appeal — Difference between.

There is a vast difference between an order made or a judgment passed on the Appellate Side of a Court and the final order passed on appeal. The latter may be included in the former but the former is necessarily not the same as the latter. AIR (Vol 23) 1936 Pat 465: 2 BR 733: 17 PLT 760: 15 Pat 659: (1936) PWN 656: 164 Ind Cas 287 (DB).

——Ss. 109 (a), 115 — Order made in revision.

Section 115 clearly distinguishes between an order made under the revisional powers of the Court and an order made on appeal. It is true that an order made under Section 115, Civil P. C., may well be an order made on the Appellate Side of the Court but it by no means follows that it is an order on appeal. Consequently, the High Court has no jurisdiction to give leave to appeal to His Majesty in Council under Section 109 (a). AIR (Vol 23) 1936 Pat 465: 2 BR 733: 17 PLT 760: 15 Pat 659: (1936) PWN 656: 164 Ind Cas 287 (DB).

——S. 109 — Dismissal of first appeal for default — Application to restore — Dismissal of — Application for appeal to Privy Council, whether maintainable — "Final order passed on appeal", meaning of.

Where, after a first appeal had been dismissed for default on the Counsel stating that he had no instructions and an application for restoration had also been dismissed, an application for leave to appeal to the Privy Council was made:

Held, that although the order dismissing the application for restoration was passed by the High Court on its appellate jurisdiction, it was not a "final order passed in appeal" within the meaning of Section 109 (c), Civil P. C.

By the expression "final order passed on appeal" is understood an order made as the result of an appeal filed before the High Court. AIR (Vol 20) 1933 All 453: (1933) ALJ 255: 145 Ind Cas 534 (1) (DB).

——S. 109 — An order reversing the decision of the lower Court on a point of limitation and remanding the case for decision on the merits, is not a 'final order' passed on appeal by the High Court within the meaning of Section 109 (a), Civil P. C. but an interlocutory order against which no appeal lies to the Privy Council. AIR (Vol 20) 1933 Bom 260: 35 Bom LR 458: 144 Ind Cas 916 (DB).

——S. 109 — Order dismissing appeal for abatement — Whether 'final order'.

An order dismissing an appeal on the ground that it had abated totally on account of the failure of the appellant to implead the legal representatives of a deceased respondent within the prescribed time, is a "final order passed on appeal", within the meaning of Section 109 (a). AIR (Vol 20) 1933 Lah 690: 14 Lah 609: 34 PLR 946: 144 Ind Cas 18 (DB).

——S. 109 — The words 'final order passed on appeal' in S. 109(a), include an order directing the dismissal of an appeal consequent upon the appellant's failure to furnish security for the costs of the respondent. AIR (Vol 19) 1932 All 312: 1932 ALJ 254: 54 All 390: 140 Ind Cas 125 (DB).

——S. 109 — Letters Patent (Bombay High Court), clause 39 — High Court decree in pursuance of directions from Privy Council.

Where the High Court in pursuance of the directions given by the Privy Council takes accounts between the parties and passes a decree on the basis of those accounts, an application for leave to appeal against such decree is not competent either under Section 109, Civil P. C., or clause 39 of the Letters Patent of the Bombay High Court as the decree cannot be said to have been passed on appeal to the High Court. AIR (Vol 19) 1932 Bom 90: 33 Bom LR 1476: 55 Bom 785: 136 Ind Cas 183 (DB).

——S. 109 — On appeal — Meaning of — Order in — Revision.

An order passed by the High Court in exercise of its revisional jurisdiction under C. P. Code, S. 115, is not an order passed "on appeal" AIR (Vol 13) 1926 All 202: 90 Ind Cas 904: 48 All 226: 23 ALJ 997 (DB).

——S. 109 — 'On appeal' — Meaning of.

An order refusing to admit an appeal as time-barred is an order "on appeal" within S. 109. AIR (Vol 4) 1917 Lah 448: 127 PWR 1917: 131 PLR 1917: 42 Ind Cas 893.

——S. 109 (a) — Final order — Execution Sale — Order of High Court setting aside or refusing to set aside a sale.

An order of the High Court on appeal setting aside or refusing to set aside a sale in execution of a final order and is appealable to the Privy Council. (1913) 40 Cal 635: 40 IA 140: 17 CWN 637: (1913) MWN 487: 11 ALJ 517: 17 CLJ 573: 15 Bom LR 515: 14 MLT 37: 25 MLJ 140: 19 Ind Cas 296 (PC).

——S. 109(a) and(c) — Final order.

An order by the High Court refusing the stay of execution under O. 41 R. 5 is not a final order passed on appeal within the meaning of S. 109(a) nor is it a case covered by S. 109(c). (1911) 13 CLJ 681: 10 Ind Cas 444 (DB).

——S. 109 (S. 595 Old Code) — Final decree passed on appeal.

An order passed by the High Court, refusing to admit an appeal presented beyond the prescribed period, is not a "decree passed on appeal" under S. 595 (a) C. P. C. and is, therefore, not appealable to His Majesty in Council. (1907) 9 Bom LR 566: 32 B 108 (110) (DB).

——Ss. 109, 110, O. 20 R. 4 (Ss. 595, 596, 206, Old Code). — Leave to appeal to the Privy Council — Charter Act, Cl. 39 — Order on an application under S. 202, C. P. C. — "Order made on appeal" — "Order made in its final appellate jurisdiction" — "Final order".

An order by the High Court rejecting an application for amendment of its own decree in appeal, is not an order made on appeal within the meaning of Cl. 39 of the Charter Act and no appeal lies from such order to the Privy Council. Quaere — Whether such an order is one passed on appeal by the High Court in its final appellate jurisdiction & whether it is "final": 21 WR 203 not followed. (1903) 30 C 679 (681, 682).

9. Public and private importance.

(a) General

(b) Special Cases

(a) General.

——S. 109 (c) — Certificate of fitness — When to be granted — Substantial question of law — Sufficiency of.

A case cannot be certified as a fit one for appeal under S. 109(c), C. P. Code, on the mere ground that it raises a substantial question of law. It must involve a question of wide public importance or great general importance, which cannot be reduced into actual terms of money.

A question as to the right of an endorsee of a railway receipt to maintain a suit against a railway for damages for loss is not one in respect of which leave to appeal can be granted under S. 109(c). AIR (Vol 36) 1949 EP 370 (DB).

——S. 109(c) — Fit case for appeal to P. C. — Question as to the nature of a holding — Finding of fact.

Where the only question for decision in a declaratory suit is whether the holding in question was ancestral or not, the finding arrived at is just a question of fact. It cannot be said that there is any law point of special importance in such a case to justify leave being granted under S. 109(c) of the C. P. Code to appeal to the Privy Council. (1948) 1948 AWR (Rev.) 10.

——S. 109(c) — Applicability — Money value of subject-matter ascertainable.

S. 109(c), C. P. Code, is not limited to cases where the money value of the subject-matter in dispute cannot be ascertained. It also applies to cases where such money-value has been definitely ascertained, but the case involves a question of great general importance. AIR (Vol 34) 1947 Lah 304: ILR (1947) Lah 696 (FB).

——S. 109(c) and O. 45, R. 3 — Otherwise fit — Matter of private importance — If covered.

The cases in order to fall within the orbit of "otherwise fit" need not be only those of "public importance but can also be a case of private importance. AIR (V 33) 1946 All 184: ILR (1946) All 221: 1945 ALJ 545: 1945 AWR (HC) 383: 224 Ind Cas 250 (DB).

——S. 109(c) — Requirements for granting leave.

The mere existence of a substantial question of law does not give jurisdiction to give leave to appeal under cl. (c) of S. 109, and the question involved in the case must be one of great public or private importance. AIR (Vol 32) 1945 Oudh 241: 1945 OWN (CC) 38: 1945 AWR (CC) 36(2): 20 Luck 259 (DB).

——S. 109 (c) — Conditions necessary.

If the decision of the Privy Council is likely to affect, not only a particular party but is of great public importance depending on general principles, a certificate of fitness ought to be granted. The point involved must be one of general public importance or of such a nature that the decision upon it may govern numerous cases. AIR (Vol 30) 1943 Nag 76: 1942 NLJ 386: ILR (1943) Nag 580: 204 Ind Cas 338 (DB).

——S. 109(c) — Public and private importance.

By private importance is meant private importance to both parties to the litigation and not only to one of them. AIR (Vol 30) 1943 Oudh 266: 1943 OWN 23: 204 Ind Cas 608 (DB).

——S. 109 (c) — Certificate of fitness — Substantial question of law.

The mere existence of a substantial question of law does not give jurisdiction to give leave to appeal under Cl. (c) of S. 109. The question involved in the case must be one of great public or private importance. It cannot be contended with any show of reasoning that the question involved in the case is one of great public importance, if it does not affect any large bodies of persons or communities. AIR (Vol 30) 1943 Oudh 266 : 1943 OWN 23 : 204 Ind Cas 608 (DB).

——S. 109(c) — Question whether amount paid by Improvement Trust in land acquisition proceedings was by way of interest or damages.

The question whether the amount awarded to a person by the Improvement Trust in the land acquisition proceedings was awarded by way of interest or by way of damages is strictly speaking not a pure question of law, but is a mixed question of fact and law and certainly not a substantial question of law. Nor is it a question of general importance. The question does not, therefore, come within the purview of S. 109 (c), Civil P. C. AIR (Vol 29) 1942 All 258 : (1942) ALJ 332 : 1942 AWR 176 : ILR (1942) All 353 : 202 Ind Cas 164 (DB).

——S. 109 — Suit or property only — Case does not come under S. 109 (c).

Where there is no question of great public importance and the suit is one for property only and so definable in money value, the case does not come within the principles of S. 109 (c), as laid down in 60 Ind Cas 85. AIR (Vol 29) 1942 Cal 498 : 47 CWN 9 : 202 Ind Cas 551 (SB).

——S. 109 (c) — Construction put on certain agreement.

A case can be certified to be a fit one for appeal to His Majesty in Council under Cl. (c) of S. 109 only when it is of considerable importance and the principle when finally decided by the Privy Council would be of benefit not only to the parties to the case but to the public generally. The question whether the construction put by the High Court on a certain agreement is correct or not will not be of any benefit to the public generally and so it cannot be said to be a question of public importance. AIR (Vol 29) 1942 Oudh 283 : 1942 OWN 100 : 1942 AWR (CC) 75 : 1942 RD 173 : 198 Ind Cas 658 (DB).

——S. 109 — Point of law covered by authority of Privy Council.

Where the point of law involved in a case is covered by the authority of the Privy Council ruling, it cannot be said that there is any question of public or private importance. AIR (Vol 29) 1942 Oudh 174 : 1941 OWN 1234 : 1941 AWR 1059 : 197 Ind Cas 313 (DB).

——S. 109 (c) — Expression "fit one ..... in Council", meaning of — Refusal to stay criminal complaint.

The expression "fit one for appeal to His Majesty in Council" in S. 109 (c) means that the question should be either of great general importance to the public at large or of great private importance to the particular litigant and that the matter was not measurable in money. A refusal to stay a criminal complaint cannot be said to be a matter of great private importance to the particular accused in the case. AIR (Vol 28) 1941 All 211

: 1941 ALJ 265 : 1941 OWN 455 : ILR (1941) All 364 : 1941 AWR 120 : 194 Ind Cas 606 (DB).

——S. 109 — Question of inadmissibility of unstamped acknowledgment.

The question whether an acknowledgment was given in order to supply evidence of the debt itself within the meaning of Art. 1, Sch. I of the Stamp Act and being not stamped is not admissible in evidence, is not a question of public importance or of great private importance nor a precedent which would govern numerous other cases. 78 Ind Cas 165 : 19 MLW 372 : 34 MLT 1 : 1924 MWN 319 : AIR (Vol 11) 1924 Mad 616 : 46 MLJ 239 (DB).

——S. 109 — 'Private importance' — Matter of small value.

The duty of the Court if it thinks that the case is a fit one for consideration by His Majesty in Council where it would not be right to call upon one party whose financial interest in the matter is too small to incur the risk of the costs of the appeal, is to refuse leave and to leave the appellant, if so advised to apply to the Privy Council for special leave.

Per Coutts Trotter J.—Where amounts at stake in the cases are in themselves small, the most satisfactory order would be to allow the appellant to appeal and get his principle settled for him on terms of paying all the other sides' costs in any event; but this Court has no power to make such an order. It is best to regard their Lordships of the Judicial Committee when they speak of "private importance" as meaning private importance to both parties to the litigation and not only to one of them. 72 Ind Cas 250 : 32 MLT 126 : 17 MLW 775: 1923 MWN 415: AIR (Vol 10) 1923 Mad 232 : 44 MLJ 217 (FB).

——S. 109 — No general question involved.

S. 109 (c) of the C. P. Code is inapplicable where the question is concerning the parties alone and no general interest is involved. 61 Ind Cas 131 : 8 OLJ 1 : AIR (Vol 8) 1921 Oudh 30 (DB).

——S. 109 (c) — Fit case — Question of general interest.

Where a plaintiff's application for setting aside the order of dismissal for default was rejected by both the courts below and the High Court in revision ordered re-admission of the case, the defendants applied for leave to appeal to Privy Council.

Held, that no question of law of general interest or importance was involved and a special certificate for appeal to Privy Council could not be granted. 24 Ind Cas 620 : AIR (Vol 1) 1914 Oudh 223 (DB).

——S. 109 (c) — Fit case.

Application of S. 109 (c) of the C. P. Code applies to cases involving questions of public or private importance or precedents governing numerous other cases. Mere questions of law are not sufficient. (1913) 15 Bom LR 1021 : 21 Ind Cas 783 (DB).

(b) Special cases.

——S. 109 (c) — Question whether mosque could be adversely possessed — Decision as to adverse possession over particular building in suit.

A case should be certified to be a fit one for appeal to His Majesty in Council under Cl. (c) of S. 109, Civil P. C., only when it is of considerable importance and the principle, when finally decided by their Lordships of the Privy Council, would be of benefit not only to the people who were directly involved in the litigation, but also to the public at large.

An application was made for a grant of a certificate under S. 109 (c), Civil P. C. The valuation of the suit was below Rs. 10,000 and by its decision the High Court had affirmed the decision of the two Courts below. There were two main grounds of appeal, first whether the building in dispute was a public mosque or a private place of worship, and secondly, whether assuming it to be a public mosque, the defendants had established adverse possession over the mosque:

Held, that the first ground was really founded on what might be described as a play upon words. The question whether there could be adverse possession of mosque could not be regarded as substantial question of law and the decision of the High Court was in regard to adverse possession over a particular building in suit in the case. The decision was unquestionably not in regard to any matter of wider public importance, and it could not furnish a ground for the grant of certificate under S. 109 (c). AIR (Vol 27) 1940 Oudh 378 : 1940 OWN 632 : 15 Luck 716 : 1940 AWR 309 : 189 Ind Cas 93 (DB).

——S. 109 (c) — Form of ritual at Tirupathi Temple in Chittoor District.

Where the case relates to the form of ritual at the Tirupathi Temple in Chittoor District, it falls under S. 109 (c), as it relates to religious rights and ceremonies at a temple of national importance and the questions in issue are in themselves of great public and private importance. AIR (Vol 26) 1939 Mad 847 : 50 MLW 252 : (1939) 2 MLJ 378: (1939) MWN 816 : ILR (1939) Mad 967 : 188 Ind Cas 41 (DB).

——S. 109 — Clause (c) of S. 109 is intended to meet special cases such, for example, as those in which the point in dispute is not measurable by money, though it may be of great public or private importance. AIR (Vol 23) 1939 Mad 311 : (1935) MWN 796 : 42 MLW 560 : 69 MLJ 497 : 160 Ind Cas 410 (DB).

——S. 109 — Ejectment suit — Question whether certain tribal Chief residing in British territory is Ruling Chief within Ss. 84 to 87, Civil Procedure Code — Question, whether one of public or private importance.

Where a question as to whether a certain tribal Chief residing within British territory is a Ruling Chief within the provisions of Ss. 84 to 87, Civil P. C., arises in a suit for ejectment brought against him, it is not a matter of such private or public importance either to the Chief himself or to the public generally or any class or section of the public that a certificate of fitness for appeal to the Privy Council within the provisions of S. 109 (c), Civil P. C., can be given. AIR (Vol 24) 1937 Sind 217 (2): 171 Ind Cas 630 (DB).

——S. 109 (c) — Meaning of words "any accession is made to the mortgaged property" in S. 70, Transfer of Property Act — Whether one of great public importance.

A Court ought not to grant a certificate under S 109 (c), unless a point of law is involved in the appeal which is not only substantial and important as between the parties, but one of general public importance or of such a nature that the decision upon it may govern numerous cases.

The question whether the words "any accession is made to the mortgaged property" in S. 70, T. P. Act, mean any accession made to the mortgaged property by the mortgagor and/or his representative-in-title, or any accession to the mortgaged property by whomsoever the accession may have been made, is one of great public importance, having regard to the existing law in India and the large number of cases which must be affected by it. AIR (Vol 23) 1936 Rang 65: 14 Rang 86: 160 Ind Cas 724 (DB).

——S. 109 — Whether a contingent reversioner is entitled to continue a suit filed by a Collector, even though he applies to be made a party after the expiry of the period of limitation, is a question of some importance. The question whether a suit brought for recovery of possession by Hindu widows or by the Court of Wards on their behalf, is a suit of a representative character, brought in the interests of the whole body of reversioners, is a question of importance. AIR (Vol 21) 1934 All 198 : (1934) ALJ 1166 : 4 AWR 1598 : 147 Ind Cas 1067 (DB).

——S. 109 (c), object of.

Section 109 (c) has been intended to meet special cases — such, for example, as those in which the point in dispute is not measurable by money, though it may be of great public or private importance. AIR (Vol 20) 1933 Bom 260 : 35 Bom LR 458 : 144 Ind Cas 916 (DB).

——S. 109 — Question of general importance — Right to carry procession.

Where a declaration that Mahomedans should be authorized to take out "duldul" procession on 4th day of Moharram of every year without any obstruction or interference is the relief sought for, the matter is of general importance to both the communities Hindus and Mahomedans and is in language of S. 109, otherwise a fit case for appeal to His Majesty in Council. 122 Ind Cas 415 : AIR (Vol 17) 1930 All 121 (DB).

——S. 109 — Special Leave — Suit for defamation — No great importance.

Cases to which Cl. (c) of S. 109 applies are those which involve questions, as for example those relating to religious rights, and ceremonies, to caste and family rights, or such matters as the reduction of the capital of companies, as well as questions of wide public importance in which the subject-matter in dispute cannot be reduced into actual terms of money. Where the applicant sued for damages for defamation & his suit was dismissed in appeal on the ground of privileged communication.

Held, special leave should be refused to him as the case was not one of great importance to the general public. 6 Rang 43 : 109 Ind Cas 697 : AIR (Vol 15) 1928 Rang 187 (DB).

——S. 109 — Interlocutory orders — Exceptional cases of great public or private importance.

Chatterjea J.— The power of the Court to deal with applications under Cl. (c) of S. 109 should be exercised only in exceptional cases of great public or private importance.

Rankin J.— Although interlocutory orders are within the ambit of Cl. (c) of S. 109 and their having some public or private importance may take the place of a high money value as a ground for leave to appeal, does not give the party complaining a right to take the matter to England but the desirability of taking interlocutory orders on appeal to England involves practical considerations of a special character. 103 Ind Cas 561 : 31 CWN 540 : AIR (Vol 14) 1927 Cal 481 (DB).

——S. 109 — I. T. Act (XI of 1922) amended by (24 of 1926), S. 66-A (2) — Question of great public or private importance.

The newly added S. 66-A (2) to the Income-tax Act is in terms the same as S. 109 (c) of the C. P. Code. Inasmuch as a reference under S. 66 of the Income-tax Act postulates the existence of a question of law, it is perfectly clear that the intention of the Legislature in adding S. 66-A to the Income-tax Act was to enable an appeal to His Majesty in Council in cases in which the High Court could certify that the question of law involved was one of great private or public importance. 100 Ind Cas 97 : 8 Lah 269 : 28 PLR 443 : AIR (Vol 14) 1927 Lah 181 (DB).

——S. 109 — Question whether or not decision of Inam Commissioner or surveyor is binding on owners of estates — If one of general importance.

The petitioner for leave to appeal to His Majesty wanted to raise the question whether or not the decisions of the Inam Commission in 1865 and that of Deputy Superintendent of Survey 1876 as regards the surveys made in the private estates were binding on the owners of those estates and of the adjacent lands. Held, neither of these questions has affected or is likely to affect any large number of persons. The case does not involve any question the decision of which might result in a precedent governing numerous other cases or in which the right in dispute is of great public or private importance. 69 Ind Cas 385 : 1922 MWN 683 : 16 MLW 517 : 31 MLT 335 : AIR (Vol 10) 1923 Mad 125 : 43 MLJ 728 (DB).

——S. 109 — Fit case — Question of law — Whether leave can be granted.

The mere fact that the appeal involves questions of law does not bring the case under S. 109 (c); it must involve decision of matters of public or private importance. The question whether a suit is maintainable to set aside ex parte decree obtained by perjured evidence has been now settled; if plaintiff's application under O. 9, R. 13 is dismissed, he is debarred from re-opening the controversy as there must be some finality to litigation. 1 Pat LT 239 : (1920) Pat 209 : 56 Ind Cas 615 : AIR (Vol 7) 1920 Pat 119 (DB).

——S. 109 (c) — Fit case — Leave to appeal to Privy Council, when certificate granted.

A certificate for leave to appeal to Privy Council should be granted when the decision is of general importance or affects a large body of persons or threatens civil or religious rights of a community and not when it is merely to serve as a precedent for subsequent cases. (1913) 7 SLR 92 : 23 Ind Cas 793 (DB).

10. Remand order.

(a) General.

(b) When final?

(a) General.

——S. 109 (a) — High Court deciding one cardinal issue but remanding case for final disposal.

The test of finality is whether the order "finally disposes of the rights of parties" and if those rights are left to be "determined by the Courts in the ordinary way", there is no final decision in the case.

In a suit for accounts out of a promissory note in which both the plaintiff and the defendants were interested, the High Court decided what interest was to be paid and how it was to be calculated and remanded the case for disposal in the light of appellate judgment:

Held, that though it decided one of the cardinal issues, the remand order did not dispose of the rights of the parties finally but left the suit alive and, therefore, it was not a final order within the meaning of S. 109 (a), Civil P. C. AIR (Vol 26) 1939 Mad 697: 49 MLW 713: (1939) MWN 597: (1939) 2 MLJ 40: 188 Ind Cas 892 (DB).

——S. 109, cls. (a), (b). (c) — Order of remand by High Court, held though not decided case finally, yet point involved was of general importance within cl. (c).

In the Court below, an objection had been taken to the jurisdiction of the Court to entertain the suit on the ground that the suit was barred by the provisions of the Sea Customs Act. The lower Court tried this issue as a preliminary

issue and upholding the objection, dismissed the suit. On appeal by the plaintiff the High Court held that the Civil Court was not deprived of jurisdiction in the matter by the provisions of the Sea Customs Act, and accordingly, directed the case to be tried on the merits. The amount claimed in the suit was more than Rs. 20,000 and the question of jurisdiction decided by the High Court was a substantial question of law and one of general importance:

Held, that though the order of the High Court remanding the case was not a "final order" within the meaning of cls. (a) and (b) of S. 109, Civil P. C. yet having regard to the general importance of the question, the case was a fit one to be certified under cl. (c). AIR (Vol 26) 1939 Mad 95: (1938) MWN 1132: (1938) 2 MLJ 904: 182 Ind Cas 260 (DB).

——**S. 109 (a) (c), O. 41, R. 23 — Order under O. 41, R. 23 reversing decree which dismisses suit upon preliminary point and remanding suit for trial.**

An order of an Appellate Court is not a final order within the meaning of S. 109 (a), unless it finally disposes of the rights of the parties in relation to the whole suit and that consequently an appeal to the Judicial Committee does not lie from an order under O. 41, R. 23 reversing a decree which dismisses a suit upon a preliminary point and remanding the suit for trial. AIR (Vol 26) 1939 Oudh 224: 1939 OWN 659: 1939 AWR 92: 14 Luck 675: 182 Ind Cas 1007.

——S. 109 — Order of remand by High Court — No appeal lies to Privy Council there being no final order. (1936) 38 PLR 112.

——**S. 109 (a), (b) and (c) — Order setting aside order dismissing suit for multifariousness and remanding suit for trial.**

An order of the High Court setting aside an order dismissing a suit for multifariousness or misjoinder of defendants and causes of action, and remanding the suit to the original Court for trial is not a 'decree or final order' within the meaning of cls (a) and (b) of S. 109 of the Civil P. C. and leave to appeal to the Privy Council from such order could be granted only if the case fulfils the requirements of cl. (c) of the said section. AIR (Vol 23) 1936 Mad 311: (1935) MWN 796: 42 MLW 568: 69 MLJ 497: 160 Ind Cas 410 (DB).

——**S. 109 (a), O. 41, R. 23 — Order of remand, whether 'final order' — Special leave.**

An order made an appeal by a High Court remanding a case for re-trial under O. 41, R. 23, Civil P. C. is not a 'final order' within the meaning of S. 109 (a), and is not appealable to His Majesty in Council as such.

But in a proper case it is always open to the Appellate Court to give a special certificate under S. 109 (c). AIR (Vol 20) 1933 PC 58: 10 OWN 195: 37 MLW 331: (1933) MWN 166: (1933) ALJ 244: 64 MLJ 307: 11 Rang 58: 35 Bom LR 331: 37 CWN 405: 57 CLJ 136: 60 IA 76: 142 Ind Cas 328.

——**S. 109, O. 41, R. 25 — Leave to appeal — 'Final order' — Order of remand to determine certain issue of fact — Rights of parties not decided by Appellate Court — Order, if final order.**

For the purposes of granting leave to appeal to the Privy Council, an order is final if it finally disposes of the rights of the parties. If the order does not dispose of the rights of the parties, then it is not a final order.

Where an Appellate Court remanded a certain case under O. 41, R. 25, Civil P. C., to the trial Court to determine certain issues of fact and to return the proceedings with the trial Court's findings and although the Court had stated its views upon some of the issues, it had not purported to decide the rights of the parties:

Held, that the order was not a 'final order'. AIR (Vol 19) 1932 Rang 137: 10 Rang 335: 140 Ind Cas 420 (DB).

——**S. 109 (a) — 'Final order'.**

The question whether an order is a final order within the meaning of S. 109 (a), Civil P. C., depends on whether the issue which it decides is or is not a cardinal point in the case and the determination of the matter depends not only upon the nature of the issue itself but also upon its importance as compared with that of the other points arising in the suit.

A person filed an objection before the Insolvency Court claiming a house as his property as against the Receiver, claiming title to the same under a compromise. The Insolvency Judge upheld the objection and released the house from the custody of the Receiver. The Appellate Court held that the compromise was inadmissible in evidence, being unregistered, and dismissed the objection. The High Court in second appeal held that the compromise must be taken to have been substantially incorporated in the decree and remanded the case below for decision on matters which had not been decided:

Held, that the order of remand was not a final order within S. 109 (a), Civil P C. AIR (Vol 18) 1931 Lah 556: 132 Ind Cas 211 (DB).

——**S. 109 — Final order — Remand — Trial Court holding temple private — High Court holding public — Remand order if appealable.**

Where a scheme suit brought under S. 92 was dismissed by the trial Court on the ground that the suit temples were private temples, but the High Court finding that the temples were public remanded the case to the trial Court, the decision of the Court was not final adjudication within the meaning of S. 109. AIR 1922 Mad 510, not Foll. AIR (Vol 16) 1929 Mad 308: 117 Ind Cas 300 (DB).

——**S. 109 — Order setting aside abatement and directing re-hearing.**

Where an application to set aside abatement of suit by excusing delay of two days in making it was rejected and in appeal from the order, the High Court accepted the appeal and directed the lower Court to re-hear the application.

Held, that the order of remand was not a final order. AIR (Vol 12) 1925 All 263: 47 All 335: 23 ALJ 19: 6 LRA Civ 175: 86 Ind Cas 161 (DB).

——**S. 109 — Suit dismissed due to plaintiffs' want of locus standi — Appeal — Prima facie case held made — Case remanded for further hearing — Order if appealable.**

Where the lower Court had dismissed the plaintiffs' suit on the ground that they had no locus standi and the High Court on appeal held that the plaintiffs had 'prima facie' sufficient interest to entitle them to an investigation of the case which they made and that the facts had not been sufficiently ascertained to justify the dismissal of the suit on the preliminary point of 'locus standi' and remanded the suit.

Held, that it was only a mere order of remand under O. 41, R. 23 and not a final order within the meaning of S. 109. AIR (Vol 12) 1925 Cal 574: 78 Ind Cas 117 (DB).

——**S. 109 — Suit for partition — Remand to effect partition — Appeal, if lies.**

Where the trial Court ordered partition on the basis of a certain family arrangement between the parties, but the High Court in appeal held that the family arrangement was not binding and the case was remanded to effect partition according to the personal law of the parties;

Held, that the remand order was not a final order within S 109, that O. 43, R. 1 (a) does not apply to appeals to Privy Council and therefore

no leave can be granted to present an appeal to Privy Council. AIR (Vol 12) 1925 Nag 349: 22 NLR 132: 88 Ind Cas 69 (DB).

——S. 109 — Order of remand deciding subsidiary issue — Appeal.

An order of remand, which does not finally determine the rights of the parties but merely disposes of a subsidiary issue, the determination of which necessitates the continuation of the trial is not a final order within the meaning of S. 109 (c). AIR (Vol 11) 1924 Oudh 81: 10 OLJ 289: 71 Ind Cas 339 (DB).

——S. 109 — Order of remand not deciding cardinal point in the case — Appeal.

An order of remand is not ordinarily capable of being the subject of an appeal to His Majesty in Council, being interlocutory and not final within the meaning of S. 109. It can only be regarded as a final order and capable of appeal if it has the effect of finally deciding some cardinal point in the suit. 23 All 220 (P. C.), Relied on.

A sued for declaration that he was the sole owner of the suit property free of any encumbrance and that he was in possession of it as owner. B contended that as he (B) was in possession, a suit merely for declaration was not competent. The suit was dismissed. In appeal, it was found that A was in possession of a portion of the property and that he was a co-sharer with C who was in possession of other portions and the case was remanded for trial on merits.

Held, that the order of remand did not finally decide any cardinal point in the suit and no appeal lay to the Privy Council, nor was the case a fit one for certifying under cl. (c). AIR (Vol 8) 1921 Lah 203: 2 Lah 106: 65 PLR 1921: 60 Ind Cas 522 (DB).

——S. 109 (a) — Final decree or order — Decision that suit is not barred by res judicata.

Appeals on matters interlocutory in their nature should be allowed to be preferred to His Majesty in Council only when their decision will put an end to the litigation and finally decide the rights of parties. When a suit is dismissed by the Subordinate Judge as barred by 'res judicata' but the decision was reversed by the High Court which remanded the case, leave to appeal to Privy Council should not be given. AIR (Vol 6) 1919 All 31: 18 ALJ 83: 1 UP LR (HC) 168: 54 Ind Cas 504 (DB).

——S. 109 and O. 41 R. 23 — Remand order — If can be considered in appeal from final decree on remand — Appeal to His Majesty in Council — If lies from order of remand.

An order of remand under O. 41, R. 23 C. P. C. is not a final order within S. 109 (a) and is not appealable to His Majesty in Council. An order under O. 41 R. 23 cannot be reconsidered in a subsequent appeal from the decision on remand. AIR (Vol 5) 1918 Nag 193: 46 Ind Cas 922 (DB).

——S. 109 (a) — Final order.

An order of remand made by the High Court which decided only one issue out of several, raised, in the first court is not a "final order" within the meaning of S. 109 (a). AIR (Vol 3) 1916 All 243: 38 All 150: 14 ALJ 50: 32 Ind Cas 360 (FB).

——S. 109 — "Final order" — Meaning of order of remand.

An order of remand by the High Court directing the disposal on the merits of a suit dismissed by the Court below on preliminary issues without taking evidence is not a final order under S. 109, C. P. C. because such an order has no effect on the ultimate decision of the case. AIR (Vol 3) 1916 Oudh 242: 19 OC 36: 33 Ind Cas 756 (DB).

See also (1918) Pat HCC 1: 4 PLW 342: 45 Ind Cas 290: AIR (Vol 4) 1917 Pat 77.

——S. 109 — Final order — Order of remand.

An order of remand is not a decree or final order within the meaning of S. 109 and is consequently not appealable. 10 MIA 340; 8 B 548; 17 A 112; 23 A 220 con. (1911) 33 All 391: 8 ALJ 192: 9 Ind Cas 932 (DB).

——S. 109 (a) and (b) — Final order.

The term final order within S. 109 (a) and (b) denotes an order which finally decides any matter directly at issue in the case in respect of the rights of the parties. Whether an order is final or not depends upon its contents.

Where the first court held that the suit was barred but the lower appellate court held that it was not so and remanded the case to be tried on the merits and the High Court upheld that order.

Held, that the order of the High Court was a final order within the meaning of S. 109, C. P. C. (1908). (1910) 10 CLJ 336: 4 Ind Cas 459 (DB).

——S. 109 (a) and O. 45, R. 1 — Final order — Final or interlocutory order — Appeal to Privy Council — Practice.

If in a remand order the Court decides only a part of the case and leaves other matters undetermined, the order is not a final order and is not therefore appealable to the Privy Council. 17 A 112 (PC) dist. (1909) 31 All 545: 6 ALJ 786: 6 MLT 94: 3 Ind Cas 967 (DB).

——S. 109 Cl. (a) — "Final Order" — Remand order:

See (1909) 10 CLJ 336 (342): 4 Ind Cas 459.

(b) When final?

——S. 109, O. 41 R. 23 — Remand order passed by Appellate Court finally deciding rights of parties — Subsidiary questions left to be worked out consequent upon final determination — Order, whether final within meaning of S. 109 (a).

Whether an order is a final order or not within S. 109(a), depends upon the effect of the order as made; if it finally disposes of the rights of the parties, the order is final, and where the Appellate Court has finally determined that the plaintiff has a good and subsisting cause of action, and all that remains is to work out subsidiary questions consequent upon the final determination of the defendant's liability, the order is in substance and effect a final order though the quantum of the rights or liability remains to be ascertained.

Where an Appellate Court passes an order that an award being void 'ab initio' as against certain persons is not binding on them and remands the case for investigation of their claims against a party applying for leave to appeal, the order is final order within the meaning of S. 109 (a), inasmuch as it finally disposes of the rights of those persons in respect of their claims against the opposite party. AIR (Vol 25) 1938 Rang 333: 1938 Rang LR 330: 177 Ind Cas 690 (DB).

——S. 109 — Order of remand — Appeal to Privy Council, competency of — 'Final order', meaning of.

An order is "final" if it determines the rights of the parties and is "interlocutory" if it relates to a matter of procedure only. An order of remand which finally determines the rights of the parties with reference to a cardinal issue in the case is, therefore, a final order and appealable to the Privy Council. AIR (Vol 18) 1931 Nag 24: 27 NLR 172: 130 Ind Cas 102 (DB).

——S. 109 — Order of remand deciding main point in the case — Appeal.

Ordinarily an order of remand is merely an interlocutory order; but, that does not finally decide the question, and if the order in question has the effect of deciding finally the cardinal point in the suit, it must be held to be a final order from which leave to appeal should be granted. Where the suit was an administration suit by a Mahomedan

widow, and the defence thereto was that she had been validly divorced.

Held, that the main point in dispute between the parties was whether the plaintiff had been legally divorced or not. The decision on that point in defendant's favour would put an end to the whole suit, and so the point was the cardinal point in the suit and an order of remand by the High Court, relating to the point must be held to be a final order within S. 109, C. P. C. AIR (Vol 12) 1925 Rang 147: 84 Ind Cas 519: 3 Bur LJ 248 (DB).

——S. 109 — Order of remand going to the root of the case — Appeal.

In execution of a mortgage decree the decree-holder applied to the Court below for the preparation of a decree for unsatisfied balance, under O. 34, R. 6. The judgment-debtors objected that the application for a decree under O. 34, R. 6 was statute barred. The execution Court upheld this contention and dismissed the application of the decree-holders. On appeal, the High Court held that the application was within time. The order of the Court below was therefore set aside and the execution Court was ordered to re-admit the application of the decree-holders on to its file of pending applications and to dispose of it according to law.

Held, that it is not certain that the order of the High Court might not fairly be described as a final order within S. 109. Certificate was granted especially since the remand order went to the root of the case. AIR (Vol 11) 1924 All 119: 79 Ind Cas 87: 45 All 741: 21 ALJ 686: 4 LRA (Civ) 577 (DB).

——S. 109 (a) — Final order — Remand.

Where an appellate court reverses the decree of the lower court which had dismissed the suit on the plea of limitation and remands it for re-trial the order of remand was a final order within S. 109 of the C. P. Code. Having regard to the nature of the questions involved in the appeal and the value of the subject matter of the suit, leave to appeal to His Majesty in Privy Council should not be refused. AIR (Vol 6) 1919 Oudh 256: 6 OLJ 270: 21 OC 336: 49 Ind Cas 520 (DB).

——S. 109 — Final order — Appeal to Privy Council — Decree — Execution proceedings — Order in — Remand.

A decision on a question relating to execution, discharge or satisfaction of a decree is a decree provided the judgment conclusively determines the rights of the parties. An order of remand can be appealed against to His Majesty in Council provided the order decides a cardinal point in the case. AIR (Vol 4) 1917 Pat 126: 1918 Pat HCC 81: 3 Pat LJ 339: 5 Pat LW 45: 45 Ind Cas 192 (DB).

——S. 109 Cl (a) — Remand order.

The term "final order" in S. 109, of C. P. C., 1908, denotes an order which finally decides any matter directly in issue in the case in respect of the rights of the parties. An order of remand may be a final order within the meaning of this section, if it decides in effect finally the cardinal point in the suit or an issue which goes to the foundation of the suit. Whether a particular order falls in this category must depend upon its contents.

When the fundamental question in the case was whether the suit was barred under S. 244 of the Code of 1882, the first court held that the suit was so barred but the lower appellate court took a contrary view and remanded the suit for trial on the facts, and this order was subsequently affirmed by the High Court. Held, that the order of the High Court was a final order within the meaning of S. 109 of the Code of 1908. (1907) 10 CLJ 336 (342): 13 Cal WN 451: 4 Ind Cas 116 (DB).

——S. 109 (S. 595, Old Code) — Privy Council appeal — Final "decree" — Cardinal issue — Order of remand — Privy Council, leave to appeal to.

An order of remand may be a "final decree" within the meaning of S. 595, C. P. C., if it disposes of the cardinal issue in the case. An order of remand on the ground that the lower Court is competent to try the case dismissed by it as non-triable is not with regard to a cardinal issue but is one merely relating to procedure and is, consequently, no final decree. An interlocutory order may be impeached before the Privy Council on appeal from the final decree. (1904) 1 ALJ 26 (28).

11. Right to appeal.

——Ss. 109, 110 — Effect of.

The effect of Ss. 109 and 110, Civil P. C., is to give a proposed appellant an appeal as of right in cases where the value of the subject-matter of the suit and of the appeal are over Rs. 10,000 and the decree appealed from is not one of affirmation. On the other hand, where the decree of the High Court is one of affirmance, there is no right of appeal unless the appeal involves some substantial question of law. AIR (Vol 128) 1941 Pat 269: 20 Pat 459: 7 BR 906: 22 PLT 736: 195 Ind Cas 344 (SB).

——S. 109 — Order passed by the High Court declining to call upon the Commissioner to state the case and refer it, is not a judgment "on a reference" within meaning of S. 66-A, sub-S. (2) Income Tax Act so as to allow a right of appeal to His Majesty in Council. AIR (Vol 21) 1934 All 974: 4 AWR 716: 57 All 306: (1934) ALJ 876: 151 Ind Cas 604 (DB).

——S. 109 — A person is not entitled as of right to appeal to the Privy Council from an order passed on the revisional side of the High Court, as under S. 109 (a) Civil P. C., an appeal lies only from any decree or final order passed in appeal by a High Court. AIR (Vol 21) 1934 All 198: (1934) ALJ 1166: 4 AWR 1598: 147 Ind Cas 1067 (DB).

——S. 109 (c) — Final order, meaning of — Order of remand deciding the proper forum of a suit.

An appeal lies to the Privy Council from an order of the High Court only if it amounts to a final order. The main test as to the finality of the order of remand is whether it finally decides the rights of the parties, and the decision can never be challenged again. In order to have finality it is not sufficient that a question of jurisdiction of the Court to entertain the suit has been decided. The finality must be a finality in relation to the suit itself, and if the suit is still a live suit in which the rights of the parties have still to be determined, there is yet no final order.

Where the High Court passed an order of remand under which an order of the Revenue Court returning the plaint for presentation to the Civil Court was set aside:

Held, that the question decided was merely one of the proper forum and did not involve an adjudication of the rights of the parties 'inter se', and as the suit had not been finally disposed of, no appeal lay to the Privy Council as of right.

Held, also that a mere substantial question of law arising between the parties which would have been sufficient if the case had fulfilled the requirements of S. 110 would obviously not be sufficient for purposes of S. 109 (c). AIR (Vol 21) 1934 All 58: (1934) ALJ 219: 3 AWR 339: 56 All 277: 147 Ind Cas 376 (DB).

——S. 109 — Ordinarily an appeal which 'prima facie' falls under S. 109 (a) cannot be converted into one under S. 109 (e) of the same Code, merely because it fails to reach the money value required by S. 110. AIR (Vol 20) 1933 Oudh 394 (2): 10 OWN 953: 147 Ind Cas 313 (DB).

——S. 109 — Where a petitioner is given a right of appeal to the Privy Council and he 'prima facie' satisfies the conditions prescribed by S. 109, the High Court should grant him leave to appeal. The chance of success of the appellant in the proposed appeal is immaterial. AIR (Vol 19) 1932 Mad 46: 35 MLW 206: 139 Ind Cas 54 (DB).

——S. 109 — Probate proceedings — Opposite party recognizing applicant to be proper party — Right of applicant to appeal.

The applicant filed a caveat in the Court of first instance and the opposite party did not apply to have caveat discharged. In other words the opposite party recognized that the applicant was a proper party to the probate proceedings. The opposite party appealed to High Court and he made the applicant party respondent to the appeal. The opposite party succeeding in appeal the applicant applied for leave to appeal to Privy Council.

Held, the High Court was not competent to enter upon the question whether the applicant had any 'locus standi' to maintain the application. AIR (Vol 12) 1925 Pat 712: 91 Ind Cas 768: 7 PLT 287: 1925 PHCC 337 (DB).

——S. 109 — S. 104 — If restricts S. 109.

The provisions in sub-s. 2 of S. 104 deal with internal appeals within the limits of British India. The application to file an award may be made in the Court of the Subordinate Judge. If any dispute arises, and the amount at stake is below a certain figure, the appeal would lie from him to the District Judge. If it were above that figure, it would lie to the High Court. The provision is intended to prevent any appeal beyond the District Judge where the sum in dispute is small. In this respect it runs parallel with S. 100, which limits second appeals from appellate decrees by District Judges. That section deals with decrees only while the decisions on arbitration questions are styled orders. There is therefore nothing in S. 104 to take away the general right of appealing to the Crown given by S. 109. AIR (Vol 11) 1924 PC 95: 83 Ind Cas 531: 1924 MWN 79: 7 NLJ 62: 34 MLT 62: 19 MLW 549: 20 NLR 33: 51 IA 72: 22 ALJ 386: 51 Cal 361: 26 Bom LR 586: 28 CWN 977: 5 LRPC 216: 46 MLJ 628.

——S. 109 — Defendant neither filing written statement, nor taking any part in defending the suit or the appeal to High Court.

A defendant who did not put in any written statement or take any part in the suit in the trial Court or take any part in the appeal to High Court and who chose to leave his interests entirely in the hands of the real defendants who applied and obtained a certificate for appeal to Privy Council, is not entitled to present a separate appeal to Privy Council. AIR (Vol 8) 1921 Pat 134: 60 Ind Cas 500: 2 PLT 173: 1921 PHCC 129 (DB).

——S. 109 — Final order — Meaning of — Temporary injunction — Refusal to issue.

The term "final order" denotes an order which finally decides any matter directly at issue in the case in respect of the rights of the parties. An order of the High Court, made in reversal of the order of the Court of First instance, refusing to issue a temporary injunction against the execution of a mortgage decree is not a final order and cannot be appealed against to the Privy Council. In a case where leave to appeal to His Majesty in Council is applied for on the ground of the case being a fit one for appeal no question of the order being final arises. AIR (Vol 2) 1915 Cal 624: 21 CLJ 281 : 28 Ind Cas 569 (DB).

——S. 109 and O. 9, R. 8 — Final order — Suit dismissed for default — Order setting it aside.

An order which deprives a party of the benefit of a final decree and directs the suit as against him to be tried again is a final order and is appealable to the Privy Council. AIR (Vol 2) 1915 Cal 610: 21 CLJ 279: 28 Ind Cas 567 (DB).

——S. 109, Cl. (a) — Final order — Privy Council appeal — Order rejecting an application for review, if appealable.

An order rejecting an application for review is not an order appealable under S. 109 (a). AIR (Vol 1) 1914 Oulh 41: 16 OC 264: 22 Ind Cas 259 (DB).

——S. 109 — Final order — Order of remand.

An order of remand merely remitting the case for retrial on the merits without deciding any question as to the right in dispute is not a final order and is not appealable. (1913) 18 CLJ 124: 21 Ind Cas 430 (DB).

——S. 109 — Final Order — Privy Council appeal — Order of High Court in revision, reversing order granting leave to sue in 'forma pauperis' if a final order — Appeal to Privy Council, if lies.

An order of the High Court in revision, which reverses the order of the lower court entitling a person to sue 'in forma pauperis' is a 'final order' and an appeal from it lies to the Privy Council, where the application is rejected on the ground that the plaint showed no cause of action and not on the ground that the petitioner is not a pauper. (1911) 13 CLJ 688: 15 CWN 879: 11 Ind Cas 65 (DB).

——Ss. 109, 110, O. 44, R. 3, (Ss. 595, 596, 600 Old Code) — Appeal to King in Council — Application to appeal — Necessary conditions — Sanction — Judicial discretion — Notice to respondent — Assent.

In order that an application for leave to appeal to His Majesty in Council may be allowed in the ordinary course two conditions must co-exist (1) that the appeal should involve either — directly or indirectly — a subject-matter of not less than Rs. 10,000 and (2) in cases of concurrent judgments the appeals should involve some substantial question of law. A special permission may be given by the High Court even in cases not involving a subject-matter of Rs. 10,000 if they involve any important matters not measurable by their pecuniary value. The discretion exercised by a High Court in granting sanction to appeal to the Privy Council is a judicial discretion which the Privy Council has power to review if necessary. The fact that the respondent did not oppose the application in the High Court to appeal to the Privy Council cannot confer a right of appeal where no such right is given by the Code. (1901) 5 CWN 193: 3 Bom LR 154: 23 A 227 (231, 232): 11 MLJ 56: 28 IA 11 (PC).

——S. 109 (S. 595 Old Code) — Final decree — Appeal to the Privy Council — Interlocutory order.

No appeal lies to the Privy Council on any interlocutory order passed by the High Court. (1900) 11 MLJ 65: 28 IA 28: 3 Bom LR 154: 5 CWN 153: 23 A 220 (227) (PC).

12. Substantial question of law.

——S. 109 (c) — Substantial question of law — If sufficient for granting of leave. See (1949) 1 MLJ 518 : AIR (Vol 36) 1949 Mad 741.

——Ss. 109, 110 — Substantial question of law — What is.

When a point of law has been virtually decided by the Judicial Committee of the Privy Council and it is not fairly open to argument that the position is otherwise and when there have been recent as well as long standing definite views of the High Courts on the question raised by the applicant, the point of law cannot be said to be "substantial" within the meaning of section 110,

Civil P. C., and consequently leave to appeal to Privy Council cannot be granted. AIR (Vol 30) 1943 Mad 581 : 56 MLW 531 : 1943 MWN 285 : (1943) 1 MLJ 375 : 212 Ind Cas 272 (DB).

——S. 109 (c) — It is well settled that in order to bring a case within the purview of S. 109 (c), Civil P. C., the proposed appeal to His Majesty in Council must raise a substantial question of law of general importance. In determining the question whether or not the question of law raised is one of general importance, the Court will take into consideration among other facts, the question whether or not the question raised is likely to arise in numerous cases. AIR (V 29) 1942 All 258 : (1942) ALJ 332 : ILR (1942) All 753 : 1942 AWR (HC) 176 : 202 Ind Cas 164 (DB).

——S. 109 (a) (c) — Leave, when can be given under Cl. (c) of S. 109.

A case should be certified to be a fit one for appeal to His Majesty in Council under Cl. (c) of S. 109 only when it is of considerable importance and the principle when finally decided by their Lordships of the Privy Council would be of benefit not only to the people who were directly involved in the litigation, but to the public at large. Where the question involved is not even a substantial question of law but a matter depending on the interpretation to be put on the previous judgment of the High Court which is said to be a bar in res judicata, it is not a question of law affecting a large body of the public. AIR (Vol 26) 1939 Oudh 224 : 1939 OWN 659 : 1939 AWR 92 : 14 Luck 675 : 182 Ind Cas 1007 (DB).

——S. 109 — Question whether alleged custom has been proved — Proof confined to certain documents — Interpretation of document not in question.

Where the real question was whether or not the custom set up by the defendant had been proved, though the proof of the alleged custom was practically confined to certain documents, and the question was not the interpretation of the documents, and the High Court, agreeing with the lower Court, held that the alleged custom was not proved:

Held, that there was no substantial question of law. AIR (Vol 26) 1939 Oudh 60 : 1938 AWR 129 : 1938 OWN 1132 : 178 Ind Cas 658 (DB).

——S. 109 (c) — Value of subject-matter in dispute assessed at Rs. 9,750 — Question of law involved — Leave under S. 109 (c), held should be granted.

It must always be kept in view that no real mischief can arise from not allowing a very wide construction of the section, because such cases, if worthy of being tried by a higher tribunal, can always be dealt with under sub-s. (c) of S. 109, Civil P. C.

Where it was not established to the satisfaction of the High Court that the value of the subject-matter in dispute on appeal to His Majesty in Council was upwards of Rs. 10,000 but the value of the subject-matter was assessed by the applicants as Rs. 9,750 in their appeal to the High Court and a question of law as involved:

Held, that leave should be granted under S. 109, sub-s. (c). AIR (Vol 25) 1938 Rang 415 : 178 Ind Cas 447 (DB).

——S. 109 — In special cases, where the points in dispute may not be measurable in money and yet there may be substantial questions of law of sufficient public or private importance, an appeal to the Privy Council may be justified under S. 109 (c). AIR (Vol 20) 1933 All 8 : 54 A 431 : 140 Ind Cas 418 (DB).

——S. 109 (c) — Questions involving matters of principle and of importance generally.

Where the questions sought to be agitated in an appeal to His Majesty in Council involve matters of principle which not only affect the parties to the litigation but are likely to concern a large class of persons who are or may be in the same situation as the plaintiffs and in whose case the decision of the Privy Council is sure to be a guiding precedent, it is a fit case for appeal to His Majesty in Council.

The subject-matter of the suit or of the appeal is not necessarily identical with the subject-matter in dispute between the parties. The subject-matter in dispute may not always be capable of being measured in terms of money, even in cases where the subject-matter of the suit or the appeal has an appreciable money-value.

Powers under this section should be sparingly used and in order to entitle a party to the benefit of this section, the case should involve, not only a question of law, but a question of general principle.

Where the questions sought to be raised in the Privy Council were chiefly as regards the extent to which the High Court was justified in interfering in second appeal with the concurrent findings of the lower Courts to the effect that the sales effected by a Hindu widow were not supported by legal necessity to sell the property at a price far below the market value:

Held, that the questions were substantial questions of law involving matters of principle and of importance to the Hindu community, and that leave to appeal to the Privy Council should be given. AIR (Vol 20) 1933 All 4 : 54 All 459 : 143 Ind Cas 312 (DB).

——S. 109 — Question of limitation — No serious divergence of judicial opinion.

Where the question involves was one of limitation and it appeared that there was no serious divergence of judicial opinion on the points, held, that it was not a fit case for appeal to the Privy Council under S. 109 (c) inasmuch as it did not involve a substantial question of law. (1930) 121 Ind Cas 506 : 31 Pun LR 17 (DB).

——S. 109 — Question of general importance — But the law already settled by Privy Council.

Although a matter may be of general importance, if the question of law involved in the appeal has been settled definitely by a judgment of the Privy Council the case should not be sent to Privy Council for a fresh decision on the same point. 1929 ALJ 241 : AIR (Vol 16) 1929 All 339 (DB).

——S. 109 — Community assessed for its income — Reference answered against the community — Leave to appeal to the Privy Council sought — Question whether constitution of the community amount to a trust or wakf.

A provision in S. 109, Cl. (c), C. P. Code, is clearly intended to meet special cases, such, for example, as those in which the point in dispute is not measurable by money, although it may be of great public or private importance.

The representative and head of the Atba-e-Malak Badar community residing at Mehdibagh Nagpur, was assessed with a sum of Rs. 2,000 as the income-tax payable on assessed income of the community for a certain year, and the reference, which was made under S. 66, Income-tax Act (XI of 1922), by the Commissioner of Income-tax Central Provinces, was answered against the community and leave to appeal to their Lordships of the Privy Council was sought.

Held, that leave should be granted as an all-important legal question was involved as to the nature of the constitution of the community and as to whether its constitution amounted to a trust or a wakf. 109 Ind Cas 129 : AIR (Vol 15) 1928 Nag 202 (DB).

——S. 109 — Dispute between riparian owners as to right to water.

The majority of cases between riparian owners as to the right to water in a channel gives rise to questions of law or at all events to mixed questions of law and fact. 106 Ind Cas 538 : AIR (Vol 15) 1928 Pat 191 (DB).

——S. 109 — In dealing with an application for leave to appeal to the Privy Council it is the duty of the High Court under the provisions of S. 110, C. P. Code, to determine where a point of law arises for discussion on appeal to His Majesty-in-Council whether there is any substance in that point. In order to entitle the appellant to appeal there must be not merely a question of law but a substantial question of law in the appeal which it is sought to prefer to His Majesty-in-Council. (1927) 106 Ind Cas 362 Pat (DB).

——S. 109 — Construction of document — Interesting parties alone.

The words "substantial question of law" mean question of general importance and they do not include the question of the construction of a document in which the parties alone are interested. (1926) 98 Ind Cas 164 : 3 OWN 841 (DB).

——S. 109 — Effect of S. 47, C. P. Code on a particular case.

The effect on a particular case of S. 47, C. P. Code, as debarring the plaintiff from proceeding by suit instead of in execution of a decree already obtained is not a question of law of general interest. The fact that leave has already been granted in respect of another case, involving the same question as the one in question, does not render it a fit case. 5 Ind Cas 583, Not Foll. 73 Ind Cas 217 : AIR (Vol 10) 1923 Mad 602 : 44 MLJ 424 (DB).

——S. 109 — Order dismissing appeal as barred and refusing to extend time under Limitation Act, S. 5.

An order dismissing an appeal as barred by limitation prescribed therefor after further refusing an application under S. 5 of the Limitation Act to admit the appeal after the prescribed time, is "passed on appeal" under S. 109.

Per Woodroffe, J. (Sanderson C. J., doubting). The appeal involves a substantial question of law. 33 CLJ 128 : 62 Ind Cas 216 : AIR (Vol 8) 1921 Cal 415 (DB).

——S. 109 and O. 45, R. 3 — Final order — "Otherwise fit" for appeal — Order of remand.

Where the High Court on appeal remanded the suit holding there was no fraud on the part of the mortgagee in the registration so as to render the suit on the mortgage liable to dismissal. Held, that the decision of the High Court was not a final order within S. 100, C. P. C. and an appeal did not lie to the Privy Council from that decision. But the question whether fraud of the mortgagor would vitiate registration and disentitle the mortgagee to enforce his mortgage was a substantial question of law and therefore the case was fit for appeal to the Privy Council. 18 ALJ 137 : 2 UPLR (HC) 99 : 54 Ind Cas 528 : AIR (Vol 6) 1919 All 34 (DB).

——S. 109 — Substantial question of law.

Position of holder of certificate under the Succession Certificate Act, 1889, is a "substantial question of law" to support grant of leave to appeal to the Privy Council. 38 All 188 : 14 ALJ 143 : 33 Ind Cas 345 : AIR (Vol 3) 1916 All 253 (DB).

——Ss. 109 (c) O. 45, Rr. 2, 3 and 8 — Substantial question of law — Appeal to Privy Council — Leave.

Leave to appeal to the Privy Council in cases below the appealable value, ought not to be granted unless a substantial question of law is involved. 18 MLT 366 : 2 LW 992 : (1915) MWN 916 : 31 Ind Cas 46 : AIR (Vol 3) 1916 Mad 686 (DB).

——S. 109 (c) — Substantial question of law — Provincial Insolvency Act, Ss. 15, 46 and 47.

A petition of insolvency was dismissed by the District Judge and an appeal to the High Court was dismissed under O. 41, R. 11. An application for leave to appeal to the Privy Council was granted as the assets and debts exceeded Rupees ten thousand and as the question of competency of the District Judge to dismiss the petition under S. 15 of the Act was a substantial question of law. (1913) 40 Cal 685 : 17 CLJ 547 : 17 CWN 752 : 19 Ind Cas 435 (DB).

——S. 110.

See also Civil P. C., S. 102 and O. 45, Rr. 3, 4 and 5.

1. **Affirming judgment.**
2. **Applicability and scope.**
3. **Connected appeals.**
4. **Connected suits.**
5. **Consent decree.**
6. **Construction.**
7. **Cross-appeals.**
8. **Evidence.**
9. **Grounds for granting leave.**
10. **Interpretation of law.**
11. **Limitation.**
12. **Substantial question of law.**
13. **Valuation.**

1. Affirming judgment.

(a) **Concurrent findings of facts.**
(b) **Dismissal.**
(c) **Interpretation.**
(d) **Meaning of.**
(e) **Variation of decree.**
(f) **What is not.**

(a) Concurrent findings of facts.

——S. 110 — Concurrent finding but for different reasons.

Where there are concurrent findings as to a question of fact, though for different reasons, it is nevertheless a finding of fact, and leave to appeal to the Privy Council will not be granted. 103 Ind Cas 31 : 1927 MWN 213 : 39 MLT 15 : AIR (Vol 14) 1927 Mad 443 : 53 MLJ 375 (DB).

——S. 110 — 'Affirming'.

The decision of the appellate Court affirms the decision of the Court below if the decree is affirmed, even though the appellate Court may have reached the same conclusion on different grounds. 70 Ind Cas 283 : 25 OC 277 : AIR (Vol 10) 1923 Oudh 49 (DB).

——S. 110 (S. 596 old Code) — Concurrent findings of facts — Application of principle of law to facts found, how far a reversal.

Where the first Court and the Court of first appeal had decided that a party had notice of a particular fact on a certain date (i. e., when he first became personally cognizant of it), but the Judicial Commissioner, on the same facts, held that a notice which had been received earlier by the party's mukhtar amounted to notice to himself on that earlier date.

Held, that the Judicial Commissioner had not reversed the concurrent findings of fact of these Courts, but had as he had jurisdiction to do merely applied a universal rule of law to the facts before him. (1903) 25 All 1 (17) : 4 Bom LR 832 : 6 Cal WN 849 : 29 IA 203 (PC).

——S. 110 (S. 596 old Code) — Leave.

Where there are concurrent findings of the lower Court and of the High Court upon questions of fact and no question of law arises a certificate granting leave to appeal to His Majesty in Council should not be granted. (1902) 5 CWN 455 : 28 C 190 (194) (DB).

(b) Dismissal.

——S. 110 — Affirming decision — Order dismissing appeal for default.

An order dismissing an appeal for default affirms the decision of the trial Court within the meaning of S. 110, C. P. Code. AIR (Vol 35) 1948 All 375 (DB).

——S. 110 — Affirming judgment — Rejection of application for admission of appeal as time-barred.

An order rejecting an application for admission of an appeal on the ground that it is barred by limitation, is not an order affirming the decision of the Court below within the meaning of S. 110, C. P. Code. (1948) ILR (1948) 2 Cal 202 (DB).

——S. 110 — Fresh right given by new Act — Trial Court and High Court differing whether petitioner is entitled to benefits of Act but High Court dismissing appeal.

Even though the judgment of the High Court is not based upon the same grounds on which the first Court's judgment was based, if the decree passed by the High Court is one of dismissal, it would be a case of affirmance of the decision of the lower Court. Where some issues alone were decided by the trial Court they being sufficient for the decision of that Court and the High Court calls for findings on other issues and the finding is not accepted by the High Court and the result is one of dismissal of the appeal, the result should follow. There is no difference between a decision in cases where no finding was given by the trial Court on certain issues and findings are called for but not accepted by the High Court and the decision of the trial Court is, in consequence, affirmed by the High Court, and the case where a fresh right is given by the Legislature and on the question whether the petitioner is entitled to the benefits of the Act the two Courts differ and the appeal is dismissed. AIR (Vol 31) 1944 Mad 269 : 1944 MWN 143 : (1944) 1 MLJ 193 : 57 MLW 158 : ILR (1944) Mad 890 : 218 Ind Cas 227 (DB).

——S. 110 — Dismissal of appeal for want of prosecution.

In the case of an order dismissing an appeal for want of prosecution, if it be considered, as it should be, that it was not an order passed on appeal, it can be said that that order did not affirm the decree of the Court below. But if it be considered to be an order passed on appeal, then that order must be considered to be one affirming the decree of the Court below. AIR (V 29) 1942 Oudh 362 : 1942 OWN 206 : 1942 AWR (CC) 156 : 199 Ind Cas 835 (DB).

——S. 110 — Where an order of the High Court dismisses an appeal on failure to furnish security for costs of the respondent, it has the effect of confirming the decision of the trial Court, the words in S. 110 being "affirms the decision of the Court" and not "affirms the decision of the Court on the merits." AIR (V 19) 1932 All 312 : (1932) ALJ 254 : 54 All 390 : 140 Ind Cas 125 (DB).

——S. 110 — Appeal and cross-objection — Dismissal of cross-objection.

Where an appeal is dismissed and a cross-objection preferred by the respondent is allowed, the decree of the Appellate Court is not one which affirms the decision of the Court below within the meaning of S. 110, and the person whose appeal has been dismissed has a right of appeal to the Privy Council under the said section. AIR (V 19) 1932 All 65 : 54 All 146 : (1931) ALJ 968 : 135 Ind Cas 234 (FB).

——S. 110 — Decision is based on different grounds.

Where the High Court in dismissing an appeal proceeded in some respects, on grounds different from those adopted by the Trial Court, the decision of the High Court amounts to an affirmation of the decree of the First Court within the meaning of S. 110. AIR (V 12) 1925 Oudh 219 : 83 Ind Cas 90 (DB).

——Ss. 110 and 149 — Affirming judgment — Dismissal for insufficiency of court-fee.

A decree of the High Court dismissing an appeal on account of insufficiency of Court-fee is one affirming the decree of the first Court within S. 110, C. P. C. A refusal by the High Court to extend time under S. 149, C. P. C. is not a question of law. AIR (V 6) 1919 Lah 65 : 2 UPLR (L) 27 : 16 PWR 1920 : 54 Ind Cas 400 (DB).

——S. 110 — Decree affirming — Appeal dismissed for default — Effect.

A decree of the High Court dismissing an appeal for default is a decree affirming the decision of the Court below within S. 110, C. P. C. AIR (V 2) 1915 All 327 : 13 ALJ 623 : 29 Ind Cas 469 (DB).

——S. 110 — Affirming Judgment — Dismissal of time-barred appeal.

Where the result of an appellate court's order lets the lower court's order stand unaltered, it is one affirming the decision within the meaning of S. 110. The order dismissing an appeal declining to exercise the discretionary power to excuse delay in preferring an appeal within time is one affirming the decision of the lower Court, and in order to certify such orders as fit for appeal to the Privy Council, a substantial question of law must be involved in the dismissal order itself. The legal question in such appeals to be determined will be whether they are right or wrong. The involving of a substantial question of law in the original decision in such cases is insufficient to hold that the legal question is involved in the appeal too. (1912) 23 MLJ 219 : 12 MLT 260 : (1912) MWN 962 : 16 Ind Cas 486 (DB).

(c) Interpretation.

——S. 110 — Decree in respect of 6 out of 11 items claimed valued at more than Rs. 10,000/- — Appeal by defendant against the decree and cross-objections by plaintiff in regard to 4 out of 5 items disallowed — Dismissal of appeal and allowing of cross-objections — Value of items allowed less than Rs. 10,000/- — No question of law involved — Leave to appeal to Privy Council by defendants as against the decree in regard to all the 10 items — Competency — Decree of High Court one of variation and not of affirmance — Certificate to issue as of right.

Plaintiff the reversioner to the estate of S claiming to be entitled to all the 11 items of property of S valued at Rs. 31,304/- sued for a declaration that they belonged to S and that a settlement deed executed by S's mother in respect of them was void. The trial Court gave the plain-

tiff a declaration in respect of 6 out of the 11 items of property claimed valued at Rs. 21,214/-.

The defendants appealed to the High Court and the plaintiff filed a memorandum of cross-objection in which he said that the subordinate Judge should have declared him to be entitled to 4 more of the disallowed 5 items. The value of these 4 items was Rs. 9,190/-. The appeal was dismissed while the cross-objections were allowed. The defendants wanted to appeal to the Privy Council in respect of all the 10 items. On an objection by the plaintiff that as there were concurrent findings so far as 6 items of the property are concerned, the defendants could only appeal with regard to the items awarded by the High Court in appeal and they in themselves did not fulfil the requirements of the C. P. Code with regard to value, there being no question of law involved.

Held, that the petitioners wished to challenge in the appeal to the Privy Council the validity of the plaintiff's claim with regard to 10 out of 11 items of property and the High Court's decree varied the decree in respect of four of the items. This being a decree of variation and not of affirmance, the petitioners are entitled as of right to a certificate under the provisions of S. 110, C. P. Code. 51 MLJ 295, overruled. AIR (V 33) 1946 Mad 539 : (1946) 2 MLJ 69 : ILR (1947) Mad 6 : 228 Ind Cas 420 : 59 LW 387 : 1946 MWN 483 (FB).

——S. 110 — Affirmance — Meaning of — Appeal to Privy Council on points on which there is agreement between High Court and lower Court — High Court at variance with lower Court on point raised in cross-objection — No argument against acceptance of cross-objection — Leave to appeal should not be given.

If there are several distinct controversies in the suit and the decision of the Court is embodied in one document, described as a decree, the adjudication with regard to each matter in controversy is a decree in itself. In that sense one document, described as a decree, may contain several adjudications on several distinct matters and may amount to several decrees. The decision of the suit, so far as it is the subject-matter of the proposed appeal to the Privy Council, is meant by the word "decision" in S. 110 and not the decision of the whole suit.

Hence it is unduly narrow interpretation of S. 110 that a decree which varies the total decisions of a Court below, in however small a manner, should automatically be a non-affirming decree and that the distinction should be made to depend on the question whether the variation is by means of a cross-objection or by means of a separate decree in a cross-appeal. The distinction is entirely technical and particularly so in view of the fact that by the provisions of O. 41, R. 22, Civil P. C., the hearing of the memorandum of cross-objections does not depend on the hearing of the appeal and may itself be heard as a substantive cross-appeal.

Where, therefore, the proposed appeal to the Privy Council is only against decisions on which the High Court is in complete agreement with the Court below, and on the point on which the High Court is at variance with the Court below there is in fact no appeal at all but a cross-objection and no argument is advanced or indeed can be advanced against the acceptance of the cross-objection, no leave to appeal to the Privy Council should be given. AIR (V 33) 1946 Nag 307 (DB).

——S. 110 — An order dismissing an appeal for abatement on failure to implead legal representative of deceased respondent is an order affirming the decision of the Court below within S. 110.

In order to affirm the decision of the Court below within the meaning of the section, it is sufficient for the Appellate Court to affirm the decree; it need not also affirm the grounds of fact upon which the judgment was passed. AIR (V 20) 1933 Lah 690 : 14 Lah 609 : 34 PLR 946 : 144 Ind Cas 18 (DB).

——S. 110 — Tests.

The question whether the judgment of the High Court was a judgment of affirmance for purposes of appeal to the Privy Council, may be seen by considering the position of the respondent. It cannot depend on whether the appellant is the plaintiff or the defendant; it depends upon whether the judgment is one affirming the judgment of the lower Court. The criterion of the right of appeal does not depend upon whether the effect of the modification is in favour of the appellant or adds to his detriment. AIR (V 20) 1933 Pat 262 : 144 Ind Cas 320 (1) (DB).

——S. 110 — Where the judgment of the High Court affirms the decision of the Court below, no leave to appeal to the Privy Council can be granted unless there is a substantial question of law involved or it is shown that the case is otherwise fit to be certified even assuming that the value of the subject-matter of the suit exceeds Rs. 10,000/-. (1932) 135 Ind Cas 510 : 32 PLR 860.

——S. 110 and O. 45, R. 3 — Substantial question of law — Question of fact.

No certificate can be granted to appeal to P. C. when the Chief Court affirms the decision of the court next below solely on facts as there was no substantial question of law and the case was not "otherwise fit" for appeal to P. C. AIR (V 3) 1916 Lah 87 : 64 PR 1916 : 15 PLR 1917 : 35 Ind Cas 583 (DB).

——S. 110 (S. 596, old Code) — "Decision", meaning of — Affirmance of decision of lower Court — Reasoning of the two courts different — Appealability of the appellate decision.

The word "decision" in S. 596, C. P. C., does not mean the same as judgment but means decision of the suit by the Court. Where the appellate Court confirms the decision of the first Court, but on different grounds and for different reasons, there is no appeal to the Privy Council under S. 596. (1902) 5 Bom LR 100 : 25 A 109 (114) : 30 IA 35 (PC).

(d) Meaning of.

——S. 110 — Affirmance — What amounts to, illustrated.

Where the decree of the High Court is one of affirmation except as regards a variation made in the lower Court's decree with the consent of persons trying to appeal to the Privy Council, those persons must show that some substantial question of law is involved. AIR (V 33) 1946 Pat 19 : 24 Pat 637 : 12 BR 279 : 222 Ind Cas 55 (DB).

——S. 110 — What is.

Where a decree or order partly maintains and partly reverses the decision of the Court immediately below, it will be deemed to be one of affirmance for purposes of S. 110, Civil P. C., when the subject-matter of appeal to the Privy Council relates to that part of the decree or order which affirms the decision of the Court below. AIR (V 31) 1944 Lah 458 : ILR (1945) Lah 242 : 218 Ind Cas 1 (FB).

——S. 110 — Suit under S. 92, Civil P. C. — High Court in second appeal upholding concurrent findings of lower Courts as to nature of trust — Variation of lower Court's decision being merely due to

voluntary relinquishment of relief sought for before and granted by lower Court.

The plaintiff brought a suit under S. 92 alleging that the trust in respect of the suit property was a public trust and prayed for the removal of the defendant from the trusteeship of the aforesaid trust and for accounts from the defendant in respect of the trust property for a certain period. The main contest raged round the question whether the property in dispute was a public trust or not. The trial Court came to the conclusion that it was a public trust and consequently, granted a decree to the plaintiff removing the defendant from the trusteeship of the property described in the plaint and appointing a new trustee for the management thereof. It also made a preliminary decree directing accounts to be taken in respect of the income and expenditure of the land in suit for a certain period.

Against this decree the defendant preferred an appeal to the District Judge but he too agreed with the Court below and dismissed the appeal. The defendant then presented an appeal to the High Court before which the plaintiffs-respondents, with a view to cut short the controversy, abandoned their relief in respect of accounts, but contested the appeal on the remaining issue. The High Court maintained the concurrent findings of the Courts below as regards the nature of the property in dispute and accordingly dismissed the appeal so far as that matter was concerned. But inasmuch as the relief as to accounts had been abandoned by the respondents themselves, the decree that was drawn up in the High Court varied the decree of the Court below to that extent. In the application by the unsuccessful appellant for leave to appeal to His Majesty in Council under S. 110, it was found that the value of the subject-matter of the suit as well as that of the subject-matter in dispute on appeal to His Majesty in Council was far in excess of Rs. 10,000/-.

It was argued for the applicant that inasmuch as the decree as passed by the Courts below, so far as it related to rendition of accounts, had actually been varied by the decree of the High Court, he was entitled as of right to appeal to His Majesty in Council; despite the fact that the variation was out and out in his favour and he had no grievance whatever in that respect. The question for determination therefore, was whether the decree made by the High Court was one of affirmance or of variance:

Held, that as the respondents had of their own accord withdrawn their relief in respect of accounts, any variation that followed in the decree of the High Court was not the result of an adjudication by the High Court but of the parties' own action. It was as if that part of the case had been entirely removed from the adjudication of the High Court and consequently it ceased to have any concern with it whatever. So far as the High Court had occasion to deal with the matter in controversy before it, the decree of the Court below had been affirmed and any variation that was introduced in it was merely because the parties had themselves so willed. The decree of the High Court was, therefore, to all intents and purposes, a decree of affirmance within the meaning of S. 100 and inasmuch as the applicant had conceded that no substantial question of law was involved as regards that part of the decree, no appeal lay as of right to His Majesty in Council. AIR (V 31) 1944 Lah 329 : ILR (1945) Lah 156 : 216 Ind Cas 33 (FB).

——S. 110 — Decree of High Court, held one of affirmance of that of lower Court.

The sale of certain property to the defendant was subject to a condition that a sum of Rs. 300/- should be paid every year for the performance of the trust. The suit for recovery of possession of the aforesaid properties by the trustee was dismissed by the trial Court. The High Court on appeal held that the plaintiff was not entitled to recover possession. As regards the undertaking in the sale-deed to pay a sum of Rs. 300/- per year for the performance of the trust, an argument was advanced that at least that sum was payable by the respondent. It was urged in reply that even this claim could not be enforced but the respondent offered that he would pay into Court a sum which would fetch Rs. 300/- per year for the benefit of the trust. This was as a matter of concession and was not a decision of the High Court. The High Court, therefore, directed the respondent to pay a sum of Rs. 12,000/- into Court and gave certain directions regarding that sum. In the application by the plaintiff for leave to appeal to His Majesty in Council:

Held, that as regards the claim for Rs. 300/-, it was a distinct matter and with regard to that matter the petitioner's claim was fully satisfied and that was not the subject-matter of the proposed appeal to His Majesty in Council. As regards the claim for recovery of possession which was the subject-matter of the appeal to His Majesty in Council, the decree of the High Court was one of affirmance of the decision of the lower Court within the meaning of S. 110. AIR (V 30) 1943 Mad 67 : 1942 MWN 565 : 55 MLW 589 : (1942) 2 MLJ 350 : 208 Ind Cas 65 (DB).

——S. 110 — Decree, held of affirmance.

Where the Chief Court in appeal varies the decision of the lower Court only by rectifying certain obvious errors committed by that Court, which errors were not disputed by the party affected, the decision of the Chief Court notwithstanding the variation is one of affirmance and no leave can be granted to appeal to the Privy Council unless the question involved is a substantial question of law. AIR (V 30) 1943 Oudh 262 : 1943 OWN 41 : 205 Ind Cas 236.

——S. 110 — Chief Court altering only rate of interest in accordance with S. 27, U. P. Encumbered Estates Act (XXV of 1934).

Whether a decree is one of affirmance or not, must depend upon the facts and circumstances of each case.

Where the decision of the lower Court upon all the points raised by the applicant in the appeal before the Chief Court was upheld, and the only modification that the Chief Court made was that it altered the rate of 'pendente lite' and future interest from 4-1/2 per cent. per annum awarded by the lower Court to 4-1/4 per cent. per annum because the rate of interest awarded by the Special Judge was in contravention of the provisions of S. 27 of the U. P. Encum. Estates Act and the mistake was the result of a sheer oversight, the decree passed by the Chief Court must be deemed to have affirmed the decree of the Special Judge. AIR (V 29) 1942 Oudh 478 : 1942 OWN 527 : 1942 AWR (CC) 324 (2) : 18 Luck 457 : 202 Ind Cas 767 (DB).

——S. 110 — Appellate decree modifying lower Court's decree on single point not disputed in either Court.

The Appellate Court varied the lower Court's decree completely in favour of the applicant for leave to appeal to the Privy Council, only by modifying it on a single point which was in dispute neither in the lower Court nor in the Appellate Court:

Held, that the appellate decree was one of affirmance, though it was not a decree merely dismissing appeal and that no certificate under S. 110, Civil P. C., could be granted to the applicant as he had no right to litigate upon other points upon which the Court had been in agreement, unless he showed some substantial question of law. AIR (V 24) 1937 Lah 712 : ILR (1937) Lah 268 : 39 PLR 877 : 172 Ind Cas 803 (DB).

——S. 110 — Judgment not one of affirmance — Substantial question of law must exist — High Court modifying decree on one point but affirming it on another — Judgment, if one of affirmance.

In an application for leave to appeal to the Privy Council, if the judgment of the High Court is one of affirmance, it is necessary for the applicant to show that there was some substantial question of law within the meaning of S. 110, Civil P. C When the Appellate Court modifes the original decree upon a single point and that completely in the applicant's favour so that he has no further grievance in that matter, he cannot, because of that modification, have a right to an appeal on other points on which the Courts have concurred without showing a substantial question of law.

Where the amount is a question in dispute, the fact that the Courts differ and that the higher Court differs in favour of the applicant does not mean that the decision is one of affirmance. The fact that the applicant has succeeded and succeeded altogether, so that he has no further grievance in that matter, does not mean that he can without showing a substantial question of law, have a right to litigate upon other points upon which both the Courts have been in agreement. AIR (V 23) 1936 Pat 553 : 2 BR 562 : 17 PLT 602 : 15 Pat 637 : (1936) PWN 587 : 163 Ind Cas 139 (DB).

——S. 110 — High Court arriving at same conclusion as lower Court but disagreeing with its opinion on certain points.

An appeal lies from the decree and not from the judgment which is only the expression of the reason of the Court for making that decree. It is open to an Appellate Court to affirm a decree on its own reasoning and in disagreement with the reasoning of the trial Court. Where the High Court arrives at the same conclusions as the lower Court in a case, though it disagrees with the opinion of the lower Court on certain points, the decree is one of affirmance. The reasons in the judgment are not part of the order. AIR (V 20) 1933 Pat 703 : 15 PLT 90 : 146 Ind Cas 744 (FB).

——S. 110 — Trifling account adjustments made — Judgment agreeing with findings of the Court below — Leave to appeal.

Where some trifling account adjustments are made in the matter of interest and the like, but the judgment on all essential points agrees with the findings of the Court below on the merits, the judgment must be treated as an affirming one. AIR (V 16) 1929 Nag 85 : 110 Ind Cas 855.

——S. 110 — Affirmance of lower Court's decree.

In order to affirm the decision of the Court below within the meaning of the section it is sufficient for the appellate Court to affirm the decree. AIR (V 14) 1927 Oudh 535 : 102 Ind Cas 433 : 4 OWN 613 (DB).

——S. 110 — Different findings but decree confirmed.

When the High Court maintains the decree of the lower Court, it affirms the decision of the lower Court even though the two Courts differ in their findings on certain issues. (1926) 92 Ind Cas 479 : 26 PLR 614 (DB).

——S. 110 — Decree affirmed on different grounds.

It is sufficient for the purpose of S. 110 in order to "affirm the decision of the Court below" to affirm the decree, though the affirmation may not proceed on the grounds on which his judgment was passed. AIR (V 8) 1921 Oudh 111 : 63 Ind Cas 292 : 24 OC 164 (DB).

——S. 110 — Reversing Judgment — Court immediately below — Meaning of — Letters Patent, Cls. 15 and 36.

A reversal by the High Court in an appeal under cl. 15 of the judgment of a single judge of the High Court, setting aside the decree of a lower appellate court has the effect of affirming the decision of the latter court, i.e., the court immediately below within the meaning of S. 110 of the C. P. C. AIR (V 3) 1916 Cal 973 : 43 Cal 90 : 33 Ind Cas 745 (DB).

——S. 110 and O. 45, R. 2 — Affirming judgment.

Where the Chief Court affirms in part a decree of the District Judge, a petition for leave to appeal to the King in Council cannot be granted, as the decree of the Chief Court is a decree of "affirmance" within the meaning of S. 110 of the Code. AIR (V 2) 1915 Lah 113 : 22 PR 1915 : 19 PWR 1915 : 66 PLR 1915 : 26 Ind Cas 402 (DB).

——S. 110 (S. 596, old Code) — Last clause — "Affirms" — Privy Council, leave to appeal to — Decree of affirmance or reversal — Valuation.

In a Land Acquisition case the applicant claimed a sum of Rs. 77,000/- and odd as the value of the land taken; the Collector assessed the value at Rs. 22,287; the Judge on reference to him upheld the Collector's award. The applicant then preferred an appeal to the High Court valuing the appeal at Rs. 49,000/- and odd being the difference between the Collector's award and the amount claimed. The High Court partially decreed the appeal by giving the petitioner an additional sum of about Rs. 7,000/-. The appellant then applied for leave to appeal to the Privy Council:

Held, that the decree of the High Court was properly a decree of affirmance of the first Court's decree as regards the subject-matter of the proposed appeal, and as there was no question of law the application ought to be refused. (1904) 8 CWN 294 (295, 296) (FB).

(e) Variation of decree.

(i) General.
(ii) Costs.
(iii) Mortgage decree.

(i) General.

——S. 110 — Value of suit and appeal exceeding Rs. 10,000 — Appeal allowed in part — Leave to appeal — If to be granted.

Where the value of the suit and the value of the appeal exceeds Rs. 10,000 and the appeal is allowed in part & a portion of the decree of the trial Court is vacated, the decree is not a decree of affirmance but is a decree varying the decree of the Court below, and the appellant is entitled as of right to a certificate granting leave to appeal under S. 110, C. P. Code. AIR (Vol 37) 1950 Cal 341 (DB).

——S. 110 — Affirming decree — Decree of High Court varying decree of trial Court but affirming it so far as proposed appellant is concerned.

Where a decree of the High Court varies the decree of the trial Court but affirms it so far as it concerns the proposed appellant, the decree is not a decree of affirmance and the proposed appellant can appeal to the Federal Court as of right. (1950) 54 CWN 538 (DB).

——S. 110 — Appealability — Test — Suit for ejectment and damages — Decree for ejectment and damages at a particular rate — High Court confirming decree for ejectment and modifying the quantum of damages in favour of the defendants — Subject-matter of suit and appeal more than Rs. 10,000 in value — Leave to appeal to Federal Court by the defendants, if can be granted.

A suit for ejectment of the defendants from a picture house was decreed & a decree for damages was also passed in favour of the plaintiffs at the rate of Rs. 200 a day from a particular date to the date when defendants might hand over possession. The High Court agreed with the trial Court as regards ejectment but as regards the quantum of damages the decree of the lower Court was modified in favour of the defendants in certain ways. Both the subject-matter of the suit and appeal exceeded Rs. 10,000. On the question whether the defendants were entitled to appeal to the Federal Court as the decree was not one of affirmance in its entirety of the decree of the trial Court.

Held, leave to appeal to the Federal Court should be granted.

Per Horwill, J.— It would be in accord with the principles accepted and followed in (1946) 2 MLJ 465: ILR (1947) Mad 744, to grant leave to appeal on the ground that decree of the High Court is not one of affirmance on the question of damages.

Per Raghava Rao, J. — If 'quoad' the party seeking leave to appeal, the decree sought to be appealed against is not one of wholesale affirmance, it does not matter in what particular or to what extent the variation has taken place or whether the variation wholly or to the extent to which it has gone is in favour of the party seeking to appeal or against him. In such a case, so long as the statutory requirements of value of the subject-matter of the suit as well as of the proposed appeal, inclusive of course even of portions on which there have been concurrent findings against the party seeking leave to appeal, stands satisfied, the party is entitled, without showing that a substantial question of law is involved in the proposed appeal, to a certificate which cannot be limited by the exclusion of such portions of the subject-matter from its ambit. (1946) 2 MLJ 465: ILR (1947) Mad 744, commented upon.

Even on the narrower view adopted by this Court in (1946) 2 MLJ 465: ILR (1947) Mad 744, the applicant is entitled to the certificate asked for. AIR (Vol 37) 1950 Mad 124: (1949) 2 MLJ 343: ILR (1950) Mad 381: 63 LW 1089 (DB).

——S. 110 — "Affirming decree" — Variation by High Court in favour of party applying for leave to appeal — Effect of — Suit for partition by adopted son — Adoption held invalid and suit dismissed but properties held to be joint family properties — High Court in appeal upholding adoption but holding only small part of property as joint family property — Decree — If one of affirmance.

Even though the decree of the High Court varies the decision of the lower Court, it does not necessarily follow that it cannot be regarded as a decree of affirmance for purposes of S. 110, C. P. Code.

In a suit for partition of joint family properties claiming a share therein as an adopted son and for possession of that share, the trial Court, while holding that all the properties in suit were joint family properties dismissed the suit on the ground that the adoption, though true, was invalid. On appeal to the High Court, that Court set aside the decree of the trial Court and held that the adoption was true and valid: it further held that out of properties mentioned in the suit only a house and two items of 'kulkaran watan' lands were joint family properties and the plaintiff's claim was allowed in respect of these items, the claim in respect of the other items being rejected. The plaintiff applied for leave to appeal to the Privy Council.

Held, that the variation in the decision of the Court below was in favour of the applicant, and the decree was to be regarded as one of affirmance, and hence it was necessary for the applicant to show that the appeal involved a substantial question of law. AIR (Vol 36) 1949 Bom 164: 51 Bom LR 168: ILR (1948) Bom 381 (DB).

——S. 110 — Affirming decree — Test — Decree partly reversed and partly affirmed — Scope of appeal.

In order to determine whether a decree is one of affirmance or not within the meaning of S. 110, C. P. Code, the true test is whether the decision of the Court below as a whole has been affirmed by the High Court and not whether the decision on the point or points left in dispute have been affirmed by the High Court. Where the decision has been partly reversed and partly affirmed by the High Court, an appeal to the Privy Council may be preferred against the whole decree and need not be confined to the points on which it has been reversed. AIR (Vol 35) 1948 Lah 1: 49 PLR 51 (DB).

——S. 110 — Affirming decree — Decree of High Court partly maintaining decision of court below and partly reversing it — Appeal to the Privy Council confined to part affirmed.

For the purposes of S. 100, C. P. Code, a decree of the High Court which partly maintains the decision of the court below & partly reverses it cannot be deemed to be one of affirmance although the subject-matter of the appeal to the Privy Council is confined only to that part of the decree which affirms the decision of the Court below. AIR (Vol 33) 1946 All 262: ILR (1946) All 328: 222 Ind Cas 240: 1946 ALW (HC) 152: 1946 OWN (HC) 144: 1946 AWR (HC) 243 (DB).

——S. 110 — Affirming decree — Appeal dismissed — Variation in final decree due to success of cross-objection without contest on one point.

A variation in the final decree of the High Court due to the success of the cross-objection without contest on one particular point when the appeal itself has been dismissed, does not take the decree out of the category of an affirming decree. Where the proposed appeal is only against the decisions on which the High Court is in complete agreement with the Court below, and on the point on which the High Court is at variance with the Court below there is in fact no appeal at all, leave to appeal to Privy Council should not be given. AIR (Vol 33) 1946 Nag 307: ILR (1946) Nag 609: 1946 NLJ 278 (DB).

——S. 110 — Decree & 'judgment', distinction — One decree comprising several decisions in respect of several subject-matters — Decree, if should be regarded as one and entire.

In connection with the High Court, the words used in S. 110, are "the decree" whereas in regard to the lower Court, the expression is "the decisions". These two expressions do not mean exactly the same thing. It is reasonable to hold that the Legislature employed two different expressions to convey two different ideas. A single decree may comprise several decisions and each decision may relate to a distinct subject-matter. The oneness of the decree does not preclude the question being considered, whether it comprised one decision or several decisions when there are several decisions in respect of several subject-matters, the decree embodying those decisions should not, by some fiction, be regarded as one and entire.

Hence, where the High Court excluded two items out of the five, held by the lower Court to belong to the deity, on the ground that they were not comprised in the grant, the High Court's decree must be treated as having affirmed the lower Court's decision in regard to three items and reversed it in regard to the remaining two. AIR (Vol 25) 1938 Mad 631: 47 MLW 393: (1938) MWN 298: (1938) 1 MLJ 487: 181 Ind Cas 988.

——S. 110 — Modification of lower Court's decree in favour of applicant — Decree partially confirmed.

It would be anomalous to grant leave to appeal to the applicant on matters in which the High Court has concurred with the trial Court on the mere ground that on other matters the High Court has modified the decree of the trial Court but in favour of the applicant. AIR (Vol 24) 1937 Lah 761: 39 PLR 992: 174 Ind Cas 893 (DB).

——S. 110 — Decree modified against some but confirmed against others by Appellate Court — Decree, if one of affirmance or reversal — Divisibility of decree into different parts.

The right way of construing S. 110 of the Civil P. C. is to read the words 'decree or final order' in cl. 3 in conjunction with and treat them as relating to 'the subject-matter' mentioned in cl. 1.

Where, in a suit against A and B, the trial Court passes a decree against A and dismisses the suit against B and the Appellate Court modifies the decree against A and confirms the decree dismissing the suit against B, the decree of the Appellate Court cannot be regarded as a decree varying the decree of the first Court so as to confer a right on the plaintiff to appeal to the Privy Council so far as the decree against B is concerned. There is no reason why when there are several decisions in respect of several subject-matters or parties, the decree embodying those decisions should by some fiction be regarded as one and entire. AIR (Vol 23) 1936 Mad 881: 44 MLW 533: (1936) MWN 1051: 71 MLJ 580: ILR (1937) Mad 121: 166 Ind Cas 251 (DB).

——S. 110 — Decree modified on single point — Right of appeal, if arises on other points simply on such modification.

When the Appellate Court modifies the original decree upon a single point and that completely in the applicant's favour so that he has no further grievance in that matter, he cannot, because of that modification, have a right to an appeal to the Privy Council on other points on which the Courts have concurred, without showing a substantial question of law. AIR (Vol 22) 1935 Cal 146: 38 CWN 1174: 62 Cal 257: 154 Ind Cas 1072 (DB).

——S. 110 — Decree on award not in conformity with award as part unenforceable due to lapse of time being omitted — On appeal decree made in conformity with award — No substantial alteration — Decree one of affirmance in substance — Leave to appeal.

The dispute between the parties in a suit was referred to arbitration and the arbitrator gave an award to the effect that the defendant should within time fixed by the arbitrator, give possession of certain property to the plaintiff and that in default he should pay Rs. 13,000 to him. The defendant filed objections to the award which were all disallowed by trial Court and the award was ordered to be filed. But the Judge being of opinion that as at the time when he passed the order filing the award the date fixed by the arbitrator for delivering possession of the property had expired, considered that it was necessary to incorporate in the decree a direction relating to the delivery of possession and therefore he granted a decree to the plaintiff for Rs. 13,000. The defendant preferred an appeal to the High Court and that appeal was accepted partly inasmuch as the decree was modified so as to bring it in conformity with the award. The defendant thereupon applied for leave to appeal to His Majesty in Council.

Held, that the alteration made in the decree by the High Court was not of substantial nature; on the contrary it being in substance a decree of affirmance and also as there was no question of law involved leave could not be granted. AIR (Vol 27) 1930 Lah 102: 10 Lah 688: 122 Ind Cas 90: 30 PLR 722 (DB).

——S. 110 — Decree of High Court partly affirming and partly varying decree of lower Court — Appeal against item of Rs. 18,000 for appeal on which leave was asked, affirmed — No question of law.

Court of the first instance decreed plaintiff's claim in part. On appeal the High Court modified the decree by finding a sum of Rs. 2,488 due by the defendants to the plaintiff. In both Courts an item of Rs. 18,000 referred to as a havala item was refused. Plaintiff moved the High Court for leave to appeal to the Privy Council as regards that item. There was no question of law involved.

Held, that under the circumstances on true construction of S. 110 it is necessary that as the decree appealed from affirmed the decision of the Court below. On this item, the appeal must involved some substantial question of law before it can be admitted. AIR (Vol 16) 1929 Bom 359: 119 Ind Cas 771: 31 Bom LR 619 (DB).

——S. 110 — Suit on mortgage-deed — Claim decreed but interest after institution of suit disallowed — Appeal by mortgagor — Cross-appeal against disallowed interest by mortgagee — Decree as to interest modified in favour of mortgagee — Leave to appeal.

In a suit on mortgage-deed, both parties were aggrieved by the direction of the lower Court as to interest and both of them took objections to the directions regarding interest which affected them respectively by appeal and cross-appeal. The appellate Court disposed of the objections of both the parties by a single decree modifying the decree of the lower Court in favour of the mortgagee and to the prejudice of the mortgagor appellants. The order read "It is ordered & decreed that this appeal be and hereby dismissed with costs and the cross-appeal be allowed. The decree of the Court below modified to this extent that interest at the bond rate shall run on principal up to the expiry of the period of grace." In the lower Court interest up to the date of suit was allowed.

Held, that the decree of the lower Court as to interest was not affirmed but modified and the decree of the appellate Court from which an appeal to His Majesty in Council is sought is consequently a decree not of affirmance but of reversal on the question of interest involved in litigation. AIR (Vol 16) 1929 Pat 561: 117 Ind Cas 193 (DB).

——S. 110 — Substantial alteration — Incidental or unsubstantial alteration — Test.

A decree which substantially alters the decree of the Court below cannot be said to be decree affirming that decision. In cases where the variation is of unsubstantial nature or of incidental character as in the case of the costs the decree passed is a decree of affirmance. Limitations have been placed upon the principle that in construing a decree as to whether it is one of affirmance or of reversal or variation one should look to the substance of the decree and see what is the subject-matter of the appeal to His Majesty in Council. AIR (Vol 16) 1929 Pat 561: 117 Ind Cas 193 (DB).

——S. 110 — Part of decree affirmed and part varied — Value of appeal.

Where decision of the appellate Court affirms part of the decree of the lower Court and is at variance as to a part, appeal is not limited to part at variance only. AIR (Vol 16) 1929 Pat 561: 117 Ind Cas 193 (DB).

——**S. 110 — Suit for setting aside wakf — Allegations that deed was executed under undue influence that wakf was illusory and that there was no transmutation of possession and that certain house belonged wakf — Court of first instance deciding all questions in plaintiff's favour and decreeing suit and also granting decree for mesne profits against the mutwali — On appeal High Court holding that house did not belong to wakf and that mutwali was entitled to remain in possession until matter was determined by Court and setting aside decree as to mesne profits — On main question Court affirming decree of trial Court but setting aside finding as to undue influence and on question of deed being illusory — Court agreeing that there was no transfer of possession as required by law — Judgment if one of affirmance.**

A suit to set aside a wakf deed executed by one B was brought by an heir of B. It was alleged that the deed was executed under the undue influence of one A and Z, and secondly that the deed was wholly illusory and had no substance in point of fact, and thirdly that there was never such transmutation of possession as required by law. It was also claimed that a certain house did not belong to Z but to B. The Court of first instance decided all points in favour of the plaintiff and gave him a decree substantially as claimed by him. The Court also gave him a decree for mesne profits against A who claimed to have succeeded to the office of mutwali on the death of B. The High Court on appeal by A and Z held that the house in question belonged to Z. To this extent the High Court varied the decree of the Court of first instance.

The High Court also held that A was entitled until the matter was determined by a Court of justice to remain in possession of property and administer the estate in accordance with the strict terms of the deed. In this view the High Court set aside the decree for mesne profits passed against A. To this extent also this Court varied the decree passed by the Court of first instance. On the main question, however, the Court affirmed the decree of the Court of first instance; but in doing so it set aside the findings of the Court of first instance both on the question of undue influence and on the question whether the wakf deed was also illusory. It agreed, however, with the Court of first instance in holding that there was not such transfer of possession as the law required and that consequently the wakf deed could not be given effect to.

Held, that the decree appealed from could not be regarded as having affirmed the decision of the Court immediately below. AIR (Vol 15) 1928 Pat 609: 116 Ind Cas 541: 9 PLT 731 (DB).

——**S. 110 — Decree varied partly — Application for leave only from that part affirming the lower Court's decree.**

Where some variation in the decree was effected by the Appellate Court and the applicants desire to appeal against the decision in so far as the Court affirmed the decision of the lower Court.

Held, that the decision of the Appellate Court is one affirming the decision of the lower Court within S. 110. AIR (Vol 13) 1926 Nag 245: 91 Ind Cas 200 (DB).

——**S. 110 — Affirmance with variation.**

Neither a variation made on the merits in petitioner's favour nor a variation as to costs not touching the merits of the case against the appellant can make the decree in appeal any the less an affirming one. AIR (Vol 10) 1923 Mad 30: 16 MLW 262: 30 MLT 337 (DB).

——**S. 110 — Modification in favour of applicant — Other portions concurrent — Decree if an affirming one.**

Where the modification is in favour of the applicant and does not afford him a right to appeal and there is in substance an adverse concurrent decision of both of the Courts as regards the portion of the claims which is decided against him the decree of the High Court is an affirming decree. AIR (Vol 9) 1922 All 243: 66 Ind Cas 721 (DB).

——**S. 110 — Lower Court decree affirmed with slight modification as to rate of interest — Decree, if one of affirmance — Leave to appeal.**

When the High Court, in a mortgage-suit, affirmed the decree of the Lower Court as to the substance, but merely changed the rate of interest, on application for leave to appeal to His Majesty.

Held, the modification of the decree as to the rate of interest was a modification in favour of the applicant as to which he could not appeal. Therefore his application for leave to appeal related to the portion prejudicial to him but which was a decree affirming the decision of the Court below and not modifying it. Looking to the substance, the subject matter of the appeal to His Majesty in Council, was that portion of the decree in respect of which the decree of the High Court was a decree in affirmance of decree of the Court below. Therefore the applicant was not entitled as of right to appeal to His Majesty in Council. AIR (Vol 9) 1922 All 89: 64 Ind Cas 916: 44 All 200: 20 ALJ 9 (DB).

——**S. 110 — High Court's decree confirming finding as to defendant's liability but slightly altering amount due — Decree if one of affirmance.**

In a suit on hundis, both the Courts concurred in holding that the person who signed the hundis for defendant was authorized to do so & thus the one defence raised by the defendant was decided against him by both Courts. But the High Court modified the decree by deducting a certain amount due to an admitted mistake in the decree and by allowing to plaintiff interest at a higher rate. The plaintiff thus obtained in the result a decree for a slightly higher amount than that decreed by the lower Court.

Held, that the lower Court's decree was modified by that of the High Court and so the latter was not a decree of affirmance.

Where the decree of the highest Court in India does not affirm the decree passed by the lower Court, the Court is not entitled to consider the extent to which the said decree has been modified. AIR (Vol 8) 1921 All 270: 64 Ind Cas 3: 19 ALJ 3: 43 All 220 (DB).

——**S. 110 — Reversing judgment — Partial reversal, whether confirming decree.**

Partial reversal of a decree is not confirming of a decree. Benefit of doubt must go to the petitioner. AIR (V 3) 1916 Mad 670: 18 MLT 387: (1916) 1 MWN 122: 31 Ind Cas 272 (DB).

——**S. 110 — Modification of part of decree.**

Where the decree of the Lower Court is not wholly affirmed by the judgment of the High Court but is varied even in one particular and the value of the subject matter in appeal is above Rs. 10,000 the party is entitled as of right to a certificate of appeal to His Majesty in Council 8 CWN 294, 62 PWR 1908, not foll. (1911) 9 Ind Cas 1040 (Oudh) (DB).

(ii) Costs.

——**S. 110 — Affirming decree — Variation of decree in respect of costs only.**

Where the only variation that is made by the appellate Court is in respect of the costs as awarded by the lower Court but otherwise absolutely affirms the decree of the lower Court, leave to appeal to Supreme Court cannot be granted unless some substantial question of law is involved. AIR (Vol 37) 1950 Ajmer 28 (2).

——S. 110 — Decree varied only as to costs, is of affirmance.

A decree of the High Court which only varies that of the Court below on a matter of costs is a judgment of affirmation within the meaning of S. 110, Civil P. C. AIR (Vol 30) 1943 Pesh 81: 209 Ind Cas 577 (DB).

——S. 110 — High Court affirming decision but interfering with order as to costs.

Where the High Court affirms the decision of the lower Court by upholding the decree of the lower Court dismissing the suit but interfers with the decision of the lower Court as to costs, the decree is still one of affirmance. AIR (Vol 29) 1942 Mad 368: 1942 MWN 136: (1942) 1 MLJ 309: 204 Ind Cas 456 (DB).

——S. 110 — Decree affirmed in appeal to High Court, except cost — No question of law — Subject value above Rs. 10,000 — Appeal to Privy Council if lies — Compensatory costs, if on the same footing as other costs.

Though the subject-matter of the appeal is above Rs. 10,000, where the decree of the lower Court is affirmed as regards the subject-matter of the suit, and there is no variation of any kind in the decree except as regards the awarding of costs in the original suit, there is no right of appeal to His Majesty in Council unless the appeal involves some substantial question of law. The compensatory costs in a suit stand on the same footing as other costs. AIR (Vol 21) 1934 Oudh 433 (2): 11 OWN (CC) 1055: 151 Ind Cas 307 (DB).

——S. 110 — Confirmation except as to costs — Decree, if one of affirmance.

Where the High Court merely exercises its discretion as regards the costs of the suit in the lower Court and entirely confirms the decision of the lower Court on the merits of the case, its decree merely affirms the decision of the Court below within the meaning of S. 110. AIR (Vol 9) 1922 Cal 316: 66 Ind Cas 407: 34 CLJ 299 (DB).

(iii) Mortgage decree.

——S. 110 — Mortgage decree — Extension of period of grace in appeal.

In every case, when an appeal is preferred against a preliminary mortgage decree, a decision by the appeal Court dismissing the appeal renders the mortgagor liable to a larger sum. Much more so is this the case when the period of grace is extended, but the order of the High Court cannot be regarded as an order of reversal for purposes of S. 110. AIR (Vol 14) 1927 Pat 379: 103 Ind Cas 703 (DB).

——S. 110 — Decree affirming decree of the Court below with variation.

The trial Court decided that in the suit, as framed, it was not open to it to direct a conveyance to the plaintiffs of the mortgaged properties. Judges of High Court came to the conclusion that in that suit as framed, it was open to the Judge of First Court to direct a conveyance of the mortgaged property to the plaintiffs and they directed by their judgment that the mortgaged properties should be included in the conveyance.

Held, under the circumstances, it is impossible to hold that the decree of High Court affirmed the decision of the Court below, and it is not necessary for the petitioner to show that any substantial question of law is involved. AIR (Vol 10) 1923 Cal 215: 70 Ind Cas 933: 26 CWN 651 (DB).

(f) What is not.

——S. 110 — Affirming decree — Suit for partition and separate possession of two sets of properties — Decree as sued for — Appeal — Confirmation as to one and modification as to other — First property worth more but second worth less than Rs. 10,000 — Leave to appeal — Right to.

A suit for partition and separate possession comprised two sets of properties A and B, which were both claimed under one and the same title, though the High Court in appeal held that they devolved under different titles. A was over, but B was under Rs. 10,000 in value. The trial Court decreed the entire claim, but in appeal the High Court upheld the decree only in respect of property A, making a small modification in respect of B, the modification being in the defendant's favour to some extent. The defendant applied for leave to appeal to His Majesty-in-Council. It was found that the dispute regarding A involved no substantial question of law, while that relating to B did.

Held: (1) that since both A and B properties were in suit, both formed the subject-matter of the suit, though held under different titles; & the value of both being over Rs. 10,000, the condition as to value of the subject-matter was satisfied;

(2) that the second condition as to the value in appeal was also satisfied, because the subject-matter in appeal comprised both properties A and B, the combined value of which was above Rs. 10,000;

(3) that the decree of the High Court was not one of affirmance because it modified the decree of the trial Court in respect of B property to some extent and since the appeal was against the whole decree, the decree in appeal looked at as a whole did not affirm that of the Court below, but reversed it, and therefore the requirement as to a substantial question of law was not attracted. AIR (Vol 34) 1947 Nag 93: ILR (1946) Nag 693: 1946 NLJ 593: 226 Ind Cas 457 (DB).

——S. 110 — Decree of affirmance, meaning of — Decree partly affirming and partly reversing lower Court's decree is not one of affirmance even though the proposed appeal relates to the portion affirmed.

Where an appeal to the High Court relates to a number of items of property and the appeal is accepted with regard to some of the items and dismissed with regard to the remaining items and the appellant proposes to appeal to the Privy Council in regard to such remaining items, the decree of the High Court cannot be treated as one of affirmance for the purpose of S. 110 of the Code notwithstanding that the proposed appeal to the Privy Council relates to a portion of the High Court's decree which has not been reversed or varied by the High Court, but has been maintained by it. AIR (Vol 33) 1946 All 262: 1940 OWN (H C) 144: 222 Ind Cas 240 (DB).

——S. 110 — "Affirm", meaning explained — Decision reversed in part and maintained as to remainder.

If the decree of the High Court reverses in part the decision of the lower Court whilst maintaining it with regard to the remainder of the claim, the decree of the High Court cannot be said to affirm the decision of the Court below. AIR (Vol 30) 1943 Pesh 45: 208 Ind Cas 162 (DB).

——S. 110 — Appeal to Privy Council held competent even on points of concurrence without showing substantial question of law.

The expression "the decision of the Court *immediately* below the Court passing such decree" as used in S. 110 means the same as the expression "decree of the Court below". The word *"decision"* means the decision of the trial Court *taken as a*

whole. The true test is whether the decision of the Court below as a whole has been affirmed by the High Court and not whether the decision on the point or points left in dispute has been affirmed by the High Court. Hence where the decree of the High Court reverses in part the decision of the lower Court whilst maintaining it with regard to the remainder of the claim, the decree of the High Court cannot be said to affirm the decision of the Court below and, therefore, an appeal to His Majesty in Council is competent even on points of concurrence between High Court and the lower Court without proving substantial question of law. AIR (Vol 28) 1941 Pat 269: 20 Pat 459: 7 BR 906: 22 PLT 736: 195 Ind Cas 344 (SB).

——**S. 110 — Suit for possession and accounts — Trial Court decreeing right to title but giving decree for partial accounts — High Court deciding question of title in favour of defendant — No finding given on defendant's accountability.**

The plaintiff in the suit claimed that the property in question belonged in four equal shares to herself and her three sisters, defendants Nos. 1, 2 and 3. The suit was resisted by defendant No. 1, who asserted that she was exclusively entitled to the property and denied that it was divisible into four shares. There was a further prayer in the plaint that defendant No. 1 should be directed to render an account of her management of the property. The trial Judge accepting the plaintiff's contention held that the property was divisible into four shares. Then as regards the claim to an account he gave a decree for partial account. There was an appeal to the High Court and the Judges held on the question of title that defendant No. 1 was solely entitled to the property. The title put forward by the plaintiff having been thus negatived, no relief could be granted on the basis of defendant No. 1's accountabiity. The learned Judges therefore, did not give any findings. Plaintiff applied for leave to appeal to the Privy Council. The defendant objected on the ground that the High Court's judgment in regard to the claim for accounts was an affirming one and the appeal did not involve any question of law:

Held, that the lower Court did not wholly disallow the claim to an account but granted a decree for partial accounts. The finding involved that defendant No. 1 was not solely entitled to the amount but her right extended only to a fourth part of it. This being so, the judgment of the High Court which negatived this right could not be said to be an affirming judgment. AIR (Vol 24) 1937 Mad 964: (1937) 2 MLJ 543: 175 Ind Cas 236 (DB).

——**S. 110 — Lower Court's decree modified by High Court — Liability of applicant reduced.**

Where as a result of the High Court decree which modified the decree of the lower Court, the liability of the appellant under the decree is reduced to a certain extent, the decree of the High Court is not one of affirmance. AIR (Vol 22) 1935 Cal 250: 39 CWN 52: 155 Ind Cas 727 (DB).

——**S. 110 — High Court upholding the question of adoption but varying in favour of applicant the value of movables in suit.**

Where the decision of the trial Court relates not only to the question of adoption but also to the question of the value of the movables in suit and this decision is upheld by the High Court as regards the matter of adoption but modified as regards the value of the movables in favour of the applicant, the decree of the High Court in form as well as in substance varies the decree of the lower Court as regards a portion of the subject-matter of the dispute between the parties. In these circumstances on the language of the last paragraph of S. 110, Civil P. C., the decree of the High Court is not a decree in affirmance of the decision of the lower Court. The applicant is, therefore, entitled to appeal to His Majesty in Council as a matter of right. AIR (Vol 22) 1935 Oudh 489: 1935 OWN 947: 11 Luck 320: 156 Ind Cas 10 (DB).

——S. 110 — An interlocutory order sending down an issue to the lower Court cannot be put on the same footing as a decree confirming a preliminary decree for accounts. AIR (Vol 20) 1933 Bom 251: 35 Bom LR 415: 145 Ind Cas 258 (DB).

——S. 110 — A person whose claim in appeal has been enhanced on appeal to the fullest extent on that particular claim cannot make that decision a basis for a further appeal on grounds unconnected with or rather dissociable from those on which he had succeeded and on which the Courts were of one mind. AIR (Vol 19) 1932 Nag 118: 28 NLR 142: 140 Ind Cas 68 (2) (DB).

2. Applicability and scope.

——**S. 110 — Leave to appeal to Federal Court — Grant of — Guiding principles to be borne in mind.**

Where an application is made to the High Court under S. 110, C. P. Code, for the grant of leave to appeal to the Federal Court, the Court must bear in mind some very fundamental principles. The first is that the High Court is the final Court in the Province normally and ordinarily; another is that law favours a finality in litigation and that it is only in the special circumstances laid down in the Code that a litigant is entitled to travel outside the Province and go to the Federal Court. Where the trial Court as well as the Court of appeal have concurred in their judgments, it is for the petitioner seeking leave to appeal to satisfy the High Court that a substantial question of law arises which requires further deliberation and adjudication by the highest Court. At the same time, in spite of the fact that both the Courts have arrived at the conclusion, if they have done by different processes of reasoning, if those processes of reasoning are inconsistent or self-destructive there would be justification for allowing the matter to be further considered by the Federal Court. But when those processes of reasoning supplement each other and the result is that the ultimate conclusion reached by both Courts is reinforced by the reasoning which each of them has advanced, there is no ground for further consideration. AIR (Vol 36) 1949 Bom 134: 50 Bom LR 744 (DB).

——**S. 110 — Applicability — High Court decreeing suit setting aside fourteen sales and a power of attorney — Leave to appeal to the Privy Council granted to three vendees only as regards the sales in their favour — Value of the subject of the suit and that of properties in dispute in appeal in the aggregate exceeding Rs. 10,000 — Granting of leave, if proper.**

The High Court decreed a suit setting aside fourteen sales and a power of attorney and granted leave to appeal to the Privy Council to three of the vendees only as regards the sales in their favour. The value of the subject of the suit in the Court of the first instance was upwards of Rs. 10,000 and the value of all the properties in dispute on appeal to the Board exceeded, in the aggregate this sum.

On a preliminary objection that the High Court had no power to grant leave having regard to the terms of S. 110, C. P. Code, for the purposes of which the case of each appellant must be regarded separately.

Held, negativing the objection, the case was not one of an appeal involving several appellants each of whom sued or was sued in respect of some dis-

tinct or unrelated cause of action and it was unnecessary to consider the applicability of S. 110, C. P. Code, and on the facts of the appeal there was but one "matter in dispute", and the mere circumstance of a plurality of appellants cannot make it otherwise. AIR (Vol 35) 1948 PC 97: 75 IA 153: ILR (1949) Mad 211: 62 LW 881: 1948 ALJ 228: 1948 MWN 441: 50 Bom LR 503: 52 CWN 892: (1948) 2 MLJ 25.

——S. 110 — Scope of — Section does not confer right of appeal or apply to application not made under clause (a) and (b) of S. 109.

Section 110 does not confer any right of appeal but merely lays down further conditions as regards the value of subject-matter of the suit in the Court of first instance and the value of subject-matter in dispute on appeal to the Privy Council and the nature of the decree or the final order in the case of appeals mentioned in cls. (a) and (b) of S. 109. Where application for leave has not been made either under cl. (a) or cl. (b) of S. 109, S. 110 has no application. AIR (Vol 33) 1946 Nag 424 (DB).

——S. 110 — Judge sitting singly on Appellate Side whether Court immediately below Letters Patent Bench.

Per Din Muhammad and Abdul Rahman, JJ., Blacker J., dissenting. — A Judge sitting singly, not on the Original Side but on the Appellate Side of the High Court is not, for purposes of S. 110, Civil P. C., a Court immediately below the Letters Patent Bench hearing an appeal from his decision. AIR (Vol 31) 1944 Lah 458: ILR (1945) Lah 242: 218 Ind Cas 1 (FB).

——Ss. 110, 109 — Appellate judgment of High Court not one of affirmance — Question to be determined.

Where the judgment of the High Court is not a judgment of affirmance, two questions will have to be determined before the High Court can grant leave for appeal to Privy Council. The first question is whether the value of the subject-matter of the suit and of the proposed appeal is over Rs. 10,000; and the second is whether the proposed appeal is against a decree or final order of the High Court. AIR (Vol 29) 1942 Cal 537: 46 CWN 857: 203 Ind Cas 518 (DB).

——S. 110 — Conditions in S. 110 — Whether mutually exclusive — Right of appeal, if exists on non-fulfilment of condition in para 2.

Even if none of the conditions mentioned in para 1 is fulfilled, but the sole condition mentioned in para 2 is fulfilled, the requirements of S. 110 will be complied with, because these two sets of conditions are alternative and may be mutually exclusive. The condition laid down in para 2 is independent and self-sufficient and is not in any way dependent on the fulfilment of both or either of the conditions in para 1. AIR (Vol 24) 1937 All 169: (1937) ALJ 38: 1936 AWR 1297: ILR (1937) All 405: 167 Ind Cas 670 (DB).

——S. 110 — Suit by disqualified proprietor.

A disqualified proprietor of an estate, under U. P. Court of Wards Act, cannot maintain an application for leave to appeal to the Privy Council under S. 55 of the U. P. Court of Wards Act. No ward can sue or be sued in any Civil Court otherwise than by and in the name of the Collector in charge of the ward. AIR (Vol 24) 1937 Oudh 132: 1936 OWN 191: 12 Luck 15: 160 Ind Cas 171 (DB).

——S. 110 — Contempt proceedings.

Proceedings for contempt for publication of article in newspaper by Advocate are in the exercise of the inherent jurisdiction of the High Court and of a criminal nature. Mere misdescription in notice will not make it of civil nature; S. 109 or 110 or 112 are inapplicable to such a case. AIR (Vol 22) 1935 All 811: (1935) ALJ 810: 57 All 910: 1935 AWR (HC) 669: 155 Ind Cas 188 (DB).

——S. 110 — Loss or detriment suffered by passing of decree not capable of being estimated in money—Case does not fall under S. 110 — Case involving determination of rights of large body of persons — Construction of deed involving question not an unmixed one of fact — Leave can be granted under S. 109(c). AIR (Vol 22) 1935 Rang 113: 13 Rang 123: 156 Ind Cas 472 (DB).

——S. 110 — Insolvency.

From orders passed by the High Court in insolvency a further appeal lies to His Majesty in Council if the conditions prescribed in that behalf under the Civil P. C. are fulfilled. AIR (Vol 21) 1934 Rang 292: 156 Ind Cas 345 (DB).

——S. 110 — Where a decree involves a question respecting property of value exceeding Rs. 10.000 and the decision of the lower Court is reversed by the High Court, the case fulfils the requirements of S. 110, and is a fit one to be granted leave to appeal to the Privy Council. AIR (Vol 20) 1933 Oudh 397: 10 OWN 880: 147 Ind Cas 125 (DB).

——S. 110 — Where no exceptional circumstances exist in a case and the value is less than Rs. 10,000 and the only question that chiefly arises is an ordinary question which has been frequently decided and is not one which involves any general principles, leave to appeal to the Privy Council should not be granted. AIR (Vol 20) 1933 Oudh 394 (2): 10 OWN 953: 147 Ind Cas 313 (DB).

——S. 110 — Where no substantial question of law is involved, an appeal to His Majesty in Council will not lie if the value of the property involved is less than Rs. 10,000. AIR (Vol 19) 1932 Lah 526: 33 PLR 647: 138 Ind Cas 37 (DB).

——S. 110 — The High Court is bound by the plain words of S. 110 which is a proviso to S. 109 and is not at liberty to read into it any words which are not to be found there actually or by necessary implication. AIR (Vol 19) 1932 Mad 46: 35 MLW 206: 139 Ind Cas 54 (DB).

——S. 110 — Order dismissing appeal for contempt — Leave to appeal.

A person in contempt cannot be heard in prosecution of his own appeal until he purges his contempt, & his appeal, as it is not proper to keep the other party before the Court for an indefinite period i.e., till he purges his contempt, can be dismissed. A petition, therefore, for leave to appeal to Privy Council against such dismissal is not maintainable. AIR (Vol 16) 1929 Mad 672: 1928 MWN 462: 117 Ind Cas 724 (DB).

——S. 110 — 'Otherwise fit' — Question when debt becomes bad.

The question whether an assessee has an absolute option to decide in what year a debt due to him or any of that debt is to be treated as irrecoverable and therefore to affect an amount of profits received in that year is of great public importance and the case is "otherwise" fit for appeal to the Privy Council. AIR (Vol 16) 1929 Nag 265: 119 Ind Cas 689 (DB).

——S. 110 — Decree — Judgment of High Court granting probate.

Judgment of High Court granting probate is a decree and a final decree, and an appeal lies to Privy Council: 12 Bur LT 87, Diss. from. AIR (Vol 14) 1927 Rang 56: 5 Rang 119: 5 Bur LJ 176: 99 Ind Cas 759 (DB).

——S. 110 — Suit to recover enhanced rent of occupancy holding — If involves claim or question to or respecting the holding.

In a suit for recovery of rent at an enhanced rate under S. 30 of the Bengal Tenancy Act as well as for additional rent under S. 52 of that Act against an occupancy tenant, the holding is not the subject-matter of the suit and of the appeal. The subject-matter of the suit and of the appeal is the plaintiff's claim to recover the enhanced rent and the additional rent under S. 52. Neither does such suit involve directly or indirectly a claim or question to or respecting the holding within S. 110. AIR (Vol 12) 1925 Cal 414: 82 Ind Cas 744 (DB).

——S. 110 — Subject-matter if induces property covered by other similar deeds.

Where on the record it is not clear whether the judgment will govern other similar deeds like the one in suit, the property covered by the other deeds is not part of subject-matter. AIR (Vol 10) 1923 Cal 451: 27 CWN 204: 84 Ind Cas 581 (DB).

——S. 110 — General rule.

The conditions imposed by the first paragraph of the section are meant to apply to all cases where nothing is involved in the decision except that which is the subject-matter of the suit. In such cases the second paragraph of the clause can have no operation and both the conditions imposed by the first paragraph must be complied with. AIR (Vol 8) 1921 Pat 229: 2 PLT 463: 1921 PHCC 229: 6 PLJ 596: 62 Ind Cas 959 (DB).

——S. 110 — Under S. 110 (2), C. P. C., the question directly or indirectly involved must be one between the parties to the suit. 90 PR 1913: 340 PLR 1913: 229 PWR 1913: 21 Ind Cas 624 (DB).

——S. 110 (S. 596 old Code) — Amount, value and nature of appeal — Putting the appellant on terms — Procedure.

Where only a small amount was at issue in an appeal the High Court, not having any power to put the appellant on terms will not certify the case to be a fit one for appeal to His Majesty in Council. But the application for such leave to the High Court is a proper step to be taken by the appellant before applying for special leave. (1909) 13 CWN 1127 (1128): 3 Ind Cas 786 (DB).

——S. 110 (S. 596 old Code) — Appeal to His Majesty in Council — Civil Procedure Code, S. 562 — Appeal from order of remand not usually admissible.

An order under S. 562 of the Code of Civil Procedure is not ordinarily capable of being the subject of an appeal to His Majesty in Council, though it may possibly be so, if the order in question has the effect of deciding finally the cardinal point in the suit. (1907) 1907 AWN 291 (291): 5 ALJ 57 (DB).

——S. 110 (S. 596 old Code) — Some question respecting property of the value of ten thousand rupees or upwards.

Where, as in S. 596, it is laid down that, in order that an appeal may lie to His Majesty in Council, the decree to be appealed from must involve, directly or indirectly, some claim or question to or respecting property of ten thousand rupees in value or upwards, the reference is to suits in existence and not to suits in 'gremio futuri'. (1902) 1902 AWN 46: 24 A 236 (238) (DB).

——S. 110 (S. 596 old Code) — Value of appeal — Point of law — Special leave.

No appeal will lie to the Privy Council merely because a substantial question of law arises, if the appeal does not involve properties of the value of Rs. 10,000. Even where the value is below Rs. 10,000 the High Court may certify the fitness of the case for appeal in special cases, such as where the point in dispute is not measurable in value and the matter is of great public or private importance. But in such cases a special certificate to that effect is necessary. (1901) 5 CWN 193: 11 MLJ 56: 3 Bom LR 154: 23 A 227 (231, 232): 28 IA 11 (PC).

3. Connected appeals.

——S. 110 — Two separate appeals from same suit — Appeals disposed of by one judgment on common ground — One appeal valued above Rs. 10,000 and other below it — Latter case can be certified as fit one under Section 109 (c) although the requirements of Section 110 were not fulfilled. Order 45, Rule 4 does not in terms apply to such a case. AIR (Vol 23) 1936 All 832: (1936) ALJ 1025: ILR (1937) All 105: 1936 AWR 883: 166 Ind Cas 283 (DB).

——S. 110 — High Court's decree in main appeal affirming lower Court's decree — Cross-appeal allowed and composite decree drawn up — Right to appeal to Privy Council.

Where the High Court's decree in the main appeal confirms that of the lower Court, the mere fact that a cross-appeal has been allowed and the lower Court's decree modified accordingly does not give the right of appeal to the appellant who otherwise would not have that right. AIR (Vol 13) 1926 Mad 1024: 51 MLJ 295: 97 Ind Cas 592: 24 MLW 455: 1927 MWN 65 (DB).

4. Connected suits.

——S. 110 — Reversioner's suit to set aside alienations by last holder — Parties claiming under different alienations, made defendants — Appellate Court confirming decree in respect of some parties but reversing it against others.

In cases where parties claiming under various alienations are brought before the Court, the mere fact that the rules of procedure permit the claims to be joined in one suit does not justify the decree being treated as single and inseparable for purposes of giving leave to appeal to the Privy Council under Section 110, Civil P. C., when the Appellate Court confirms the lower Court's decree in respect of some of the parties and reverses it as against other parties. AIR (Vol 25) 1938 Mad 598: (1938) 1 MLJ 492: 47 MLW 514: (1938) MWN 439: 177 Ind Cas 248 (DB).

——S. 110 — A decree for the payment of a certain amount, which is the result of taking an account is one decree, and not a series of decrees merely because it is the result of decisions in respect of a number of items. Where, in such a case, the High Court's decree does not entirely affirm the decision of the Court immediately below, then the decree of the High Court is not an affirming decree. AIR (Vol 19) 1932 Mad 46: 35 MLW 206: 139 Ind Cas 54 (DB).

——S. 110 — Suits decided by distinct judgments — Appeal to Privy Council.

The two suits in question involved substantially the same questions for determination, and were determined in first Court by two distinct judgments but in the High Court they were no doubt originally heard together and decided by one judgment. But afterwards in one appeal there was an application for review of that judgment and eventually that appeal was reheard on review and another judgment was given.

Held, the suits cannot be said to be decided by one judgment, though the judgment on review did not in any way modify the other portion of the earlier judgment in any way. AIR (Vol 10) 1923 Mad 602: 44 MLJ 424: 73 Ind Cas 217 (DB).

——S. 110 — Connected suits — Variation in part — Meaning of.

Where there is part variation and part affirmation of a decree, it is not an affirmance within Section 110, C. P. C. In a joint decree granting damages and declaratory relief, both should be considered in deciding the value of the subject-matter. Two decrees of the same court, between same parties filling opposite characters may be joined for granting certificate to appeal. AIR (Vol 6) 1919 Cal 118: 23 CWN 582: 50 Ind Cas 760 (DB).

——S. 110 — Connected suits — Privy Council appeal — Leave to appeal — Grant of.

Certain suits for declaration of ownership were tried together and were valued in all above Rs. 10,000. They being dismissed, an appeal was filed to the High Court in respect of one suit in which the claim was above Rs. 5,000. On the appeal being allowed, defendant applied for leave to appeal to Privy Council as a claim or question to property above Rs. 10,000 was involved. Leave was not granted as the value of the defendant's interest was less than Rs. 10,000. AIR (Vol 2) 1915 All 486: 13 ALJ 1075: 33 Ind Cas 369 (DB).

——S. 110 — Connected appeals — Certificate given in one.

Where of two connected appeals arising in the same suit the High Court granted leave to appeal to the Privy Council in the appeal in which it reversed the decision of the Court below, the unsuccessful party in the other connected appeal in which the High Court confirmed the decision of the Court below was also held entitled under the special circumstances to get leave to appeal to the Privy Council' and that this would be covered by the words "otherwise a fit one for appeal to the Privy Council". AIR (Vol 2) 1915 All 129: 37 All 124: 13 ALJ 57: 27 Ind Cas 378 (DB).

——S. 110 — Connected appeals — Valuation in one lower than Rs. 10,000 — Certificate.

Where some appeals satisfy the requirements of Section 110 and others connected with the former do not, though they involve the same question, certificate for the others also should be granted. (1910) 5 Ind Cas 583 (All) (DB).

5. Consent decree.

——S. 110 — Where a decree is in fact made by consent of the parties and does not except so far as authorised by consent, embody any judicial finding by the Court itself, no appeal lies from it to the Privy Council. Such a decree can be set aside, if at all, only in substantive proceedings appropriate to that particular remedy. AIR (Vol 19) 1932 PC 251: 9 OWN 929: 36 MLW 631: 37 CWN 134: 64 MLJ 84: 56 CLJ 568: 139 Ind Cas 545.

——S. 110 — Agreement of parties — Question of fact or law.

A dispute as to whether two parties have agreed or not to a certain decree is not in general a question of law. Still less is it a substantial question of law. It is in general a pure question of fact. AIR (Vol 16) 1929 Bom 68: 114 Ind Cas 372: 30 Bom LR 1610 (DB).

——Ss. 110 and 96 — Consent decree — No appeal.

No appeal lies against a consent decree to His Majesty in Council and leave to appeal cannot be granted. AIR (Vol 7) 1920 Pat 721: (1920) Pat HCC 349 (DB).

6. Construction.

——S. 110 — Any variation in decree is not enough to take it out of S. 110 last para.— "Decree" and "decision" in S. 110, explained.

It cannot be said that any variation in the decree, is enough to take it out of the last paragraph of Section 110, Civil P. C. The term "decree" used in connection with the High Court and the expression "decision" used in regard to the lower Court in Section 110, Civil P. C., do not mean exactly the same thing. A single decree may comprise several decisions and each decision may relate to a distinct matter. AIR (Vol 30) 1943 Mad 67: 1942 MWN 565: 55 MLW 589: (1942) 2 MLJ 350: 208 Ind Cas 65 (DB).

——S. 110 — The word 'property' in the second paragraph of Section 110, Civil P. C., need not necessarily be the subject-matter in dispute in the suit. AIR (Vol 20) 1933 All 177: (1932) ALJ 730: 54 All 858: 138 Ind Cas 670 (DB).

——S. 110 — Court 'immediately below', meaning of.

A single Judge of the High Court is a Court 'immediately below' the Division Bench of the same Court within the meaning of Section 110, Civil P. C. AIR (Vol 19) 1932 Lah 121 (2): 32 PLR 833: 13 Lah 338: 135 Ind Cas 605 (DB).

——S. 110 — The word 'and' in Section 110, means 'and' and not 'or' and each of the conditions mentioned in the action must be separately fulfilled. AIR (Vol 18) 1931 PC 125: 35 CWN 669: 33 Bom LR 954: (1931) MWN 657: 61 MLJ 273: 132 Ind Cas 605.

——S. 110 — Consent decree — No substantial question of law.

Where the question related to the construction of a consent decree and it appeared that the Court had given certain directions regarding the enforcement of the decree.

Held, that there was no substantial question of law involved so as to sustain this grant of leave to appeal to the Privy Council. AIR (Vol 18) 1931 Cal 174: 51 CLJ 270 (DB).

——S. 110 — "Indirectly" — Meaning of.

A suit is not said to involve claim "indirectly" simply because similar questions may arise in other estates or in connection with other like things in the same province. If the decision of an issue in a particular case makes the decision of the same issue in other cases res judicata, or some such similar connexion can be shown, then alone the value of other disputed matters may be taken into account. AIR (Vol 16) 1929 Mad 780: 1929 MWN 602: 30 MLW 946: 57 MLJ 477 (DB).

——S. 110 — "So far as may be" in Section 66-A (3) of the Income tax Act — Privy Council appeal.

The words "to be a fit one for appeal to His Majesty in Council" coupled with the words "so far as may be" in paragraph 3, S. 66-A, exclude from any right of appeal cases which fall within the requirements of Section 110 of the Code and are operative to confine that right to cases which are certified to be otherwise fit for appeal to His Majesty in Council. AIR (Vol 16) 1929 Nag 336: 120 Ind Cas 409 (DB).

——S. 110 — "Subject-matter" — "Property" — Meaning of.

The words "subject-matter" and "property" used respectively in Clauses 1 and 2 cannot be treated as synonymous terms. The word "property" in Clause (2) is used there with a view to indicate property not in suit or dispute, which may be, directly or indirectly, involved: AIR (Vol 16) 1929 Nag 75 (DB).

——S. 110 — "Immediately below" — Meaning of.

The words "immediately below" in Section 110 do not necessarily mean "subordinate to". Where, therefore, a Division Bench of the High Court affirms a decision of a single Judge, and the case involves no question of law, no leave can be granted. 43 Cal 90, Diss. from. AIR (Vol 15) 1928 Lah 537: 109 Ind Cas 863 (DB).

——S. 110 — "Directly or indirectly" — Meaning of.

The words "directly or indirectly" cannot possibly be stretched to cover a claim which is quite distinct in its character and to which there is an irrelevant reference in the plaint. They refer to suit in existence and not to suits in gremio futuri. AIR (Vol 13) 1926 Rang 128: 95 Ind Cas 377: 5 Bur LJ 45 (DB).

——S. 110 — Principles.

No real mischief can arise from not allowing a very wide construction of Section 110 because such case, if worthy of being tried by a higher tribunal, can always be dealt with under subsection (c) of Section 109. AIR (Vol 12) 1925 PC 159: 49 MLJ 20: 88 Ind Cas 445: 22 MLW 255: 30 CWN 98: 27 Bom LR 867: 52 Cal 650: 52 IA 207: 41 CLJ 623.

——S. 110 — Decree for small property — Incidental finding as to large property — If decree involves indirectly question regarding large property.

No exact or rigid construction of the word "indirectly" can be given. It must inevitably be a question of degree whether the relation between the decree or order and the claim or question is established with sufficient closeness to be in an indirect relation. Where there was no more than an incidental finding in the judgment of High Court as regards the boundary line except in so far as it determined the ownership of the plots which were directly in dispute; held that because of such a mere incidental finding, the decree or final order cannot be said to involve indirectly any question regarding the larger extent. AIR (Vol 10) 1923 Mad 125: 43 MLJ 728: 69 Ind Cas 385: 1922 MWN 683: 16 MLW 517: 31 MLT 335 (DB).

——S. 110 — "Decision" — 'Affirms'.

The word 'decision' means the decision of the suit by the Court. It is not necessary that the Appellate Court should also affirm the grounds of fact upon which the judgment was based. It is immaterial that appellate Court comes to a different conclusion on the question of fact, if the conclusion is affirmed. AIR (Vol 10) 1923 Rang 55: 77 Ind Cas 400: 11 LBR 410: 1 Bur LJ 215 (DB).

——S. 100 — "Involve directly .... of Rs. 10,000 in value" — Meaning of.

The words "must involve, directly or indirectly, some claim or question to or respecting property of upwards of Rs. 10,000 in value" in Section 110, evidently refer to questions arising between parties to the suit and not to questions affecting the title of one of the parties to the suit or suits that can hereafter be brought but are not now pending. AIR (Vol 9) 1922 Mad 34: 42 MLJ 78: 66 Ind Cas 686: 1922 MWN 46: 15 MLW 140: 30 MLT 42 (DB).

——S. 110 — Final order — Order setting aside a dismissal of suit for default.

An order of the High Court setting aside an order dismissing the suit for want of prosecution is a final order within Section 110. AIR (Vol 8) 1921 Pat 37: 60 Ind Cas 479: 6 PLJ 116: 2 PLT 155 (DB).

——S. 110 — A question of law is not deemed to be involved in an appeal under Section 110, if it need not be decided for the disposal of appeal or if such question may arise in certain contingencies. The word "involved" in Section 110 implies a considerable degree of necessity. AIR (Vol 3) 1916 Oudh 286: 19 OC 131: 36 Ind Cas 807 (DB).

——S. 110 — In the face of concurrent findings of fact, leave to appeal to the King in Council can only be given if a substantial question of law is 'involved". A question of law is not involved if it would arise only if the Privy Council reversed those findings. (1914) 7 LBR 103: 25 Ind Cas 922 (DB).

7. Cross-appeals.

——S. 110 — Right of appeal to Privy Council — Though appeal failed decision modified partly on cross-objections — No substantial question of law.

Where the main appeal against the decision of the trial Court fails, but the decision is partly modified on cross-objection and there is no substantial question of law, the appellate decree does vary the decision of the trial Court as contemplated by Section 110, C. P. Code, so as to entitle the appellant to go up to the Privy Council. AIR (Vol 35) 1948 Oudh 76: 1947 AWR (CC) 119: 22 Luck 461: 1947 OA (CC) 119: 1947 OWN 369 (FB).

——S. 110 — Only question of fact and not of law involved — Fact that creditor's appeal is admitted does not confer upon debtor petitioner right which he does not possess.

Where the right of the debtor petitioner does not involve any question of law, but involves only a pure question of fact, the mere fact that an appeal has been filed by a creditor against the decision of the High Court and that it has been admitted does not confer on the petitioner a right which he does not otherwise possess. AIR (Vol 31) 1944 Mad 269: 1944 MWN 143: 57 MLW 158: ILR (1944) Mad 890: (1944) 1 MLJ 193: 218 Ind Cas 227 (DB).

——S. 110 — Main appeal confirmed — Cross-appeal accepted — Right of appeal to Privy Council.

Where the High Court's decree in the main appeal confirms that of the lower Court, the mere fact that a cross-appeal has been allowed and the lower Court's decree modified accordingly does not give the right of appeal to the Privy Council to the appellant. AIR (Vol 31) 1944 Oudh 295: 1944 OWN 372: 1944 AWR (CC) 255: 20 Luck 256 (DB).

——S. 110 (3) — Two cross-appeals from decree of lower Court — Appellate Court by issuing one decree dismissing one of them while allowing the other — Appeal from order dismissing lower Court's decree.

Where there had been two cross-appeals against the decree of the Court of first instance, and the Appellate Court has, by issuing one decree, allowed one of them and dismissed the other, there are in effect two orders of the Court, one dismissing one cross-appeal and affirming the decree of the lower Court and the other allowing the appeal and modifying the decree of the lower Court. So far as the decree affirming the decree of the lower Court is concerned, no appeal would lie to the Privy Council. AIR (Vol 28) 1941 Mad 227: (1940) MWN 878: 52 MLW 509: (1940) 2 MLJ 645 (DB).

——S. 110 — Suit to recover Rs. 34,000 — Decree for Rs. 11,950 — Appeal to High Court by both parties — Plaintiff's appeal dismissed while de-

fendant's accepted partly — Amount of decree reduced to Rs. 6,068-12-0.

A suit was instituted by the plaintiff against the defendants for recovery of Rs. 34,000 as damages for non-performance of three contracts. The trial Judge passed a decree in favour of the plaintiff for Rs. 11,950. From this decree both parties appealed to High Court. The two appeals were heard together. The plaintiff's appeal was dismissed, while that of the defendant was accepted in part, the amount decreed by the trial Court, i.e., Rs. 11,915 being reduced to Rs. 6,068-12-0. Plaintiff applied for leave to appeal to the Privy Council. The questions raised in the memorandum of the proposed appeal were all questions of fact:

Held, that no appeal lay under Section 110 as of right and hence no leave could be granted. The appeal and the cross-appeal could not be considered together for the purposes of Section 110 and the fact that a composite decree was prepared in both the appeals made no difference. AIR (Vol 24) 1937 Lah 916: 176 Ind Cas 314 (DB).

——S. 110 — Two cross-appeals separately disposed of — One allowed but the other dismissed — Effect — Decision in latter, if not one of affirmance — Appeal to Privy Council — Leave, if can be granted.

When two cross-appeals are separately disposed of, the matters in controversy in the two appeals are distinct and separate and, therefore, the adjudications of such matters are also distinct and separate. The dismissal of the plaintiff's appeal is, therefore, an affirmance of the adjudication made by the first Court so far as the matter in controversy in the plaintiff's appeal is concerned whereas the allowing of the defendants' appeal is a variation of the adjudication of the first Court so far as the matter in controversy in that appeal is concerned. From the mere fact that a cross-appeal has been allowed and the adjudication varied so far as the matter in controversy in that appeal is concerned, it does not follow that the decision in the other appeal which is dismissed is not one of affirmance. Consequently, where there are cross-appeals filed in the High Court on behalf of the plaintiff and the deft. and the defendant's appeal is decreed and the decree of the Court below varied, but the plaintiff's appeal is dismissed, the plaintiff cannot be allowed to appeal against the judgment of the High Court reversing the first Court's decree. AIR (Vol 22) 1935 All 374: (1935) ALJ 352: 1935 AWR (HC) 380: 57 All 873: 155 Ind Cas 487 (FB).

——S. 110 — Quaere.— Whether in case of separate appeals by opposite parties the variation of the decree of the first Court in one appeal would entitle a party to appeal in the whole suit impugning even the decision of the first Court in the appeal which has been dismissed. AIR (Vol 19) 1932 All 65: (1931) ALJ 968: 54 All 146: 135 Ind Cas 234 (FB).

——S. 110 — Appeal and memo of cross-objections — When constitute separate cross-appeals and the judgment in one affirming and the other reversing.

The memorandum of objections can be treated as a separate cross-appeal only if the appeal and the memorandum of objections are such as must be treated as forming two independent proceedings relating to distinct sets of facts.

Plaintiff sued the trustee of a temple asking for a general account with respect to the trusteeship, but alleged in the plaint eight specific charges of malversation. In the lower Court the subject-matter of the trial was the eight specific charges, some of which were found in favour of the trustee and the others against him. The trustee appealed with respect to the charges found against him and the plaintiff filed his cross-objections. The High Court, however, holding that there was no liability for general account dismissed the whole suit.

Held, that the appeal and the cross-objections could not be treated as two independent appeals inasmuch as the eight charges were not independent but only particulars of the same claim for general account; and consequently the decree of the High Court could not be split up so as to hold that one part of it, viz., about cross-objections was affirming judgment and the other about appeal a reversing one, and therefore though cross-objections alone related to an amount below Rs. 10,000 the whole suit was for over Rs. 10,000; cerificate ought to be granted. AIR (Vol 16) 1929 Mad 429: 56 MLJ 476: 121 Ind Cas 16: 29 MLW 623: 1929 MWN 304: 52 Mad 521 (DB).

——S. 110 — Cross appeals — No substantial question of Law.

The Court of first instance decreed a suit in part and dismissed it in part. There were cross appeals by the plaintiffs and the defendants. The High Court decreed the defendant's appeal reversing the judgment and decree of the Court below. The plaintiff, applied for leave to appeal aginst the judgment of the High Court reversing the first Court's decree and the application was granted. On an application for leave to appeal against the portion of the judgment affirming the first Court's decree, Held, that leave could not be granted inasmuch as there was no substantial question of law. AIR (Vol 5) 1918 All 245: 16 ALJ 864: 48 Ind Cas 124 (DB).

8. Evidence.

——S. 110 — Substantial question of law — Important documents held inadmissible and their admissibility affecting results of appeal.

The words "substantial questions" are to be understood in their being of substance to the parties. Consequently, the question as to the admissibility of certain important documents which have been held to be inadmissible by the High Court and which might affect the result of the appeal, is a substantial question of law within the meaning of S. 110. AIR (V 29) 1942 Mad 368 : 1942 MWN 136 : (1942) 1 MLJ 309 : 204 Ind Cas 456 (DB).

——S. 110 — Substantial question of law.

At the time of hearing the insolvency petition presented by a creditor, the petitioning creditor made a statement on oath that the debt due to him by the debtor existed at the date of hearing. Relying on the presumptions under S. 114, Evi. Act and other facts, the Court came to the conclusion that the debt existed at the date of hearing & thereupon adjudged the debtor as insolvent:

Held, that the decision was upon a question of fact and consequently, no question of law, still less a substantial question of law, arose within the meaning of S. 110, Civil P. C. AIR (V 26) 1939 Cal 35 : ILR (1938) 1 Cal 13 : 181 Ind Cas 251 (DB).

9. Grounds for granting leave.

——S. 110 (3) — Substantial question of law — Question never raised in Courts below or even in application for leave to appeal to Supreme Court — Grant of leave — Permissibility.

An entirely new point, never taken at any previous stage of the litigation, nor even in the ap-

plication for leave to appeal to the Supreme Court, cannot be urged or made the ground for granting leave to appeal. The question of law must definitely and clearly arise and must not be one newly raised; and leave to appeal cannot be granted for the purpose of raising for the first time a question which was not raised at any time while the litigation was pending, i.e., either in the trial Court or the appellate Court. AIR (V 37) 1950 Pat 478 (DB).

——S. 110, O. 45, R. 3 — That large stakes are involved in appeal, whether by itself ground for granting leave.

The fact that large stakes are involved in the appeal in itself would be no ground for granting leave. What the High Court has really to decide is whether any substantial question of law exists which would enable it to give a certificate as required by O. 45, R. 3, Civil P. C., that the case fulfills the requirements of S. 110. AIR (V 29) 1942 Mad 368 : 1942 MWN 136 : (1942) 1 MLJ 309 : 204 Ind Cas 456 (DB).

——Ss. 110, 109 — Leave to appeal for raising for first time question before Privy Council.

Where leave to appeal to the Privy Council is asked for, for the purpose of raising for the first time before the Privy Council a question which was not raised at any time while the litigation was pending in India, that is either in the trial Court or in the High Court, such leave cannot be granted. AIR (V 27) 1940 Mad 810 : (1940) MWN 717 : (1940) 2 MLJ 433 : 52 MLW 463 : 193 Ind Cas 353 (DB).

——S. 110 — Suit for declaration with respect to eleven items value of which exceeding Rs. 10,000/- — Decree granting six items — Defendant's appeal dismissed but plaintiff's cross-objection with regard to four additional items decreed — Application for leave — No substantial question of law involved but value of subject-matter in appeal to Privy Council exceeding Rs. 10,000/- — Appellate decree being one of variation and not of affirmance, leave held should be granted.

Where the case fulfils the requirements of S. 110 of the Code with regard to value, a party has a right of appeal if the decree of the Appellate Court varies the decree of the trial Court. Where the Appellate Court affirms the decision of the Court below, an appeal lies only when it involves some substantial question of law.

The plaintiff as the reversioner to the estate of one S sued for declaration that he was entitled to eleven items of the property belonging to the estate of the deceased and that a deed of settlement executed by S's mother in respect of those properties was void. The trial Court granted a decree in respect of six of the items and dismissed the rest of the claim. The defendant appealed and the plaintiff filed a cross-objection claiming to be entitled to four of the remaining five items. The appeal was dismissed but the cross-objection was allowed. The defendant thereupon applied for leave to appeal to His Majesty in Council. There was no substantial question of law involved in the appeal but the value of the six items granted by the trial Court was Rs. 21,214/- and that of the four items allowed by the cross-objection was Rs. 9,190/-:

Held, that as the defendant wished to challenge in the appeal to the Privy Council the validity of the plaintiff's claim with regard to ten of the eleven items of property the value of which was admittedly above Rs. 10,000/- and as the appellate decree varied the trial Court's decree in respect of four of the items of property, it was one of variation and not of affirmance and therefore, the defendant was entitled as of right to the leave. AIR (V 33) 1940 Mad 539 (FB).

[Overrules AIR (V 13) 1926 Mad 1024.]

——S. 110 — High Court varying lower Court's decree — Party, held entitled to appeal to Privy Council as of right.

Where in plaintiff's appeal, the High Court varied the trial Court's decree by a sum which was far in excess of Rs. 10,000/-, variation no doubt being all in favour of the plaintiff, he could not have any appealable grievance against such variation, but nonetheless, the decree of the High Court was not one of affirmance and having regard to the clear wording of S. 110, it must be held that the requirements of the section had been fulfilled and that the plaintiff was, though it was not necessary for him to show that appeal involved substantial question of law, entitled to appeal to His Majesty in Council as of right. AIR (V 25) 1938 Lah 836 : 40 PLR 399 : 181 Ind Cas 248 (DB).

——S. 110 — Held, that as plaintiff was claiming to enforce a charge and obtain a decree for sale with option to sell any part of the mortgaged property, there would be an appeal as of right if the total value of the property sought to be sold exceeded Rs. 10,000/-. AIR (V 24) 1937 All 169 : (1937) ALJ 38 : ILR (1937) All 405 : 1936 AWR 1297 : 167 Ind Cas 670 (DB).

——S. 110 — Considerations.

When a defendant applies for leave to appeal, the Court is not concerned with the different considerations that might arise in a case where the applicant for leave to appeal to His Majesty in Council is the plaintiff in the suit. AIR (V 21) 1934 Rang 65 : 12 Rang 164 : 149 Ind Cas 1033 (DB).

——S. 110 — A certificate of fitness for appeal to the Privy Council cannot be granted under S. 110 unless the conditions in S. 110 are fulfilled. AIR (V 18) 1931 PC 125 : 35 CWN 669 : 33 Bom LR 954: (1931) MWN 657: 61 MLJ 273: 132 Ind Cas 605.

——S. 110 — Mortgagee succeeding in his mortgage suit except on question of interest — Both mortgagee and mortgagor appealing to High Court — Mortgagor's appeal dismissed and that of mortgagee accepted — Mortgagor applying for leave under S. 109 — No question of law.

The mortgagee sued the mortgagor for ejectment, arrears of rent and interest thereon. The suit was decreed except on the question of interest. From this decision both parties appealed to the High Court. The appeal of the mortgagor was dismissed and that of the mortgagee was accepted with a variation as to the question of interest. The mortgagor applied for leave to appeal to His Majesty in Council from this appellate decision.

Held, that the variation in the appellate decree took place as a result of the decision of the appeal filed by the mortgagee and it could not entitle the mortgagor to the certificate asked for, unless he was able to show that a substantial question of law was involved. AIR (V 17) 1930 Lah 554 : 123 Ind Cas 523 : 31 PLR 236 (DB).

——S. 110 — Misapplication of law.

It is only when a case is of larger importance and the principle, when finally decided by their Lordships of the Privy Council, will be of benefit not only to the people who are directly involved in the litigation, but to a considerable body of other people that leave to appeal should be granted. Misapplication of law to the particular facts of the case is not a fit ground for granting leave

to appeal to His Majesty in Council. AIR (V 15) 1928 All 220 : 50 All 640 : 108 Ind Cas 238 : 26 ALJ 336 (DB).

——S. 110 — Leave to appeal — New position.

If the appellant takes up a new position while appealing to Privy Council, leave cannot be granted. AIR (V 7) 1920 All 241 : 58 Ind Cas 179 (DB).

10. Interpretation of law.

——S. 110 — Substantial question of law — Question of general interest in United Provinces — Question referred decided by Full Bench.

Where one of the questions involved in the case is the subject of a decision by a Full Bench of the Court being upon the construction of the word "principal" in S. 14, U.P. Encum. Estates Act, the proposed appeal involves substantial questions of law and questions of general interest in the United Provinces. AIR (V 30) 1943 Oudh 262 : 1943 OWN 41 : 205 Ind Cas 236 (DB).

11. Limitation.

——S. 110 — Substantial question of law — Question as to starting point of limitation, held substantial question of law.

When the alienor does not profess to convey trust property as manager but does so in his professed capacity as an absolute owner, the question whether time would begin to run from the date of the alienation or only from the death of the alienor is a substantial question of law. AIR (V 30) 1943 Mad 67 : 1942 MWN 565 : 55 MLW 589 : (1942) 2 MLJ 350 : 208 Ind Cas 65 (DB).

——Ss. 110 and 109 — The question of limitation or of adverse possession on which all the Judges are agreed, held not to be a substantial question of law. AIR (V 29) 1942 Cal 498 : 47 CWN 9 : 202 Ind Cas 551 (SB).

——S. 110 — Deduction of period of pendency of opponent's suit — Question if substantial.

After institution of B's suit L brought a cross-suit or another suit to establish his right to an easement. At the time when L brought his suit, which was some months later than the institution of the opponent's suit, the period of 20 years had elapsed and it was held that it was not open to him to add on to the period which had expired at the time of the institution of the opponent's suit, subsequent period after the institution of that suit.

Held, that although there was a point of law it was not a substantial question of law. AIR (V 16) 1929 Bom 341 : 119 Ind Cas 782 : 53 Bom 552 : 31 Bom LR 632 (DB).

——S. 110 — Refusal to exercise discretion to extend time for payment of court-fee — Question if substantial.

The question of law need not be one of importance, but must be a substantial question of law between the parties to the case, where the trial court, in the exercise of its discretion, refuses to extend the time for putting in court-fees, it can hardly be said that the question is a substantial question of law arising between the parties to the case. It is more a question between the court and the plaintiff. 5 Lah 216. Not Foll. AIR (V 15) 1928 Lah 560 : 110 Ind Cas 179 (DB).

——S. 110 — Revival after 1871 of claim barred by limitation before 1871.

The revival after 1871 of a claim to malikana which had been barred by limitation before 1871 on the ground of its being a claim to an interest in land is not a substantial question of law within S. 110. AIR (V 11) 1924 Pat 271 : 85 Ind Cas 8 : 1 Pat LR 314 (DB).

——S. 110 — Substantial question of law — Limitation.

The applicability of Limitation Act to suits by minors against administrators for accounts is a substantial question of law within S. 110, C. P. C. AIR (V 5) 1918 Pat 666 : 45 Ind Cas 182 (DB).

——S. 110 (S. 596, old Code) — Application for leave to appeal to His Majesty in Council — Limitation Act, Ss. 5, 12.

Held, that neither S. 5 nor S. 12 of the Limitation Act, 1877, applies to applications under S. 596 of the Code of Civil Procedure for leave to appeal to His Majesty in Council. (1906) 28 A 391 (393) : 1906 AWN 55 : 3 ALJ 165 (DB).

12. Substantial question of law.

(a) Adoption.
(b) Compromise.
(c) Construction of documents.
(d) Custom.
(e) Discretion.
(f) Dismissal.
(g) Evidence.
(h) Execution.
(i) Interpretation.
(j) Mortgage.
(k) Pre-emption.
(l) Settled Law.
(m) What is.
(n) What is not.

(a) Adoption.

——S. 110 — Suit by widow — Subsequent adoption reserving right of management to widow — Adopted boy not impleaded — Leave to appeal — No question of law.

The question, whether a suit was not maintainable, because a previous action commenced by the predecessor in interest of the plaintiff had abated under O. 22, R. 9, is not a substantial question of law within the meaning of S. 110. A suit was instituted by a Hindu widow in possession of the estate of her late husband. During the pendency of the suit she adopted a son. At some stage in the trial the question was raised whether, after this adoption, it was not incumbent upon the lady to bring upon the record as plaintiff in the suit the name of the minor boy and then to continue the action as his next friend. The contention was repelled by the trial Court. There was at the time of the adoption an agreement between the lady herself and the father of the boy, the effect of which was to vest the management, at any rate, of the estate in the hands of the lady until the boy should attain majority.

Held, the question whether the widow could be allowed to proceed with the suit was not substantial question of law. AIR (V 11) 1924 All 66 : 75 Ind Cas 100 : 45 All 667 : 21 ALJ 665 : 4 LR A Civ. 298 (DB).

(b) Compromise.

——S. 110 (3) — Applicability — Question of law — Whether there was consideration for compromise — If can be raised for first time in appeal.

The question whether there was or was not consideration for a compromise is a question of fact and not a question of law or a substantial question of law for purposes of granting leave to appeal to the Supreme Court under S. 110 (3), C. P. Code. Nor can such a question of fact be raised for the first time in appeal; it ought to be raised in the first Court itself and made the subject of an issue in that Court. AIR (V 37) 1950 Pat 478 (DB).

——S. 110 — "Substantial question of law" — Meaning of.

A question of law is substantial if it is substantial as between the parties to the suit. A question of law is substantial as between the parties if the decision turns one way or another on the particular view taken of the law. If it does not affect the decision then it cannot be substantial as between the parties. But if it substantially affects the decision then it is substantial as between the parties though it may be wholly unimportant to others. The construction of a compromise which forms the root of title and whether it is possible, as a matter of law, to infer that there was a compromise, and as to what the terms were, from the material on record, are not only questions of law but are substantial questions of law as between the parties when the decision of the case turns upon those questions. 1940 Nag 29 and 1948 Mad 111, Comm. on. AIR (V 36) 1949 Nag 300 : 1949 NLJ 125 : ILR (1949) Nag 224 (DB).

——S. 110 — The question whether when the parties to a suit agree to abide by the statement of a referee, and the proceedings are in the nature of an arbitration or a compromise is a substantial question of law. AIR (V 20) 1933 All 177 : (1932) ALJ 730 : 54 All 858 : 138 Ind Cas. 670 (DB).

——S. 110 — Hindu widow as executrix.

The question as to whether a Hindu widow 'qua executrix' can compromise, is not a substantial question within the meaning of S. 110. AIR (V 13) 1926 Cal 711 : 43 CLJ 206 (DB).

(c) Construction of documents.

——S. 110 — "Substantial question of law" — Meaning and essentials of — Construction of document or decree.

A substantial question of law within the meaning of S. 110, C. P. Code, is not necessarily a question of public importance; it must be a substantial question of law as between the parties to the case involved. What is contemplated is not a question of law alone; it must be a substantial question of law. Where the question of law is not well settled or when there is some doubt as to the principle of law involved, it would certainly be "a substantial question of law."

The question of construction of a document or a decree is certainly a question of law; but every construction of a document or decree does not necessarily involve a substantial question of law. AIR (V 36) 1949 Bom 134 : 50 Bom LR 744 (DB).

——S. 110 — Question whether property was gift to God or 'archaka' service 'inam' based upon construction of 'inam' papers.

Where the question to be decided is one of fact, it does not involve any issue of law merely because documents which were not instruments of title or otherwise the direct foundation of rights, but were really historical materials, have to be considered for the purpose of deciding the question.

Where, therefore, the finding of the Court upon the question as to whether certain property was gift to God or an 'archaka' service 'inam', is reached upon the construction of 'inam' papers, no substantial question of law is involved. AIR (V 25) 1938 Mad 631 : 47 MLW 393 : (1938) MWN 298 : (1938) 1 MLJ 487 : 181 Ind Cas 988.

——S. 110 — When appeal to Privy Council lies on question of interpretation of document.

The interpretation of a document may amount to a substantial question of law, but that will depend on the circumstances of the document. AIR (V 21) 1934 Oudh 433 (2) : 11 OWN 1055 : 151 Ind Cas 307 (DB).

——S. 110 — Question of the interpretation of a document is a question of law, and when it arises between the parties, it may be said that it is a substantial question of law. AIR (V 20) 1933 All 561 : (1933) ALJ 172 : 145 Ind Cas 549 (DB).

——S. 110 — Waqf.

Where the value of the subject-matter of a suit in the lower Court was more than Rs. 10,000/- and the value of the subject-matter in dispute on appeal to the Privy Council was more than Rs. 10,000/-, and the argument for the proposed appellant was that a deed of 'wakf' was more or less illusory, because 20 per cent. income of the 'wakf' property was to go towards the payment of servants and to meet miscellaneous expenses, and that Rs. 700/- were to go to the 'mutawalli' himself and it was urged that the provision that 20 per cent. of the income was to be used for the purchase of fresh property was an invalid provision under the law and if allowed to stand, would be against public policy:

Held, that these were substantial questions of law and the terms of S. 110, Civil P. C., were fulfilled. AIR (V 20) 1933 All 561 : (1933) ALJ 172 : 145 Ind Cas 549 (DB).

——S. 110 — Inalienability of property.

The question as to whether the mortgaged property is Ghatwali and inalienable is a point of law as it depends upon construction of documents on the record. AIR (V 16) 1929 Pat 561 : 117 Ind Cas 193 (DB).

——S. 110 — Difficulty.

Construction of a difficult document such as an indemnity bond is a mixed question of law and fact; and as regards the law it is a substantial question. AIR (V 14) 1927 Mad 443 : 53 MLJ 375 : 1927 MWN 213 : 39 MLT 15 : 103 Ind Cas 31 (DB).

——S. 110 — Circumstances.

The interpretation of a document may amount to a substantial question of law but that depends on the circumstances of every document. AIR (V 12) 1925 Oudh 219 : 83 Ind Cas 90 (DB).

——S. 110 — General interest.

The interpretation of documents involving a substantial question of law and of general interest only justifies grant of leave. AIR (V 11) 1924 All 559 : 79 Ind Cas 213 : 46 All 227 : 5 LR A Civ. 158 (DB).

——S. 110 — When important.

Mere questions of construction of particular documents cannot be treated as questions of general importance or substantial questions of law within the meaning of S. 110. AIR (V 9) 1922 Oudh 214 : 73 Ind Cas 407 (DB).

——S. 110 — Substantial question of law — Construction of document — Semble.

The construction of any particular document is not a substantial question of law within the meaning of S. 110 of C. P. C. AIR (V 4) 1917 All 93 : 40 Ind Cas 110 (DB).

(d) Custom.

——S. 110 — Sufficiency of evidence.

Whether the evidence produced to establish the custom of the adoption of a daughter's son in the city of Nagpur amongst the Maharashtra Brahmins was sufficient does not amount to substantial question of law within S. 110. AIR (V 13) 1926 Nag 215 : 90 Ind Cas 270 (DB).

——S. 110 — Question of forfeiture on alienation of Karamkari and Adimayavana tenures — General interest.

The question whether the permanent tenures known as Karamkari and Adimayavana in Malabar have the incident of forfeiture on alienation attached to them by custom or not is a substantial question of law and one of general interest in

Malabar. Leave may be granted in these cases under S. 109 (c), as the question raised is a substantial question of law of general interest in Malabar and as the same question arose in second appeals in which High Court had already given leave. The question whether a custom has been established or not is a question of law though it has to be inferred from the facts proved. AIR (V 10) 1923 Mad 443 : 72 Ind Cas 918 : 17 MLW 445 (DB).

(e) Discretion.

——S. 110 — Oudh Chief Court Rules, Chap. XVII, R. 18 — Appeal dismissed under R. 18 — Appeal to Privy Council against order of dismissal.

Rule 18 of Chap. XVII of the Chief Court Rules gives the Court discretion to dismiss the appeal for want of prosecution if it is not satisfied that there are reasonable grounds for default. Where the appeal is dismissed for want of prosecution and an appeal is sought to be preferred to the Privy Council against the order of dismissal, the only question in the appeal is whether the discretion has been rightly exercised and it cannot be said that it involves any substantial question of law. The questions of law involved before the Court of first instance cannot be considered. AIR (V 29) 1942 Oudh 362 : 1942 AWR (CC) 156 : 1942 OWN 206 : 199 Ind Cas 835 (DB).

——S. 110 — Costs are a matter of discretion and a variation by the High Court in this matter alone does not affect the question whether the judgment of the High Court is or is not one of affirmance. AIR (V 20) 1933 Pat 703 : 15 PLT 90 : 146 Ind Cas 744 (FB).

——S. 110 — Discretion — Right or wrong exercise of discretion.

A wrong exercise of discretion in refusing to grant leave under Clause 12 of the Letters Patent to file an additional written statement is not a substantial question of law. Whether discretion has been rightly or wrongly exercised by the High Court may in some cases involve a question of law; but it cannot be said that any substantial question of law within the meaning of Clause 3 of Section 110 of the C. P. Code would arise in such a case. AIR (V 9) 1922 Bom 11 : 77 Ind Cas 941 : 24 Bom LR 196 (DB).

——S. 110 — Time to make up Court-fee.

The Court has discretion to grant or refuse to grant time for making up deficient Court-fee, and whether a Court has used proper discretion in a particular case is a substantial question of law. (1922) 63 Ind Cas 222 (Lah) (DB).

——S. 110 — Substantial question of law — Interest.

An award of interest at 9 per cent. per annum by the Court is not such an arbitrary and unwarrantable exercise of the discretion of the Court as to involve such a substantial question of law as is contemplated by S. 110 of the Code. AIR (V 2) 1915 Lah 113 : 22 PR 1915 : 19 PWR 1915 : 66 PLR 1915 : 26 Ind Cas 402 (DB).

(f) Dismissal.

——S. 110 — Substantial question of law — Order dismissing appeal for default.

Per Wali Ullah, J.— An order dismissing an appeal for default does not involve a substantial question of law within the meaning of Section 110, C. P. Code, as the only question before the Privy Council if an appeal is preferred will be whether or not the Court was justified, under the circumstances of the case, in dismissing the appeal. AIR (Vol 35) 1948 All 375 (DB).

——S. 110 — Laches and irregularities in filing — No question of law.

Where the High Court dismissed an appeal on the ground of laches and certain irregularities in filing the appeal on the part of the appellant;

Held, that the only question for the Judicial Committee being whether the High Court was right in dismissing the appeal in the exercise of discretion, there was no substantial question of law involved. AIR (Vol 8) 1921 Cal 94: 33 CLJ 131: 62 Ind Cas 205 (DB).

——S. 110 — Substantial question of law — High Court dismissing appeal on appellant's failure to furnish security.

Where an appeal was dismissed by the High Court on the ground of the appellant's failure to furnish security for costs as diretced and appellant thereupon applied for permission to appeal to the Privy Council, the permission was not granted as the appeal did not involve a question of law. AIR (Vol 1) 1914 All 54: 36 All 325: 12 ALJ 451: 23 Ind Cas 532 (DB).

(g) Evidence.

——S. 110 — Substantial question of law — Inference as to nature of property (e. g.) whether debutter or secular.

If a Court is asked to infer from evidence the legal nature of a certain property, (e. g.) whether it is to be regarded as debutter or secular, the inference would be an inference of law and not of fact. Where the oral evidence as to the user of the property is in conflict and there is not much evidence to establish the debutter nature of the property, the question whether the High Court is right in inferring from such evidence that the property is debutter, is a substantial question of law giving rise to a right of appeal to the Federal Court. (1950) 54 CWN 538 (DB).

——S. 110 — Affirming judgment — Subject matter over Rs. 10,000.

Although subject-matter of a suit may be above Rs. 10,000, if the decree of the lower Court is affirmed by the High Court and there is no variation of any kind in the substantive portion of the decree except the awarding of costs in original suit, there is no right of appeal to the Privy Council unless the suit involves some substantive question of law. AIR (Vol 16) 1929 Oudh 43: 5 OWN 1076: 114 Ind Cas 320 (DB).

——S. 110 — Partition suit — Lower Court granting certain share — High Court on appeal increasing it — No further grievance to plaintiff — Proof of question of law.

If the two Courts, High Court and lower Court, are at one upon the matter which is to be in debate before the Privy Council, then it is a case of a decree which affirms the decision of the Court immediately below. Where the amount is a question in dispute, the fact that the Courts differ and that the higher Court differs in favour of the applicant, may not mean that the decision is one of affirmance, but where in a suit for partition, the lower Court granted certain share and High Court increased it further, so that the plaintiff has no further grievance in that matter, he cannot, without showing a substantial question of law, have a right to litigate upon other points upon which both the Courts have been in agreement. AIR 1925 PC 60, Not Foll. AIR (Vol 14) 1927 Cal 543: 45 CLJ 426: 31 CWN 572: 103 Ind Cas 65 (DB).

——S. 110 — Admission of further evidence on a point given up in the lower Court.

The term 'decision' means the decree or order passed and not the reasons given for passing such decree or order. Affirming decree does not

mean affirming judgment, i. e., the grounds of the decree need not be precisely stated: therefore, even when there are no concurrent findings of fact clause 3 of Section 110 may apply and in that case some substantial question of law will have to be shown to have been involved in the appeal. Where the appellate Court allows an issue to be re-opened which had been given up and permits further evidence to be taken that by itself is not a sufficient substantial question of law especially where the applicant was in no way prejudiced by the procedure adopted by the appellate Court. AIR (Vol 11) 1924 Pat 468: 75 Ind Cas 58: 5 PLT 17: 2 Pat LR Civ 48 (DB).

——S. 110 — Affirming judgment with variation by consent.

Where the decree of the High Court is one of affirmation except as regards a variation made in the lower Court's decree with the consent of the persons trying to appeal to the Privy Council, those persons must show that some substantial question of law is involved. AIR (Vol 8) 1921 Cal 81: 25 CWN 775: 66 Ind Cas 621 (DB).

——S. 110 — Substantial question of law — Incidental conclusion — Appreciation of evidence.

Where the decision only incidentally involves a decision on the question of interpretation to be put on certain documents it cannot be regarded as a substantial point of law directly involved in the case. Misappreciation of the value of documentary evidence is not the same as a misconstruction or misinterpretation of a document and does not involve a question of law. AIR (Vol 4) 1917 Lah 381: 129 PWR 1917: 133 PLR 1917: 41 Ind Cas 781 (DB).

——S. 110 — Substantial question of law — Misconstruction of evidence.

Misconstruction of a part of the evidence concerning certain facts is not a "substantial question of law" within the section. AIR (Vol 3) 1916 Mad 1222: 30 Ind Cas 372 (DB).

(h) Execution.

——S. 110 — Decree transferred for execution — Application for substitution made to second Court — Maintainability of, if a question of law.

The question, whether an application made for substitution to a Court to which execution is transferred is, according to law, a substantial question of law within S. 110. AIR (Vol 12) 1925 Oudh 728: 88 Ind Cas 552.

(i) Interpretation.

(i) General.
(ii) Difference of opinion.
(iii) General or particular interest.

(i) General.

——S. 110 — Question whether O. 13, R. 1 and O. 16, R. 1 apply to document, held not question of law.

The question whether the provisions of O. 13, R. 1 and O. 16, R. 1 apply to the documents and witnesses on which the plaintiffs rely only as regards those issues of which the burden of proof lies upon them or whether they refer to the documents and witnesses of the plaintiffs for the whole case is not a substantial question of law. AIR (Vol 30) 1943 Pesh 81: 1943 Pesh LJ 81: 209 Ind Cas 571.

——S. 110 — The requirement of S. 70, Hindu Religious Endowments Act, is fulfilled by the notice being served upon the 'archaka' on the ground that he was the 'de facto' trustee. This view is based upon the clear language of the section itself and the question whether the requirement of S. 70 is fulfilled by giving notice to 'archaka' is not a substantial question of law. AIR (Vol 25) 1938 Mad 631: 47 MLW 393: (1938) MWN 298: (1938) 1 MLJ 487: 181 Ind Cas 988.

——S. 110 — Appeal involving question as to effect of Proviso 2 to S. 4(2), Income Tax Act — — Amount of tax involved Rs. 3,500 — Assessee carrying on big business as planter — Held, question was a substantial question of law — Though actual amount involved was Rs. 3,500, still leave held should be granted.

An assessee carried on a business as a planter in the State of Mysore. The Income-tax Authorities applied for leave to appeal to the Judicial Committee of the Privy Council from the decision of the High Court, on the effect of the Proviso 2 to S. 4(2), of the Income Tax Act. The actual amount of the tax involved in the appeal was Rs. 3,500:

Held, that the effect and interpretation of Proviso 2 to S. 4(2), was a substantial question of law within the meaning of S. 110.

Held, further, that though the actual amount was Rs. 3,500, the question would arise each year while the assessee remained in this business. Therefore, in the end, the amount of tax would be very considerable and hence the application should be granted. AIR (Vol 25) 1938 Mad 352: 47 MLW 350: (1938) MWN 465: 174 Ind Cas 491 (SB).

——S. 110 — Every question of law is not a substantial question of law and a question of law will not be substantial merely because much is at stake on the answer to it. It must be a question of some difficulty in which the pros and cons are about equally balanced.

Where a Full Bench decision of the High Court has settled the law, the fact that there is conflict between the decision of another High Court does not render the case a fit one for appeal to the Privy Council. The case is less fit for appeal when the other High Courts have come to the same conclusion. AIR (Vol 23) 1936 Mad 311: (1935) MWN 796: 42 MLW 568: 69 MLJ 497: 160 Ind Cas 410 (DB).

——S. 110 — Although before certifying a case to be a fit one for appeal, the High Court must bear in mind that their Lordships of the Privy Council are not unnecessarily troubled more than once in disposing of a matter, yet if the substantial questions of law which principally arise in a case go to its very root and are the foundation of the pleas raised by the defendants touching the question of the 'locus standi' of the plaintiff and the plea of limitation, there would be a considerable waste of time, energy and labour in allowing the parties to have the questions of fact in the case fought out at length while the substantial and main questions of law still remain undisposed of finally. Under such circumstances, leave to appeal to the Privy Council may be given. AIR (Vol 21) 1934 All 198: (1934) ALJ 1166: 4 AWR 1598: 147 Ind Cas 1067 (DB).

——The question whether when there is a doubt as to the applicability of the Estates Land Act and a compromise for the purpose of settling that doubt for ever, the provisions of the Act cannot be applied for the purpose of showing that the terms of the compromise are illegal is a substantial question of law. AIR (Vol 20) 1933 Mad 221: 142 Ind Cas 711 (DB).

——S. 110 — Where the Commissioner of Income-tax applied for leave to appeal to the Privy Council from an order of the Judicial Commissioner's Court requiring him to refer to that Court cer-

tain questions of law arising out of an order of an Income-tax officer refusing to register certain persons as a firm, on the ground that an order refusing registration was a final order and the Judicial Commissioner's Court had no jurisdiction to require the Commissioner to state the case:

Held, that the Commissioner was entitled to obtain leave to appeal and leave should be granted. AIR (Vol 20) 1933 Sind 344: 148 Ind Cas 161 (DB).

——S. 110 — Question whether the use of certain words effects a divorce.

The question whether the use of certain words in 'urdu' by a woman's husband, must be held to effect a divorce under the Hanafi Law in spite of the admitted fact that there was no intention of divorce on the part of the husband, is a proposition of law, but it is not a substantial question of law within the meaning of S. 110, sufficient to entitle a party for leave to appeal to the Privy Council. AIR (Vol 19) 1932 Oudh 134: 9 OWN 103: 138 Ind Cas 630 (1).

——S. 110 — Law on particular point unsettled.

Where a law on a particular point does not seem to have ever been laid down by the Privy Council, the question does not cease to be a material question of law merely because cases involving somewhat similar points have been dealt with by the Privy Council so as to disentitle a party to leave to appeal to Privy Council. AIR (Vol 16) 1929 Rang 280: 7 Rang 271: 119 Ind Cas 218 (DB).

——S. 110 — Binding nature of a document by Hindu widow.

Where the question between the parties was whether certain documents executed by a Hindu widow were binding on the estate and the reversioner.

Held, that the question was not a substantial question of law and that the case was not otherwise fit for appeal to His Majesty in Council. AIR (Vol 15) 1928 All 19: 103 Ind Cas 654 (DB).

——S. 110 — Meaning of.

The term "substantial question of law" merely means such a question as between the parties in the case involved. AIR (Vol 15) 1928 Nag 76: 23 NLR 156: 106 Ind Cas 366 (DB).

——S. 110 — Proposition of law.

The point of law for granting leave for appeal to Privy Council must be a question of law and not merely a proposition of law. AIR (Vol 13) 1926 Oudh 381: 1 Luck 265: 29 OC 215: 3 OWN 557: 95 Ind Cas 193 (FB).

——S. 110 — Re-opening of settled account for mistake.

Where the question of mistakes in a settled account was not raised in the pleadings nor considered in the trial Court and no evidence was given to explain the mistakes, but the High Court on appeal considered the mistakes to be sufficient to enable the Court to re-open that account.

Held, that the question whether mistakes, which though not material, are sufficient in the circumstances to entitle the Court to re-open a settled account, is a question of law and the manner in which the case was conducted in the trial Court, that is to say, no question being raised therein as to mistakes and no opportunity being given to the parties to explain the alleged mistakes, is also in itself a question of law of sufficient importance for determination by a higher tribunal. AIR (Vol 14) 1927 Pat 311: 102 Ind Cas 752 (DB).

——S. 110 — Party transferring her interest in subject-matter of suit to a third person — No substantial point of law involved.

Where though the application was made in the name of the party to appeal but the party had parted with all interest in the subject-matter of the suit,

Held, that in these circumstances unless the High Court were satisfied that a substantial point of law was involved, it would not be disposed to assist a gambler in litigation at the expense of the legal heirs to the estate. 94 Ind Cas 464: 3 Rang 656: AIR (Vol 13) 1926 Rang 111 (DB).

——S. 110 — No substantial question of law need be involved if there is a small variation by the Appellate Court in the Lower Courts' decree.

Where the appellate Court increased the amount of maintenance payable to defendant from Rs. 800 to Rs. 1,200 a year and in other respects confirmed the lower Court's decree,

Held, for purposes of appeal to Privy Council no substantial question of law need be involved, as the lower Court's decree was not 'affirmed' but 'varied' by the appellate Court. AIR (Vol 12) 1925 PC 60: 86 Ind Cas 504: 51 Cal 969: 51 IA 319.

——S. 110 — Question involving discretion.

The exercise of discretion under S. 90 of the Evidence Act cannot be considered to involve any substantial question of law within the meaning of S. 110 of the C. P. Code. AIR (Vol 8) 1921 Oudh 30: 61 Ind Cas 131: 8 OLJ 1 (DB).

——S. 110 and O. 45 R. 3 (1) — Affirming Judgment — Substantial question of law — Appeal to Privy Council.

Where a High Court has affirmed the decree of a Lower Court and the value of the subject-matter is above Rs. 10,000, it is essential for granting leave to appeal to Privy Council that some substantial question of law must be involved. AIR (Vol 3) 1916 Mad 1222: 30 Ind Cas 372 (DB).

——S. 110 — Point covered by precedents.

No appeal lies to the Privy Council, if the question of law, which is the ground for appeal, has already been decided by the Privy Council. AIR (Vol 2) 1915 Oudh 158: 2 OLJ 214: 30 Ind Cas 239 (DB).

——S. 110 — Substantial question of law — Appellate decree confirming original decree on different grounds.

A substantial question of law should be involved for an appeal to lie to the Privy Council against an appellate decree which confirms with the original decree but on different grounds. (1911) 13 CLJ 501: 11 Ind Cas 159 (DB).

(ii) Difference of opinion.

——S. 110 — A question in order to be a substantial question of law must be a question of law in respect of which there may be a difference of opinion. AIR (Vol 16) 1929 Lah 55: 9 Lah 581: 29 PLR 529: 110 Ind Cas 258 (DB).

——S. 110 — A substantial question of law means a question of law in respect of which there may be a difference of opinion. (1926) 92 Ind Cas 479: 26 PLR 614 (DB).

——S. 110 — A question of law in respect of which there may be a difference of opinion constitutes a substantial question of law within S. 110. AIR (Vol 13) 1926 Nag 215: 90 Ind Cas 270 (DB).

——S. 110 — Difference of opinion.

In order to justify the grant of a certificate for leave to appeal to His Majesty in Council, the High Court must be satisfied that a substantial question of law is involved in the case; that is to say, a question of law in respect of which there may be a difference of opinion. AIR (Vol 13) 1926 Nag 5: 89 Ind Cas 941 (DB).

——S. 110 — The question whether the evidence produced to establish certain custom is sufficient

though technically a question of law is not a substantial question of law justifying grant of certificate for appeal to Privy Council. A substantial question of law is one in respect of which there may be a difference of opinion. AIR (Vol 11) 1924 Lah 473: 5 Lah 260: 6 LLJ 180: 78 Ind Cas 417 (DB).

(iii) General or particular interest.

——S. 110 — 'Substantial question of law'.

The words 'substantial question of law' in the last clause of S. 110 of the Civil P. C. mean a substantial question of law as between the parties in the case involved and not a question of general importance. The condition is satisfied if there is a substantial question of law between the parties. (1934) 147 Ind Cas 121: 10 OWN (CC) 879.

——S. 110 — General or particular importance.

A substantial question of law, within the last clause of S. 110, does not mean a substantial question of general importance, but a substantial question of law as between the parties in the case involved. AIR (V 15) 1928 PC 172: 55 MLJ 651: 55 Cal 944: 55 IA 235: 32 CWN 817: 29 PLR 429: 48 CLJ 119: 28 MLW 66: 5 OWN 668: 30 Bom LR 1384: 26 ALJ 1215: 109 Ind Cas 723: 1928 MWN 917.

——S. 110 — General interest.

Whether, where a case involves a substantial question of law within S. 110, the question should be of general interest. AIR (Vol 15) 1928 All 19: 103 Ind Cas 654 (DB).

——S. 110 — General importance.

The phrase "substantial question of law" in S. 110, C. P. Code, means a substantial question of law as between the parties to the proceeding and not merely one of general importance. AIR (Vol 15) 1928 Nag 114: 106 Ind Cas 531.

——S. 110 — General importance.

A substantial question of law does not mean a question of general importance but the words "substantial question of law" mean a substantial question of law as between the parties in the case involved. AIR (Vol 14) 1927 PC 110: 2 Luck 93: 54 IA 126: 31 CWN 495: 4 OWN 515: 26 MLW 70: 1927 MWN 519: 102 Ind Cas 889.

——S. 110 — Inheritance of "Lawa-jama" in Berar — Question of public importance.

The question whether the inheritance of the cash allowances known comprehensively in Berar as "lawa-jama" is governed by the Inam Rules or by the law relating to ordinary pensions, was held to be a question of considerable public importance. AIR (Vol 14) 1927 Nag 63: 96 Ind Cas 751 (DB).

——S. 110 — General interest — Debatability.

Where the grounds of appeal raise questions of law but they are not substantial in the sense that they are debatable, of general interest or without previous decisions of their Lordships of the Privy Council to guide Indian Courts, leave cannot be granted. AIR (Vol 12) 1925 Oudh 545: 85 Ind Cas 409 (DB).

——S. 110 — General interest.

The question involved must generally be important in the way that the decision of them will affect a large number of persons. AIR (Vol 10) 1923 Nag 272: 73 Ind Cas 221.

(j) Mortgage.

——S. 110 — Mortgage not registered by company — Question if one of law.

The question whether a mortgage which is not registered in accordance with the provisions of S. 109 can be repudiated by the company itself while it is a going concern, is not a substantial question of law within S. 110, C. P. Code, as the law on the question is perfectly clear, namely that such a mortgage cannot be repudiated by the company itself. AIR (Vol 14) 1927 Rang 288: 6 Bur LJ 160: 5 Rang 585: 104 Ind Cas 326 (DB).

——S. 110 — Right of prior mortgagee in possession to apply under O. 21, R. 89 — Question if one of law.

Whether a prior mortgagee in possession can apply under O. 21, R. 89 to set aside a sale where such a sale has taken place in pursuance of a decree obtained by a subsequent mortgagee of a simple mortgage in a suit to which the prior mortgagee was not a party and whether Cl. (b) of S. 72, T. P. Act applies to such a sale are substantial questions of law within the meaning of S. 110, C. P. Code. AIR (Vol 13) 1926 Oudh 17: 2 OWN 860: 91 Ind Cas 93 (DB).

——S. 110 — Substantial question of law — Construction of document — Mortgage by conditional sale.

The question whether a document creates a mortgage by conditional sale or a sale with an option to purchase is a substantial question of law within the meaning of S. 110 of the C. P. C. (1912) 14 Ind Cas 269 (All) (DB).

——S. 110 — Substantial question of law.

A case is a fit one for appeal to the Privy Council where a substantial question of law of general importance is in question, e.g., the extent to which a mortgage without necessity by a manager of a Hindu family is binding. (1913) 18 Ind Cas 305 (All) (DB).

(k) Pre-emption.

——S. 110 — Question whether demand was immediate if one of law.

Where there was an interval of perhaps a minute between the time when the pre-emptor heard of the sale and the time when he made the demand, the High Court held that this was to all intents and purposes an immediate demand by the pre-emptor. It was argued on an application for leave to appeal that this view was opposed to the strict letter of the law as laid down in a passage from the Hedaya, and that the right of pre-emption is a special right and is of such a nature that all the technicalities prescribed by law must be strictly complied with before it can be exercised.

Held, that from this point of view the point is an arguable one and it is an important point of law affecting the right of Mahomedans generally and that there is a substantial point of law, on which leave to appeal should be granted. AIR (Vol 15) 1928 Rang 132: 6 Rang 169: 110 Ind Cas 386 (DB).

——S. 110 — Estate comprising in part, however small, of movable property — Question of applicability of law of pre-emption if one of law.

The point whether, with regard to an estate comprising in part however small of movable property the law of pre-emption applies, is a substantial point of law. AIR (Vol 15) 1928 Rang 132: 6 Rang 169: 110 Ind Cas 386 (DB).

(l) Settled law.

——S. 110 — Substantial question of law — Question of law definitely settled by High Courts in India.

A question of law which has been definitely settled by the High Courts in India and on which there is no difference of opinion, is not a substantial question of law within the meaning of S. 110, C. P. Code. AIR (Vol 36) 1949 EP 330: 51 PLR 95 (DB).

——S. 110 — Substantial question of law — Principle of law well established — Application of those principles to a particular set of facts — Hindu Law — Joint family — Blending of separate property — Test.

Where the principles of law on a point are well settled and the only question is the application of those legal principles to a particular set of facts,

it cannot be said that a substantial question of law arises.

The test for determining whether there had been a blending of separate with joint family property by a Hindu is the intention of the person dealing with the properties and the various matters which may legitimately be considered by the Courts in order to determine what the intention of the persons concerned was have been already indicated by the Privy Council and as there could be no enunciation of any fresh legal principle leave to appeal cannot be granted on the question whether the circumstances in any particular case would justify an inference of "blending". AIR (Vol 35) 1948 Mad 111: (1947) 2 MLJ 194: 60 LW 511: 1947 MWN 497.

——S. 110 — Where the decision of the High Court is given in accordance with a previous Full Bench decision, which, however, is subsequently overruled by the Privy Council, that is a substantial question of law. AIR (Vol 33) 1946 Bom 437 (DB).

——S. 110 — No two opinions on point of law.

Where there can be no two opinions on a point of law or where a point of law has been finally settled by the Privy Council, then there is no substantial question of law involved. AIR (Vol 30) 1943 Pesh 81: 1931 Pesh LJ 81: 209 Ind Cas 577 (DB).

——S. 110 — Case supported by Privy Council decision — Held no question of law.

Held, that apart from the value of the property in dispute, the case was not a fit one for appeal to His Majesty in Council as involving substantial question of law, since the opposite party's title to the property in dispute was protected by the judgment of their Lordships of the Judicial Committee in other suit. AIR (Vol 26) 1939 Oudh 1: 1938 AWR 112: 1938 OWN 1101: 178 Ind Cas 250 (DB).

——S. 110 — Questions sought to be agitated subject of consideration by Courts over 70 years — Uniform decisions arrived at — Titles created on such decisions.

Under S. 110, it is incumbent upon the Court in a case where the appellate decree affirmed the decree of the lower Court to be satisfied, before it burdens the Judicial Committee of the Privy Council with the hearing of the appeal, that a question of law fairly open to argument, and not merely an alleged question of law, is involved in the appeal.

Where the questions sought to be agitated by the petitioner before the Privy Council have been the subject of consideration by the Courts in the Punjab for a period of over 70 years and the Courts have arrived at a uniform decision and the predecessors of the petitioner were party in several of such cases and the titles have been created for a long time on the strength of such decisions, neither a substantial question of law arises nor is the case fit in other respects for appeal to the Privy Council. AIR (Vol 24) 1937 Lah 758: 39 PLR 972: 174 Ind Cas 265 (DB).

——S. 110 — Object of appeal to challenge act of Executive Government — Question in dispute settled by statute.

Where the whole object of the appeal which is sought to be argued before their Lordships of the Privy Council is to challenge the act of the Executive Government of the United Provinces of Agra and Oudh in taking the Estate of the applicant under the management and superintendence of the Court of Wards, no substantial question of law is involved as the matter in dispute is settled by statute-law contained in the U. P. Court of Wards Act. In such a case, leave will not be granted for appeal to His Majesty in Council. AIR (Vol 24) 1937 Oudh 132: 1936 OWN 191: 12 Luck 15: 160 Ind Cas 171 (DB).

——S. 110 — Legal principles governing case authoritatively settled — Real question only as to applicability of principles to facts of case.

Where the legal principles governing the case do not admit of any doubt, but have been settled authoritatively by the highest Tribunal and there is no longer any room for difference of opinion and the real question is one of the application of the principles to the particular facts of the case, no 'substantial question of law' within S. 110 can be said to be involved and leave to appeal to the Privy Council cannot be granted. (1936) 165 Ind Cas 735 (Lah).

——S. 110 — Where the principles of law on a particular point are well-settled and the only question is the application of these principles to a particular set of facts, it cannot be said that a substantial question of law arises within the meaning of S. 110, Civil P. C. AIR (Vol 18) 1931 Lah 753 (2): 32 PLR 599: 13 Lah 251: 134 Ind Cas 790 (DB).

——S. 110 — Decree for redemption — Order for foreclosure against holder of probate — Subsequent revocation of probate — Order for foreclosure is binding on real owner — Even assuming that it was not binding, it is not open to real owner to institute fresh suit for the very purpose for which the previous suit had been instituted — No substantial question of law was involved in the case for purposes of appeal under S. 110. AIR (Vol 18) 1931 Rang 283: 9 Rang 360: 133 Ind Cas 494 (2) (DB).

——S. 110 — Application of settled-law.

The application of well-defined legal principles to a particular set of facts is not a question of law which can fairly be described as substantial. AIR (Vol 15) 1928 All 61: 50 All 208: 25 ALJ 970: 107 Ind Cas 33 (DB).

——S. 110 — Settled Buddhist law — Right of lesser wife living apart from her husband — No substantial question of law.

The decisions of the Rangoon High Court following, as they do, successive decisions of the Highest Court in Upper Burma are consistent with the law as stated in the Manukye Dhamma that Vol. X, S. 42 as regards the rights of an inferior or lesser wife when living apart from her hubsand and should be regarded as settling the law on the point and is not a substantial point of law. AIR (Vol 13) 1926 Rang 111: 3 Rang 656: 94 Ind Cas 464 (DB).

(m) What is.

——S. 110 — Substantial question of law — What is — Question of Court-fee, if one.

A substantial question of law within the meaning of S. 110, C. P. Code, does not mean a question of general importance but only a substantial question of law as between the parties in the case. The question of the payment of the proper Court-fee is no question between the parties and is just a question between the state on the one hand and the plaintiff in the suit on the other and so would not be substantial question of law. AIR (Vol 37) 1950 Ajmer 28 (2).

——S. 110 — Substantial question of law — What is — Case involving important rights of parties — Sufficiency.

The fact that the case is one which is undoubtedly important and in which important rights are in question does not necessarily mean that substantial questions of law arise out of the judgment of the Court so as to entitle an applicant to leave to appeal to the Federal Court. AIR (Vol 37) 1950 Pat 305 (DB).

——S. 110 — Substantial question of law of general interest — Question of jurisdiction of the Civil

Court in view of S. 211 of the U. P. Municipalities Act.

Where a question as to the bar of jurisdiction of the Civil Court by virtue of the provisions of S. 211 of the U. P. Municipalities Act is involved, as cases of such character come before the Court frequently, it cannot be denied that the question is a substantial question of law of general interest so as to satisfy the condition in the third part of S. 110, C. P. Code. AIR (Vol 35) 1948 All 189: ILR (1948) All 99: 1947 ALJ 616: 1947 AWR (HC) 412 (DB).

——S. 110 — Income from "Malikana" whether liable to Income-tax is a question of law.

The question whether income from "Malikana" is liable to income-tax is a substantial question of law within the meaning S. 110, as the decision regarding "Malikana" though it depends particularly upon historical considerations, raises an important question as to what is to be considered agricultural income. (1946) ITR 265 (DB).

——S. 110 — Income from self-grown forests, whether agricultural — Question of law.

The question whether income derived from self-grown forests is agricultural income within the meaning of the Income-tax Act is a substantial question of law within the meaning of S. 110. (1946) ITR 265 (DB).

——S. 100 — Payment of annuity with interest — Substantial question of law.

The question whether certain payments of annuity with interest were liable to income-tax is a substantial question of law within the meaning of S. 110. (1946) ITR 265 (DB).

——S. 110 — Questions relating to method of calculating value of bungalows for land acquisition.

Where in a case under the Land Acquisition Act, the District Judge has granted certain amount and on appeal the High Court has increased that amount, it must be taken for the purposes of S. 110, Civil P. C., that the decision of the lower Court has been affirmed by the High Court and, therefore, it must be shown that the appeal involves some substantial question of law.

Where the grounds of appeal refer to questions of law relating to method of arriving at the value of bungalows for the purposes of land acquisition they are substantial questions of law. AIR (Vol 26) 1939 All 723: (1939) ALJ 736: 1939 AWR 651: 185 Ind Cas 513 (DB).

——S. 110 — The existence of a point of law by itself does not give a right of appeal to the Privy Council under S. 110. There must be a substantial question of law as between the parties in the case, not merely a question of general importance. The question contemplated by S. 110 must be one in respect of which there may be a difference of opinion. AIR (Vol 20) 1933 Mad 221: 142 Ind Cas 711 (DB).

——S. 110 — In order to constitute a substantial question of law to justify appeal to the Privy Council, the "point" should be such as to impress the High Court that it is debatable in view of the authorities or that the authorities themselves may require reconsideration. The mere fact that the Judges out of deference to the arguments, exhibited patience in the hearing and care in the judgment, does not establish that a point is substantial.

Per Muhammad Noor, J.—A question of law does not become "substantial" simply because the Judge has stated and examined it in detail in order to show that it has no substance. AIR (Vol 20) 1923 Pat 703: 15 PLT 90: 146 Ind Cas 744 (SB).

——S. 110 — A 'substantial question of law' in S. 110, does not mean merely an 'important' question of law; it means a question of law on which there may be a difference of opinion. AIR (Vol 19) 1922 Lah 56 (1): 33 PLR 229: 132 Ind Cas 2 (DB).

——S. 110 — Question of the exercise of discretion under S. 21(g), Specific Relief Act, if one of law.

Whether the first Court exercised a reasonable discretion in granting the decree for specific performance having regard to the terms of S. 21(g), and whether any discretion was left to grant such a decree involves a substantial question of law and satisfies the requirements of S. 110, C. P. Code. AIR (Vol 15) 1928 Nag 292 (DB).

——S. 110 — Substantial question of law — Question of law — General importance.

Where the subject matter is less than Rs. 10,000 in value and the sole question is one of evidence the point is not one of general interest and importance to justify the grant of a certificate. AIR (Vol 6) 1919 All 97: 54 Ind Cas 463 (DB).

——S. 110 — Substantial question of law — Question of general importance — Interpretation of Privy Council decision.

When there is a conflict of opinion as to what was intended to be laid down in a decision of the Privy Council and as to the effect of the decision, the question is one of general importance and justifies the grant of a certificate under S. 110, C. P. C. for leave to appeal to the Privy Council. AIR (Vol 7) 1920 All 206 : 2 UPLR (A) 149 : 56 Ind Cas 526 (DB).

——S. 110 — Substantial question of law — What is.

Where there has been a difference of opinion on a question of law, between the various High Courts and among the Judges of the same Court, the question must be considered a substantial question of law within S. 110 of the C. P. C. (1913) 18 Ind Cas 327 (Oudh) (DB).

——S. 110 — Substantial question of law — Presentation for registration.

Whether a document was validly presented for registration is a substantial question of law. (1913) 18 Ind Cas 126 (All) (DB).

(n) What is not.

——S. 110 and O. 32, R. 3(4) — Substantial question of law — Failure to serve notice on minors under O. 32, R. 3 (4).

After the decision of their Lordships of the Privy Council in ILR 30 Cal 1021, that failure to serve notice on the minors under O. 32, R. 3 (4), C. P. Code, is a mere irregularity and is not fatal to the suit, it cannot be contended that such an irregularity involves a substantial question of law. AIR (Vol 37) 1950 Ajmer 62.

——S. 110 — Substantial question of law.

A question which has been well considered in previous decisions of the Privy Council is not a substantial question of law within the meaning of S. 110 of the C. P. Code, for the purpose of granting leave to appeal to the Privy Council. (1947) 1947 AWR (Rev) 113.

——S. 110 — Substantial question of law — High Court applying legal principles to facts of case and rejecting appellant's contention — No substantial question of law arises.

Where the High Court deals with a particular question in the judgment and applies certain established legal principles to the facts of the case and rejects the appellant's contention, it cannot be said that any substantial question of law arises. Nor is the raising of a question after it has been expressly abandoned a substantial question of law. AIR (Vol 33) 1946 Nag 307 (DB).

——S. 110 — The question which was involved was whether the plaintiff, who is a stranger to the contract had the right to maintain the action:

Held, that there was no substantial question of law involved in the case. AIR (Vol 33) 1946 Pat

19: 24 Pat 637: 12 BR 279: 222 Ind Cas 455 (DB).

——S. 110 — Construction of decree and jurisdiction of Court to pass it.

A question of the construction of the preliminary partition decree and a question of the jurisdiction of the Court which prepared the decree are not substantial questions of law within S. 110, Civil P. C. AIR (Vol 30) 1943 All 358: 1943 AWR (HC) 187: (1943) ALJ 378: ILR (1943) All 840: 209 Ind Cas 532 (DB).

——Ss. 110, 109 — Judges differing — Discussion and exchange of views — Sufficient deliberations, what amounts to, is question of fact.

Where Judges happen to differ, they need not confer with each other till the last moment with a view to bring unanimity amongst them, and even if they do not, the separate judgments, which they deliver can be regarded as judgments. It is quite true that there must be discussions and exchange of views amongst Judges composing a Division Bench before the judgments are prepared and delivered. But if there are consultations amongst them, it is for them and them only to judge if further discussions would be fruitful and for them only to say at what stage the discussions amongst them should cease. There cannot be an absolute rule of law as to what will amount to a sufficient conference for the purpose. The question whether or not the conference or discussions amount to a sufficient deliberation by which the Judges composing the Division Bench mutually assist each other in arriving at a decision, is at most a question of degree, and as such, a question of fact to be determined with reference to the facts and circumstances of each particular case. The point is not a question of law, much less a substantial question of law. AIR (Vol 29) 1942 Cal 498: 47 CWN 9: 202 Ind Cas 551 (SB).

——S. 110 — Value put upon statement by person.

The question as to the value to be put upon certain statement made by a person is one of fact and not of law. AIR (Vol 29) 1942 Mad 368: 1942 MWN 136: (1942) 1 MLJ 309: 204 Ind Cas 456 (DB).

——S. 110 — Court-fee.

An application was made for leave to appeal to His Majesty in Council against the order of the Chief Court rejecting the appeal for failure to make good the deficiency in the court-fee. The lower Court had decided that the plaintiffs being out of possession had to pay ad valorem court-fee on the valuation of the relief sought on their plaint. The amount of court-fee payable on the plaint and the memorandum of appeal in the Chief Court was the same. The question of the amount of court-fee payable on the memorandum of appeal was entirely dependent upon the amount of court-fee payable on the plaint. In determining that question, or in determining the question of the court-fee payable on the memorandum of appeal, the Chief Court did not merely rely upon the findings of the lower Court only, but went into the evidence of possession on the record and came to the conclusion that the plaintiffs were not in possession of any portion of the property in dispute and were liable to pay ad valorem court-fee on the plaint as well as on the memorandum of appeal:

Held, that the order sought to be appealed against fell under the last clause of S. 110, Civil P. C. and was an order of affirmance of the decision of the Court below. It was, therefore, necessary for the applicants to prove that some substantial question of law was involved in the appeal. The determination of the question of the court-fee payable on the plaint and the memorandum of appeal depended upon a simple question of fact and no question of law arose for decision in that connection. The appeal did not involve any substantial question of law. AIR (Vol 27) 1940 Oudh 397: 1940 OWN 616: 1940 AWR 263: 189 Ind Cas 87 (DB)

——S. 110 — Misapplication of legal principles.

Where the legal principles such as are applied in the case are well defined, a mere misapplication of these principles does not raise any substantial question of law. AIR (Vol 25) 1938 Nag 482: ILR (1940) Nag 29: 181 Ind Cas 559 (DB).

——S. 110 — Non-joinder of parties.

The question of non-joinder of all the creditors in an administration suit cannot be held to be a substantial question of law involved in the appeal. AIR (Vol 24) 1937 Lah 761: 39 PLR 992: 174 Ind Cas 893 (DB).

——S. 110 — Interpretation of judgment.

Where the decision as to title is contained in a judgment in a civil suit to which the petitioner was a party, but it is argued that although the present petitioner was a party, no decision was given in respect of his title, the question is not one of law but one of interpretation of that judgment. AIR (Vol 24) 1937 Pesh 61: 1937 Pesh LJ 61: 169 Ind Cas 926.

——S. 110 — No two opinions possible on question in case.

Where no two opinions are possible about the question involved in a case, there is no substantial question of law requiring decision of their Lordships of the Privy Council. AIR (Vol 23) 1936 Pesh 200: 166 Ind Cas 254 (DB).

——S. 110 — "Substantial question of law", significance of.

Under S. 110, it is incumbent upon the Court in a case where the appellate decree affirms the decree of the lower Court, to be satisfied, before it burdens the Judicial Committee of the Privy Council with the hearing of the appeal, that a question of law is involved in the appeal. The words 'substantial question of law' in the section import this sense. They do not involve the construction that they do not mean a question of law which the Court thought was reasonably debatable, but any alleged question of law, good, bad or indifferent, which it decided against the clients would substantially affect their right. Merely because Counsel on behalf of the applicants in an application for leave to appeal to His Majesty in Council asserts that a question of law arises, it does not follow that the appeal involves a substantial question of law. AIR (Vol 23) 1936 Rang 125: 13 Rang 744: 161 Ind Cas 383 (DB).

——S. 110 — Law correctly applied by lower Courts to set of facts concurrently found by them.

Where the law about which there can be no two views has been applied to a set of facts concurrently found by two Courts and to which it is rightly applicable, there is no substantial question of law involved such as will justify the High Court granting leave to appeal to the Privy Council. (1935) 157 Ind Cas 605: 61 CLJ 69.

——S. 110 — Plaintiff changing allegations — High Court finding them true and decreeing suit.

In the beginning the plaintiff had made certain allegations which at a subsequent stage of the trial he changed and the High Court found that the new facts alleged by him were the correct facts and having found them true, it decreed the plaintiff's suit:

Held, that no substantial question of law was involved within the meaning of S. 110. AIR (Vol 22) 1935 Lah 91: 157 Ind Cas 1024 (DB).

——S. 110 — Contention that Judge had no jurisdiction to go behind order of Sale Officer — Whether involves a substantial question of law.

Where in the appeal before the High Court the only question argued was that the Subordinate Judge had no jurisdiction to go behind the order of the Sale Officer and that the Sale Officer could not be questioned by the Civil Court in execution proceedings:

Held, that this contention did not involve any substantial question of law in order to make an appeal to the Privy Council maintainable. AIR (Vol 21) 1934 Oudh 291: 11 OWN 577: 10 Luck 76: 148 Ind Cas 1202 (DB).

——S. 110 — Land given to yeoman tenant — Widow acquiring status of proprietor — Question, if widow became full proprietor of land — Whether a substantial question of law.

Where a person was given a land as a yeoman tenant under certain conditions and on his death, his widow acquired the status of a proprietor by payment of the necessary instalments:

Held, that the question whether she became a full proprietor of the land in question or whether it was to be considered a mere accretion to the husband's estate was not a substantial question of law. AIR (Vol 20) 1933 Lah 1044 (2): 147 Ind Cas 709 (2) (DB).

——S. 110 — Decree for redemption — Order for foreclosure against holder of probate — Subsequent revocation of probate — Order whether binding on real heirs — Second suit for redemption — Appeal to Privy Council.

A mortgagor obtained a decree for redemption in 1898. After his death his nephew obtained probate of a will of the deceased and impleaded himself as the deceased's representative in the redemption suit. He made no payment and the mortgagees obtained an order for foreclosure against him in 1900, and obtained possession. The probate was subsequently revoked in 1903. In 1928, the son of the mortgagor instituted another suit for redemption:

Held, (i) that the order for foreclosure obtained in 1900 against the nephew to whom probate had been granted, as executor and legal representative was binding on the plaintiff even though the probate was subsequently revoked:

(ii) that even assuming that it was not binding, it was not open to the plaintiff to institute a fresh suit for the very purpose for which his father had sued and obtained a decree in 1898:

(iii) that there was no substantial question of law involved in the case for the purposes of appeal to the Privy Council. AIR (Vol 18) 1931 Rang 283: 9 Rang 360: 133 Ind Cas 494 (2) (DB).

——S. 110 — A substantial question of law does not mean a substantial question of general importance but a substantial question of law as between the parties in the case involved. AIR (Vol 17) 1930 Bom 509: 32 Bom LR 1189: 112 Ind Cas 430 (DB).

——S. 110 — Question relating to immaterial findings.

Where in a suit some findings involve questions of law, but they are quite immaterial to the decision of that suit which of itself does not involve any question of law, no appeal lies to the Privy Council. AIR (Vol 16) 1929 Nag 85: 110 Ind Cas 855.

——S. 110 — Untenable point of law.

The proposition that, although the point of law may be obviously untenable, if the decision in the case turns upon it, that point would be a substantial point of law, is not tenable. AIR (Vol 15) 1928 Mad 233: 39 MLT 655: 107 Ind Cas 643 (DB).

——S. 110 — Inference from fact.

Whenever the decision of a certain fact is based to some extent on inferences from other facts it cannot be said that a substantial question of law is involved. AIR (Vol 15) 1928 Nag 76: 23 NLR 156: 106 Ind Cas 366 (DB).

——S. 110 — Question not directly decided but well established from other cases.

Although a point has not ever been directly decided by any decision of Courts in India, if it is well established upon the principles which have been laid down in such cases, it is no substantial question of law for decision by a higher tribunal. AIR (Vol 15) 1928 Pat 581: 110 Ind Cas 483 (DB).

——S. 110 — Question of time limit to certify adjustment of decree settled by a Full Bench.

The question whether there is a time limit for a decree-holder to certify adjustment under R. 2 is not a substantial question of law when a Full Bench of the Bombay High Court (11 Bom 6, FB) specifically decides it and its judgment is obviously correct. AIR (Vol 14) 1927 Oudh 43: 3 OWN 987: 98 Ind Cas 1069 (DB).

——S. 110 — Matter already settled by Privy Council decision.

Where authoritative decisions of the Privy Council exist on a matter and that matter is re-agitated in any Court, that matter can no longer be said to remain a substantial question of law. AIR (Vol 13) 1926 Oudh 381: 3 OWN 557: 1 Luck 265: 29 OC 215: 95 Ind Cas 193 (FB).

——S. 110 — Question as to intention of legatees signing as witnesses.

The question whether the legatees signing the will as witnesses did not intend to attest the will is not a substantial question of law. AIR (Vol 12) 1925 Oudh 541: 2 OWN 394: 88 Ind Cas 579 (DB).

——S. 110 — Question of procedure disallowing new plea in second appeal.

Where the suit was one for specific performance of a contract for sale and had been instituted on the last possible day of limitation that is to say, exactly three years from the date of the contract for sale and it was strongly contended for the first time in second appeal that under these circumstances a decree for specific performance ought not to be granted more especially as there was an alternative plea for relief by way of damages, and the High Court decided that as a matter of procedure it was not right or proper to permit the plea to be raised at the stage of second appeal.

Held, that a point of procedure of this sort is not a proper one for an appeal to His Majesty in Council. AIR (Vol 10) 1923 All 463: 76 Ind Cas 516 (DB).

——S. 110 — No public importance.

Where from the record it is not clear whether resumptions by several strangers were for exactly the same grounds as those in suit, the case does not involve questions of wide public importance. AIR (Vol 10) 1923 Cal 451: 27 CWN 204: 84 Ind Cas 581 (DB).

——Ss. 110 and 48 — Subtantial question of law — Applicability of S. 48 of Code of 1908 to decree passed under Code of 1882.

Section 48 of C. P. C. (1908) applies to a decree passed under Code of 1882; but the question whether the section so applies to a decree passed under Code of 1882 is not a substantial question of law within S. 110, C. P. C. (1908). AIR (Vol 4) 1917 Pat 493: 39 Ind Cas 141 (DB).

——S. 110 — Substantial question of law — Decree — Setting aside.

That a suit to set aside a decree obtained by fraud was brought by a person who was not a party to the suit in which that decree was passed is not a question of such public importance as to justify the issue of a certificate under S. 110, C. P. C., (1912) 5 Bur LT 13: 14 Ind Cas 626 (DB).

——S. 110 (S. 596, old Code) — "Substantial question of law" — What is a question of fact — Leave to appeal refused.

The main question at issue in a suit for partition of moveable and immoveable property being whether the family was or was not joint in title and interest, the defendants, on being asked what evidence they would call to prove set down a series of facts which they alleged that they could prove, and which, they contended, indicated that the family was at the time of suit joint as to property as well as in other respects. The plaintiff admitted the facts so alleged and the parties therefore summoned no witnesses on either side. Some documentary evidence, however, was put in, mainly consisting of the will of the late head of the family.

Held, that the finding on these data as to what was the status of the family was a finding of fact merely, and could involve no "substantial question of law" within the meaning of S. 596 of the Code of Civil Procedure. (1908) 1908 AWN 7 (8): 4 ALJ 792 (DB).

——S. 110 (S. 596 old Code) — Leave where no substantial question of law was involved.

Where, on an appeal to the Privy Council, there were two concurrent decisions of the Courts below on facts sufficient to dispose of the suit, but the High Court had granted leave to appeal, stating that there seemed to be a point of law which, however, had not been argued in the High Court, the Privy Council held that there was no substantial question of law involved, and that there was no sufficient ground for the leave to appeal, which ought not to have been granted. (1902) 4 Bom LR 248: 6 CWN 241: 11 MLJ 379: 25 M 215 (219): 29 IA 38 (PC).

13. Valuation.

(a) Acquiescence.
(b) Computation.
(c) Cost.
(d) Interest.
(e) Interpretation.
(f) Mesne profits.
(g) Objection to.
(h) Practice.
(i) Standard of.

(a) Acquiescence.

——S. 110 — No objection to re-valuation raised by defendant-respondent — Decree for costs awarded to defendant on basis of re-valuation — Decree for costs actually enforced — Defendant, if could contend that valuation of suit was not over Rs. 10,000.

The suit was originally valued below Rs. 10,000. Appeal was also valued on the same basis but it was found that certain reliefs claimed in the plaint were not valued. A proper valuation of the reliefs brought the total value of the suit to over Rs. 10,000 and the deficiency in court-fee was made good by the plaintiff. The defendant-respondent took no objection to the re-valuation and was actually executing his decree for costs which had been calculated on the new valuation:

Held, that as the new valuation of the suit in appeal was accepted without demur and a decree for costs based on such valuation actually enforced, it was not open to the defendant to contend subsequently that the value of the suit was not over Rs. 10,000. AIR (Vol 28) 1941 Pat 269: 20 Pat 459: 7 BR 906: 22 PLT 736: 195 Ind Cas 344 (SB).

——S. 110 — Suit for declaration as to whole property and for possession of small item — Suit valued at less than Rs. 10,000 — Plaintiff, if estopped from showing that value of subject-matter was over Rs. 10,000.

Where, in a suit for declaration, although the declaration prayed for by the plaintiff related to the whole of the property, the prayer for possession related only to comparatively few items, the prayer for a declaration can only be valued on a notional basis and the suit as a whole can only have a notional valuation even for the purposes of jurisdiction. If the plaintiff puts in his valuation at less than Rs. 10,000 and the claim is valued at less than Rs. 10,000 in appeal also and he files a petition for leave to appeal, praying that a certificate should be issued under S. 110, para. 1, he is not estopped nor barred by the rule that a man cannot approbate and reprobate from showing that the value of the subject-matter of the suit and the appeal is Rs. 10,000 or over within the meaning of S. 110.

The statement in the plaint that for the purposes of jurisdiction the value of the suit is of a particular value may be taken as an admission under Ss. 21, 22 and 23, Evi. Act. But an estoppel under S. 115 is a very different thing. For raising an estoppel, the declaration, act or omission must be made with the intention of causing or permitting another person to believe a thing to be true and act upon such belief. Estoppels must be specifically pleaded and strictly proved. They operate between the person making the declaration and the person believing and acting upon it—and the representatives of those persons. Therefore, before an estoppel can be relied upon, it would in the first place have had to be alleged and proved that the plaintiff intentionally caused the defendant to believe that the subject-matter of the suit was less than Rs. 10,000 and not more. AIR (Vol 24) 1937 Bom 326: 39 Bom LR 332: ILR (1937) Bom 402: 170 Ind Cas 717 (DB).

——S. 110 — Variation of valuation — When ground for shutting out appeal to Privy Council — Erroneous valuation in plaint.

Whether by way of estoppel or of res judicata, the Courts have considered whether the question of valuation has been raised and decided at an earlier stage and also whether the opposite party has been led to act upon such valuation as for instance by way of second appeal, or to put it in another way, whether the party seeking to vary the valuation for the purpose of appeal to England is in the position of approbating and reprobating; where this is the case variation of value should not be allowed. But where this is not the case, a party should not be shut out from his right to appeal to the Privy Council merely because of an erroneous valuation in the plaint.

The mere fact that a lower valuation was put on the plaint for the purposes of court-fee and jurisdiction should not be allowed to operate as estoppel against the plaintiffs for the purposes of a Privy Council appeal and the High Court is entitled to investigate the real value of the subject-matter. AIR (Vol 24) 1937 Cal 292: 41 CWN 289: 64 CLJ 561: 171 Ind Cas 163 (DB).

——S. 110 — The plaintiff valued the suit at Rs. 9,000. The defendant contended that the value was not less than Rs. 15,000. The Court found that the value was only Rs. 9,000 and the defendant in his appeal valued the same at Rs. 9,000.

Held, that it was not open to the plaintiff to contend that the value was over Rs. 10,000, for purposes of appeal to the Privy Council. AIR (Vol 18) 1931 All 651: 133 Ind Cas 415.

——S. 110 — Appeal to Privy Council — Valuation of suit — Party cannot approbate and reprobate.

The doctrine that a party cannot both approbate and reprobate applies to the case where he appeals to the lower Appellate Court upon a valuation inconsistent with the valuation upon which he seeks

a certificate enabling him to appeal to the Privy Council.

Where court-fee is payable upon the real or market value, a party who sues in or appeals to a Court which would have no jurisdiction if the value of the land exceeded Rs. 10,000 debars himself from claiming at a later stage to have the value of the subject-matter of the suit in the Court of first instance treated for purposes of an appeal to England as exceeding Rs. 10,000.

The value referred to in S. 110, is the real or market value and that where, under the Court Fees Act or otherwise, a plaint or memorandum of appeal is not required to be valued according to the real or market value, but is allowed or required, to be valued upon some other basis, the doctrine of "approbate and reprobate" does not apply. AIR (Vol 18) 1931 Cal 417: 58 Cal 66: 132 Ind Cas 910.

——S. 110 — Plaintiff under-valuing his suit — Defendant acquiescing in the valuation — Effect of.

The plaintiffs valued their suit at less than Rs. 10,000 and defendants objected to the valuation but did not press their objection and the suit was decided, plaintiff's valuation being accepted. Defendants put the same value on their appeal to the District Judge and their appeal was allowed. Plaintiffs appealed to the High Court & the decree of the District Judge was reversed. Defendants applied for leave to appeal to His Majesty in Council and applied for a report under O. 45, R. 5, contending that the value of the subject-matter was more than Rs. 10,000.

Held, that the defendants acquiesced in the valuation placed upon the subject-matter of the suit by the plaintiffs and obtained the advantage of an appeal to the lower appellate Court as a ground for appeal to His Majesty in Council, and having regard to the facts of the case it is not one in which High Court ought to refer the matter to the Court of first instance for a report as to the value of the subject-matter of the suit. AIR (Vol 14) 1927 Cal 418: 45 CLJ 225: 101 Ind Cas 901 (FB).

——S. 110 — Valuation of trial Court not challenged by appeal or by cross-objections.

When the decision is given against a party he must be taken to have acquiesced in it if he neither by appeal nor by cross-objections questions the trial Court's decision before the appellate Court. The valuation of the subject-matter in dispute in the original Court must be held to be binding upon the party and it is not open to such party on an application for leave to appeal to the Privy Council to re-open that question. AIR (Vol 13) 1926 Rang 138: 4 Rang 92: 5 Bur LJ 23: 96 Ind Cas 107 (DB).

——S. 110 — Under-valuation by plaintiff — Decision of three Courts on that basis — Repudiation for purpose of appeal to Privy Council.

The plaintiff having deliberately undervalued his suit in the Court of first instance and having thus obtained the decision of three Courts in this country upon his claim, cannot be allowed to repudiate his valuation fixed upon the market value of the property, for the purpose of obtaining the decision of a fourth tribunal. AIR (Vol 10) 1923 Mad 125: 69 Ind Cas 385: 31 MLT 335: 16 MLW 517: 1922 MWN 683: 43 MLJ 728 (DB).

——S. 110 — No objection as to valuation — Effect of.

Defendants who accept the value of property for purposes of jurisdiction cannot be heard to question that value subsequently. The value of the property is a question of fact. It is not proper for a party by an admission as to a lower valuation to suffer an appeal to be heard by a single Judge and then to claim a higher valuation for the purpose of obtaining an appeal to the Privy Council. AIR (Vol 10) 1923 Oudh 93: 74 Ind Cas 214: 9 OLJ 531: 26 OC 24 (DB).

(b) Computation.

(i) General.

(ii) Date.

(iii) Partition suit.

(i) General.

——S. 110 and O. 45, Rr. 2 and 3 — Suit by wife of S for declaring alienations executed by S in favour of certain persons as invalid — Allegation that S being of unsound mind alienees had colluded together to deprive S of his properties — Suit dismissed by trial Court but decreed in appeal — Value of subject-matter above Rs. 10,000 — Held, leave to appeal to His Majesty in Council should be granted.

The wife of one S brought a suit for declaration that three alienations effected by S in favour of three persons for a consideration of Rs. 7,250 were invalid on the ground that her husband S being of unsound mind these persons had colluded together to deprive her husband of his properties. The suit was dismissed by the trial Court but on appeal the High Court reversed the decision and granted a decree. The valuation of the suit taken as a whole at the date of the plaint and on the date of the High Court's judgment was above Rs. 10,000. On an application for leave to appeal to His Majesty in Council it was contended on the basis of the decision in AIR (Vol 6) 1919 Mad 275 that the suit against the three sets of alienees must be treated as three different suits and that each alienee must show that the value of the properties of which he was in possession was Rs. 10,000 or upwards:

Held, that as there was a common cause of action against all the alienees the principle of the decision in AIR (Vol 6) 1919 Mad 275 was not applicable. The value of the subject-matter of the suit in the Court of first instance and at the date of High Court's decree being over Rs. 10,000 and the decision of the High Court being one of reversal, leave to appeal to His Majesty in Council should be granted. AIR (Vol 33) 1946 Mad 458 (DB).

——S. 110 — Appeal to Privy Council — Value of interest affected.

A defendant is entitled to appeal to the Privy Council on his proving that the value of his property affected by the decree of the High Court or the pecuniary value of the loss which he would sustain by the decree is Rs. 10,000 or upwards even though the value of the suit for purposes of jurisdiction is much less than Rs. 10,000. AIR (Vol 32) 1945 Bom 113: 46 Bom LR 798: ILR (1945) Bom 268 (DB).

——S. 110 — Trial Court's decree modified in appellant's favour — Amount involved more than Rs. 10,000 — Certificate under S. 110, can be granted.

An appellant is entitled to challenge the decision of a High Court even if the High Court has modified in his favour a decision of the trial Court where the amount involved is Rs. 10,000 or upwards.

The decision of the trial Court in regard to the defendant's liability to refund the sum of Rs. 26,000 as claimed by the plaintiff was affirmed by the High Court. The rate of interest, was however, reduced from 6 per cent to 4 per cent. At 6 per cent., the liability in respect of interest amounted to Rs. 18,700 and at 4 per cent to Rs. 12,380. The appellant, however, denied his liability for interest and applied for leave to appeal to Privy Council:

Held that the leave could be granted under S. 110, C. P. C. [AIR (Vol 26) 1939 All 723 : 185 Ind Cas 513 : 1939 ALJ 736 Overruled.] AIR (Vol 28) 1941 All 66: (1940) ALJ 869: 1941 AWR (HC) 14 : ILR (1941) All 180 : 192 Ind Cas 461 (FB).

——S. 110, para 2 — Test — Decretal amount with interest amounting to less than Rs. 10,000 — Property attached in execution valued at Rs. 15,000 held to be 'waqf' property not liable to attachment and sale.

Paragraph 2 of S. 110 is intended to extend the privilege given by the first paragraph only to cases where a claim regarding rights of Rs. 10,000 or upwards in value is involved indirectly, though not directly. The second paragraph means that the suit must, to satisfy its conditions, involve rights and claims to property which rights and claims are worth Rs. 10,000 and upwards, not that the rights affect properties whose value is Rs. 10,000 and upwards.

Where therefore, in execution of his decree a decree-holder attached certain property of the judgment-debtor valued at Rs. 15,000 for recovery of the decretal amount with interest amounting to Rs. 9,957-5-3, and an objection under S. 47, Civil P. C. that the property being 'waqf' property was not liable to attachment and sale being successful, applied for leave to appeal to the Privy Council:

Held, that leave could not be granted as the test laid down by para 2 of S. 110, Civil P. C. had not been satisfied. AIR (Vol 28) 1941 Oudh 407: 1941 OWN 562: 1941 AWR (CC) 134: 16 Luck 737: 193 Ind Cas 639 (DB).

——S. 110 — Applicant, if can be allowed to enhance valuation of plaint for purposes of S. 110.

A person applying for leave to appeal to His Majesty in Council has no right to allege before the High Court that the valuation for jurisdiction which he put on his plaint in the trial Court was too low and that he should be allowed to enhance the valuation for the purpose of S. 110, Civil P. C. AIR (Vol 26) 1939 All 695: (1939) ALJ 751: 1939 AWR (HC) 641: 185 Ind Cas 690 (DB).

——S. 110 — The multiples prescribed by Encum. Estates Act were fixed for the purposes of the Act, and they cannot be made the basis of calculating values of properties generally.

Where the High Court had distinctly dismissed the claim for mesne profits, no question of mesne profits arises in valuing the property for the purposes of an appeal to His Majesty in Council.

The market value of immovable property is usually determined by instances of sales. AIR (Vol 26) 1939 Oudh 1: 1938 OWN (CC) 1101: 1938 AWR (CC) 112: 178 Ind Cas 250 (DB).

——S. 110 — Income-tax.

Amount of tax involved Rs. 3,500: Held: that the question would arise every year while the assessee remained in business. Hence in the end the amount of tax will be very considerable and the application for leave should therefore be granted. AIR (Vol 25) 1938 Mad 352: 47 MLW 350: (1938) MWN 3 174 Ind Cas 491 (SB).

——S. 110 — Where the question between the parties is whether the plaintiff shall receive and continue to receive from the defendant royalties in respect of coal raised for the period of 999 years under a lease, the minimum royalty payable being Rs. 3,200 per annum, the liability being of a recurring nature, the value of the subject-mattter of the suit in the Court of first instance exceeds Rs. 10,000. (1936) 163 Ind Cas 731: 62 Cal 992.

——S. 110 — Directly or indirectly, if refers only to existing suits.

Where, in order to make up the prescribed limit of valuation for appeal to the Privy Council, several claims indirectly connected with the subject-matter of the suit are sought to be added, the indirect relation must not be too remote and the phrase "directly or indirectly" refers to suits in existence and cannot be stretched to cover suits not yet brought. The indirect relation must be decided with reference to actual circumstances at the time and not to circumstances which are remote. On the other hand, the possibility of future suits may be taken into consideration if such suits will be affected by the doctrine. AIR (Vol 23) 1936 Lah 31: 38 PLR 767: 170 Ind Cas 469 (DB).

——S. 110 — Decision involvng indirectly property worth more than Rs. 10,000 — But no claim ever made in respect of that property.

The words "or the decree or final order must involve directly or indirectly, some claim or question to or respecting property of like amount or value" in S. 110 are no doubt very wide. But this reference in the second clause of S. 110 is to suits in existence and not to suits in 'gremio futuri'. Consequently, the second clause of S. 110 does not authorise an appeal to His Majesty's Privy Council in respect of property for which no claim has ever been made or in respect of which no question has ever arisen in any Court. AIR (Vol 23) 1936 Oudh 181: 1936 OWN 181: 12 Luck 27: 160 Ind Cas 799 (DB).

——S. 110 — Question, whether in partition suit valuation for purposes of appeal to Privy Council should be of entire property.

The question whether for the purpose of S. 110 in the right to appeal to His Majesty in Council, the valuation for the purpose of that section is to be taken of the entire property which it was sought to partition or whether it is the value of the share claimed by the plaintiff itself, is one of sufficient importance for allowing leave to appeal to the Privy Council. AIR (Vol 22) 1935 Pat 266: 16 PLT 279: 1 BR 475: 155 Ind Cas 633 (DB).

——S. 110 — Criterion — Value of whole property involved is immaterial — Loss of Rs. 10,000 or more should have been suffered by petitioner.

Under S. 110, it is the extent to which the decree or order has operated to the prejudice of the applicant that determines whether the decree or order is subject to appeal or not, and whatever may be the value of the property in respect of which a claim or question is involved in the appeal, no appeal lies under S. 110 unless the value of the loss or detriment which the applicant has suffered by the passing of the decree or order and from which he seeks to be relieved by His Majesty in Council, is Rs. 10,000 or upwards.

The District Court passed an order on an application by the respondent presented by way of demurrer, in which it was 'inter alia' alleged that a petition filed by the applicants for the adjudication of the respondent and three other persons did not disclose an available act of insolvency on which the petition could be based. The order passed by the District Court plainly was not a final decree or order, but on appeal, the High Court held that no available act of insolvency by the alleged debtors was disclosed in the petition for adjudication, and dismissed the petition with costs. On application for leave to appeal to the Privy Council by the petitioner:

Held, (i) that the order of the High Court from which it was sought to appeal to His Majesty in Council was a final order passed on appeal within cl 37 of the Letters Patent and Ss. 109 and 110, Civil P. C.:

(ii) that the value of the petitioning-creditors' debts was not in controversy at this stage of the proceedings, and was not the criterion to be applied nor was the value of the respondent's estate as a whole;

(iii) that as the petitioners had not satisfied the Court that they or any of them had suffered loss

or detriment of the value of Rs. 10,000 by reason of the decree or order from which they sought to obtain leave to appeal, leave to appeal could not be granted. AIR (Vol 21) 1934 Rang 292: 12 Rang 355: 156 Ind Cas 345 (DB).

——S. 110 — High Court substantially varying decree of trial Court — Value of subject-matter of suit and appeal above Rs. 10,000 — Absence of question of law — Appeal to Privy Council, if lies.

Though the Privy Council will not ordinarily interfere with concurrent findings of facts arrived at by Courts in India on any particular point, yet if the decree of the High Court does not affirm the decision of the trial Court, and if the value of the subject-matter of the suit in the trial Court and in the appeal to the Privy Council be Rs. 10,000 or upwards, a party desirous of appealing to the Privy Council would seem to be entitled to leave to appeal from the decree of the High Court under S. 110, Civil P. C.

Where P instituted a suit for accounts against his agent valuing his claim at Rs. 40,000 and the trial Court passed a decree for a sum of Rs. 5,682 only, on which the defendant appealed and P filed a memorandum of objections claiming a decree for further amount and valuing his memorandum of cross-appeal at Rs. 20,000 and the High Court allowed the defendant's appeal in part and reduced the amount decreed by the trial Court by Rs. 4,000 and the cross-appeal by P was allowed to a small extent by Rs. 150 but dismissed as regards the balance of the amount claimed:

Held, that P was entitled to leave under S. 110 to appeal to the Privy Council. AIR (Vol 19) 1932 Mad 46: 35 MLW 206: 139 Ind Cas 54 (DB).

——S. 110 — Value of property above Rs. 10,000 — Value of appellant's interest less than Rs. 10,000 — Appeal, competency of.

In determining whether the amount or value of the subject-matter in dispute in an appeal to the Privy Council is under Rs. 10,000 or not, what the Court has to look to is what is the detriment to the person seeking to appeal to the Privy Council, and whatever may be the value of the property with respect to which the claim is brought, if in fact the total amount of the subject-matter of the suit, so far as the appellant's interest is concerned, is under Rs. 10,000, the matter does not come within the terms of S. 110, Civil P. C. AIR (Vol 18) 1931 Rang 132: 9 Rang 52: 131 Ind Cas 280 (DB).

——S. 110 — Lessee — Building — Liability to removal.

The question whether a decree involves indirectly a claim respecting property of the value of Rs. 10,000 or upwards within S. 110 (2) must be determined with reference to the actual circumstances at the time and not to a mere possibility. Where the tenant who had constructed building to the value of Rs. 25,000 on the land demised the value of which was only Rs. 4,000, brought a suit for the specific performance of an agreement for renewal but only got a decree entitling him to hold the land for his life.

Held, the question involved a claim to the land itself worth only Rs. 400, and that the requisites of S. 110 were not complied with. The possibility of the removal of the structures at some future time if and when the landlord chooses to evict him was too remote. AIR (Vol 17) 1930 Bom 509: 32 Bom LR 1189 (DB).

——S. 110 — Easement right.

In case of easement to light and air, in considering whether the leave to appeal to His Majesty in Council under Cl. 2. S. 110, it is not the value of the whole property which is to be taken into consideration but the value of the easement. AIR (Vol 16) 1929 Bom 341: 119 Ind Cas 782: 53 Bom 552: 31 Bom LR 632 (DB).

——S. 110 — New machinery brought on property during pendency of suit for specific performance.

If during the pendency of a suit for specific performance of a contract of sale, new machinery is brought on the premises in suit, of which no mention is made in the pleadings or in evidence, or even at argument, its value cannot be taken into account. Nag Misc Petn. No. 58 of 1927, Dist. AIR (Vol 16) 1929 Nag 75 (DB).

——S. 110 — Suit for specific performance of contract — Relief for possession only ancillary.

Where a suit is one for obtaining the main relief of specific performance of the contract of sale, and the relief of possession is regarded as an ancillary relief flowing from the main relief, relief of specific performance need not be separately valued. AIR (Vol 16) 1929 Nag 75 (DB).

——S. 110 — Contract of sale.

The consideration or price payable under the contract of sale must alone determine the value of the subject-matter in dispute on appeal to His Majesty in Council. AIR (Vol 16) 1929 Nag 75 (DB).

——S. 110 — Inam wet land.

Where the subject-matter of the suit was an inam wet land, held in estimating the value of such land for purposes of Privy Council appeal, house sites in the vicinity should be excluded from consideration and only cultivable lands in the vicinity should be relied upon. AIR (Vol 15) 1928 Mad 448: 109 Ind Cas 167 (DB).

——S. 110 — Under-valuation by plaintiff — Estoppel.

The mere fact that a low valuation is put on a plaint for the purpose of Court-fee and consequently for the purpose of jurisdiction should not be allowed to operate as estoppel against the plaintiff on the question of value for the purpose of Privy Council appeals and the High Court is entitled to go into the real value for the purpose of considering whether a certificate should be granted when it is not a case in which the higher valuation would have meant that the trial would have to be in a different Court. AIR (Vol 14) 1927 Cal 225: 99 Ind Cas 921: 44 CLJ 572: 31 CWN 268 (DB).

——S. 110 — Wrong valuation by plaintiff himself.

The plaintiff is not absolutely precluded from contending that his valuation in the plaint is wrong. The Court will merely treat his admission as a strong piece of evidence against him. AIR (Vol 14) 1927 Mad 862: 104 Ind Cas 577 (DB).

——S. 110 — Suit for redemption and possession — Value of property.

Although for purposes of Court-fees the value of suits for the recovery of the property mortgaged is "the principal money expressed to be secured by the instrument of mortgage', the mortgage-money is not the basis of the valuation for purposes of jurisdiction. In such cases the value of the mortgaged property should be the basis. AIR (Vol 14) 1927 Rang 304: 105 Ind Cas 412: 5 Rang 499 (DB).

——S. 110 — Subject-matter incapable of valuation.

The second clause of S. 110 might apply if the matter in dispute is incapable of valuation as in the case of easements. In such a case the value of the matter in suit to the applicant should be considered. AIR (Vol 13) 1926 Rang 138: 96 Ind Cas 107: 4 Rang 92: 5 Bur LJ 23 (DB).

——S. 110 — Applicability of Suits Valuation Act.

The rules under the Suits Valuation Act in accordance with which the land in suit is valued for the purposes of jurisdiction in the Lower Courts

do not apply in determining the value for the purposes of S. 110 of the Civil Procedure Code but it is the market value which has to be ascertained. AIR (Vol 11) 1924 Lah 82: 75 Ind Cas 520: 4 Lah 185: 6 LLJ 44 (DB).

——S. 110 — Value of annuity or of property charged.

The 110th section of the Code of Civil Procedure, 1908 applies to the value of the annuity which is sought to be recovered, not to the value of the property upon which that annuity is charged. AIR (Vol 10) 1923 PC 102: 75 Ind Cas 502: 26 Bom LR 731: 1923 MWN 590: 18 MLW 146: 26 OC 216: 28 CWN 289: 33 MLT 232: 10 OLJ 288: 45 MLJ 253.

——S. 110 — Ejectment suit.

Where in an ejectment suit it was found that the monthly rent of the premises was Rs. 275 and capitalised at twenty years' purchase the value of the property will be over Rs. 10,000, held that the certificate to appeal to His Majesty from the decree in the suit must be granted. AIR (Vol 10) 1923 Bom 23: 67 Ind Cas 938: 24 Bom LR 350 (DB).

——S. 110 — Mortgage suit — Appeal by co-sharer in equity of redemption — Value of appeal.

For purposes of appeal to Privy Council by one of two co-mortgagors, the value of the subject-matter is the value of entire claim of the mortgagee at the date of suit together with interest and not only the share of the co-mortgagor seeking to appeal, when that co-mortgagor is not claiming a title paramount to the mortgagee.

Whether a previous decree can be rectified by a subsequent suit is a substantial question of law. AIR (Vol 10) 1923 Cal 387: 71 Ind Cas 371 (DB).

——S. 110 — Dispute as to nature of tenancy.

Where the subject-matter of the suit was the question whether the applicants were permanent tenants of the site, or mere tenants at will, and the plaintiff laid no claim whatever to the buildings on the site and indeed his prayer was that the said buildings should be removed.

Held, the matter in dispute between the parties was solely the nature of the tenancy of the site.

The second paragraph of S. 110 means that the suit must to satisfy its conditions involve rights and claims to property, which rights and claims are worth Rs. 10,000 or upwards, not that the rights affect properties whose value is Rs. 10,000 or more. AIR (Vol 10) 1923 Lah 286: 75 Ind Cas 654: 6 LLJ 78 (DB).

——S. 110 — Cause of action different against defendants — Appeal against one — Value of appeal.

Where the cause of action against one defendant is distinct and different from the causes of action against the other defendants, the fact that a joint suit is brought cannot make the value of the subject-matter of the appeal against him to the Privy Council higher than what is decreed against him. AIR (Vol 10) 1923 Mad 30: 16 MLW 262: 30 MLT 337 (DB).

——S. 110 — Suit for declaration as Rajput.

Plaintiff sued for declaration that he was a Rajput by caste and valued his suit for purposes of jurisdiction at Rs. 11,000.

Held, that it could not be said that the value of the subject-matter of the suit amounted to Rs. 10,000 or that the decree involved any claim or question to or respecting property of like amount or value. The words "the decree must involve, directly or indirectly, some claim or question to or respecting property of like amount or value" in S. 110 of the Civil Procedure Code refer to some specific property and do not contemplate property which a party may be desirous of acquiring. The valuation for purposes of jurisdiction is not always the real value of the subject-matter of the suit for purposes of S. 110 of the Civil Procedure Code. AIR (Vol 9) 1922 Lah 131: 65 Ind Cas 239: 26 PLR 1922: 2 Lah 297: 116 PLR 1921 (DB).

——S. 110 — Decree for redemption and for Rs. 7,000 — Appeal by mortgagee claiming Rs. 2,000 due to himself — Value of appeal if over Rs. 10,000.

Plaintiff sued to redeem his mortgaged property. He claimed that all the money due had been paid from the usufruct and that there was a large surplus which was due to him. The trial Court held that the entire mortgage-money had been paid and decreed plaintiff's claim for possession and for a surplus amounting to Rs. 9,012-12-8. The defendant appealed to the High Court to be relieved of the surplus awarded to plaintiff and caimed a sum of Rs. 2,073 due on the mortgage. The decree of the Trial Court was modified in the High Court to the extent of reducing the surplus awarded to Rs. 7,910-11-7. The defendant then applied for leave to appeal to His Majesty.

Held, that the value of the subject-matter, including the surplus awarded viz., Rs. 7,910-11-7 amounted to Rs. 9,983-11-7 since in the memorandum of appeal to the High Court the defendant had claimed only Rs. 2,073 on the mortgage and had not claimed possession of the property. It not being alleged that the appeal affected a question relating to property exceeding Rs. 10,000 in value, no leave to appeal could be granted under S. 110 although the decree of the High Court varied the decree of the Court below. AIR (Vol 9) 1922 Oudh 214: 73 Ind Cas 407 (DB).

——S. 110 — Dispute as to Rs. 1,300 realised in execution — Unexecuted balance over Rs. 10,000 — Grant of leave.

Where further applications for execution were time-barred and the sum realised in execution as to which there was dispute between joint decree-holders was only Rs. 1,300 though the unsatisfied balance under the decree executed was Rs. 10,000.

Held, leave could not be granted to appeal to His Majesty. AIR (Vol 9) 1922 Pat 611: 67 Ind Cas 991: 3 Pat LT 781: 1922 PHCC 296 (DB).

——S. 110 — General Rule.

The proper construction to be placed upon S. 110 in so far as it relates to the amount or value of the subject-matter of the suit, must be taken to be the amount or value which the plaintiff either obtained or, had he been successful, would have obtained in his suit at the date when the decree was passed. (1921) 60 Ind Cas 523: 2 Pat LT 340 (DB).

——S. 110 — When certain cases are tried together and decided by the same judgment, and the fundamental question in the cases which goes to the root of the matter is common to all the suits, they should be treated as consolidated for pecuniary valuation under S. 110 C. P. C. for an appeal to the Privy Council although substantial question of law arises in only some of the cases. (1911) 13 CLJ 503: 10 Ind Cas 967 (DB).

(ii) Date.

——S. 110 — Date on which property to be valued.

The value of the property referred to in the second paragraph of S. 110, Civil P. C., is the value of the property at the date of the decree from which an appeal to His Majesty in Council is to be made. AIR (Vol 19) 1932 Lah 526: 33 PLR 647: 138 Ind Cas 37 (DB).

——S. 110 — As regards the amount or value of the subject-matter of the suit in the Court of first instance, the material date is that of the institution of the suit. AIR (Vol 18) 1931 PC 125: 35 CWN 669: 33 Bom LR 954: (1931) MWN 657: 61 MLJ 274: 132 Ind Cas 605.

——**S. 110 and O. 45, R. 5 — Valuation — Subsequent accretion.**

In estimating the value of subject-matter for the sake of appeal to Privy Council only the lands which existed at the date of suit should be considered and not the lands which may be formed in the course of future years by alluvion. The increase in the value of the land from the date of original suit and the date of application for leave to appeal should not be considered. (1910) 5 Ind Cas 645 (Cal) (DB).

——**S. 110 — Valuation at date of suit or appeal.**

In a case coming under Cl. (1), S. 110, the conjunction "and" cannot be read as "or" so that, besides the value of the subject-matter of the suit in the Court of first instance at the date of the institution of the suit, the value of the subject-matter in dispute on appeal to His Majesty in Council at the date of the decree from which the appeal to His Majesty in Council is to be made, must be taken into consideration. AIR (Vol 16) 1929 Nag 75 (DB).

——**S. 110 — Valuation — Appeal.**

For the purpose of valuation for a Privy Council appeal, the value at the date of decree is to be considered and not the value at the institution of the suit. AIR (Vol 4) 1917 Cal 496: 44 Cal 119: 24 CLJ 350: 21 CWN 530: 35 Ind Cas 605 (DB).

(iii) Partition suit.

——**S. 110, cl. 2 — Suit for partition of property worth more than Rs. 10,000 — Decree by High Court declaring that plaintiff was entitled to share worth less than Rs. 10,000 — Leave to appeal to Privy Council, if can be given to defendant.**

In order to satisfy the conditions of S. 110, the suit must involve rights and claims to property which rights and claims are worth Rs. 10,000 or upwards & not the rights affecting the property the value of which as a whole is Rs. 10,000 or upwards.

Where, therefore, a decree is passed by the High Court in a suit for partition of property valued at more than Rs. 10,000 declaring the plaintiff to be entitled to a share worth less than Rs. 10,000 and the defendant wishes to prefer an appeal to the Privy Council, the case does not fall under cl. 2 of S. 110, as the value of the claim decreed is less than Rs. 10,000 though the value of the whole property is more than Rs. 10,000. AIR (Vol 25) 1938 Mad 666: 47 MLW 591: (1938) MWN 433: (1938) 1 MLJ 728: ILR (1938) Mad 923: 182 Ind Cas 913.

——**S. 110 — Directly and indirectly.**

A suit was brought by the plaintiff to recover his one-sixth share in certain properties by partition. Valuation of the subject-matter was Rs. 5,550. The trial Court allowed the suit and provided in its decree that defendant No. 4, a brother of the plaintiff, should also recover his one-sixth share, with mesne profits equal to those which the plaintiff would get on payment of the necessary stamp duty. On appeal by defendants Nos. 1 to 3, the decree was reversed; plaintiff and defendant No. 4 filed an application for leave to appeal to Privy Council:

Held, that for determining the value under S. 110, the decree is to be looked at as it affects the interests of the party (or parties) prejudiced by it & it would appear that the decree of the High Court had affected the interests of both the applicants, viz., the plaintiff and defendant No. 4, and that the decree of the High Court did involve a question respecting property of the value of Rs. 10,000 or upwards. Though the share of defendant No. 4 was only involved indirectly, yet for the purpose of para. 2 of S. 110, that was sufficient. AIR (Vol 24) 1937 Bom 181: 39 Bom LR 156: ILR (1937) Bom 705: 168 Ind Cas 599 (DB).

——**S. 110 — Decision on question of impartibility of estate — Whether one affecting whole estate.**

A decision on the question of the impartibility of an estate raised as a bar to the suit for partition is one which possibly affects the estate and if the value of the estate is above Rs. 10,000, appeal to His Majesty in Council is competent. AIR (Vol 22) 1935 Pat 266: 16 PLT 279: 1 BR 475: 155 Ind Cas 633 (DB).

——**S. 110 — Criterion.**

In a suit for partition, the value of the whole estate is the value to be taken into account when considering whether leave to appeal to His Majesty in Council should or should not be granted. AIR (Vol 20) 1933 All 177: (1932) ALJ 730: 54 All 858: 138 Ind Cas 670 (DB).

[Overruled by AIR (Vol 31) 1944 PC 65: 48 C WN 820: (1944) 2 MLJ 218.]

——S. 110— On principle it can make no difference on the point of valuation for purposes of appeal to Privy Council whether a suit is a partition suit or a partnership suit. It is the value of the appellant's share and not the whole of the property that determines the value of the subject-matter. AIR (Vol 12) 1925 Bom 137: 85 Ind Cas 191: 49 Bom 149: 26 Bom LR 1261 (DB).

——**S. 110 — Partition suit — Decree affecting plaintiff's share and also that of some of the defendants — Value of appeal.**

Where in a partition suit the decree affects the interests not only of the plaintiffs who are appealing but of some of the defendants, the value of the subject-matter within S. 110 is the value of the property and not that of the plaintiffs' share therein. AIR (Vol 8) 1921 Pat 502: 60 Ind Cas 844: 2 PLT 386 (DB).

——S. 110 (S. 596, old Code) — For the purposes of valuation within S. 596, C. P. C., in a partition suit, the value of the subject matter of the suit is the value of the whole of the estate which it is sought to partition and not merely that of the particular share which one of the parties claim. (1906) 3 CLJ 257: 10 CWN 564 (564) (DB).

(c) Costs.

——**S. 110 — Variation of matters of costs only is not decree of variance.**

No doubt the language of S. 110 is wide enough to cover the case of any variation, but the language should be restricted to variation with regard to the subject-matter of the suit and should not be extended to those variations which are not strictly the subject-matter of the suit and which are matters in the discretion of the Court. For the purpose of the valuation of appeal to His Majesty in Council, costs are not taken into consideration and are treated as extraneous to the subject-matter of the suit. Hence variation in the matters of costs only is not a decree of variance and gives no right of appeal to the Privy Council. AIR (Vol 30) 1943 All 358: (1943) ALJ 378: ILR (1943) All 840: 1943 AWR (HC) 187: 209 Ind Cas 532 (DB).

——**S. 110 — Costs of proceeding and interest subsequent to suit, if can be added to make up deficiency.**

Where the difference between the amount claimed and amount decreed is less than Rs. 10,000, the plaintiff cannot add the costs of the proceedings to make up the deficiency. Nor can the interest subsequent to the institution of the suit be added to make up that deficiency. AIR (Vol 29) 1942 Pesh 6: 1942 Pesh LJ 6: 198 Ind Cas 392 (DB).

——**S. 110 — If included in subject-matter of suit.**

The costs of the suit are in no sense the subject-matter of the suit in the Court of first instance and ought not to be added to the value of the sub-

ject-matter in order to bring the valuation up to the appealable amount under the provisions of S. 110. AIR (Vol 14) 1927 Pat 328: 6 Pat 444: 104 Ind Cas 267: 8 PLT 714 (DB).

(d) Interest.

——S. 110 — "Involve directly", etc. — Mortgage of property worth more than Rs. 10,000 — Suit for amount less than Rs. 10,000 — Decree for amount exceeding Rs. 10,000, including a post litem interest — Leave to appeal.

In a suit to enforce a mortgage, claiming an amount of less than Rs. 10,000, there was a decree for an amount more than Rs. 10,000, including 'post litem' interest. The value of the mortgaged property was more than Rs. 10,000. The mortgagor applied for leave to appeal to the Privy Council.

Held, that a mortgage suit was concerned exclusively with the amount due on the mortgage to the mortgagee and unless the amount exceeded Rs. 10,000 it would not satisfy the requirements of the first paragraph of S. 110, C. P. Code, that the subject-matter of the suit must be that sum. AIR (Vol 24) 1937 All 169, Diss. AIR (Vol 36) 1949 Pat 448: 27 Pat 237 (DB).

——S. 110 — Subsequent interest.

In the case of a plaintiff whose suit is dismissed by the High Court on appeal, the value for the purposes of leave to appeal to His Majesty in Council is the amount calculated upto the date of the decree of the lower Court and further interest cannot be added. The reason is that the grant of subsequent interest is within the discretion of the Court and, therefore, the further interest which may or may not be allowed is not part of the claim for the purpose of S. 110, Civil P. C. If therefore, the decree is a mortgage decree, interest subsequent to the date fixed for payment cannot be added because the grant of such interest is discretionary and it was grantable under S. 34, Civil P. C., prior to 1929; in this respect, the law is the same even after 1929. Therefore, even if the Judicial Committee in a particular case reverses the decision of the High Court, it might, having regard to the facts of the case, refuse to award interest from the date fixed for payment in the lower Court. Therefore, what may or may not be awardable is not to be included in the claim. It is not part of the claim. AIR (Vol 29) 1942 Mad 535 : 55 MLW 120 : (1942) 1 MLJ 296 : 1942 MWN 399 : ILR (1942) Mad 618 : 202 Ind Cas 170 (DB).

——S. 110 — Interest awarded under S. 31 by trial Court cannot be added.

A decree was obtained for Rs. 9,141-5-0 with interest at 6 per cent. On appeal the High Court reversed the decree and the claim of the plaintiff was dismissed. Thereupon the plaintiff applied for leave to appeal to the Privy Council alleging that the value of the subject-matter of the appeal to His Majesty was more than Rs. 10,000 as he was entitled to add interest upto the date of High Court decree to the amount decreed by the trial Court

Held, that as the granting of interest was in the discretion of the Court under S. 34, Civil P. C., and could not be claimed by the plaintiff as a matter of right, he was not entitled to do so. AIR (Vol 28) 1941 Pat 255: 22 PLT 363: 20 Pat 481: 7 BR 884: 195 Ind Cas 196 (FB).

——S. 110 — No appeal on concurrent findings — Question of interest not being of sufficient value to amount to Rs. 10,000, — No leave can be granted.

The plaintiff brought a suit for enforcement of a mortgage executed by defendant No. 1 against defendant No. 1 and defendant No. 2. The trial Court granted a decree on the mortgage. Defendant No. 2 appealed and the main question was whether the mortgage was valid. In first appeal, the High Court held that the mortgage was valid but the amount of interest was reduced in favour of the appellant. The decree, therefore, was varied in favour of the appellant but the amount of variation was less than Rs. 10,000. In the proposed appeal to the Privy Council it was desired to raise the question of the validity of the mortgage, an issue on which the findings of the two Courts were concurrent:

Held that the issue on which there had been concurrent findings could not be raised in appeal. Moreover, the question of interest was not of sufficient value to amount to Rs. 10,000 and therefore, leave to appeal on the question of interest alone could not be granted. AIR (Vol 26) 1939 All 322: (1939) ALJ 62: ILR (1939) All 443: 1939 AWR 115: 182 Ind Cas 367 (DB).

——S. 110 — High Court passing decree for Rs. 9,182-6-3 — Amount with interest exceeding Rs. 10,000.

In the case of an application for appeal to the Privy Council, for the purpose of ascertaining the amount or value of the subject-matter of the suit in the Court of first instance, it is necessary to ascertain the amount or value of the subject-matter of the suit at the date of the institution of the suit.

Where the plaintiff's claim which was for a sum above Rs. 10,000 was dismissed in the trial Court but the High Court passed a decree for Rs. 9,182-6-3 with interest at 6 per cent. and the decree of the High Court including interest up to the date of decree exceeded Rs. 10,000:

Held, that the defendant should be given leave to appeal to the Privy Council under S. 110, Civil P. C. AIR (Vol 21) 1934 Rang 65: 12 Rang 164: 149 Ind Cas 1033 (DB).

——S. 110 — There is no rule of law enabling a plaintiff to enforce the award of interest and it cannot, therefore, be deemed to be part of his claim against the defendant and is not part of the subject-matter in dispute on appeal to His Majesty in Council, within the meaning of S. 110, Civil P. C. AIR (Vol 20) 1933 Mad 401: 37 MLW 491: 64 MLJ 496: (1933) MWN 260: 56 Mad 886: 143 Ind Cas 139 (DB).

——S. 110 — Interest from date of suit to 'dies datus' and costs.

In calculating the value of the subject-matter in appeal for purposes of appeal to the Privy Council interest awarded by the decree from the date of suit till 'dies datus' can be taken into concount, but not the costs of the suit. AIR (Vol 20) 1933 Nag 22: 28 NLR 845: 15 NLJ 154: 141 Ind Cas 42 (DB).

——S. 110 — When included in subject-matter.

Where in a suit for property including promissory notes which in the plaint are described as of their face value & so valued together with the other subject-matter in dispute, the amount of Rs. 10,000 cannot be reached, but if to the face value of the promissory notes is added the interest up to date of the decree of the first Court, then the sum of Rs. 10,000 is exceeded.

Held, that the interest could not be so added to bring the case within S. 110. AIR (Vol 17) 1930 PC 44: 121 Ind Cas 513: 34 CWN 235: 51 CLJ 168: 1930 MWN 193: 32 Bom LR 517: 53 Mad 167: 57 IA 56 : 58 MLJ 184.

——S. 110 — When included in subject-matter.

The amount of interest which a Court may allow in the exercise of its discretion but which is not claimable as of right, cannot be included in the value under S. 110. AIR (Vol 16) 1929 Nag 75 (DB).

——S. 110 — When included in subject-matter — Interest from filing plaint up to decree.

Where interest is claimed in the plaint such interest as accrues during the period between the filing of the suit and the decree is part of the subject matter of the suit and the amount of such interest can be regarded as part of the amount or value of the subject-matter of the suit in the Court of first instance within the meaning of S. 110. AIR (Vol 13) 1926 Rang 45: 3 Rang 405: 91 Ind Cas 647 (DB).

——S. 110 — Claim inclusive of interest pendente lite and amount provided by O. 34, R. 2 is Rs. 10,000.

Where all that is sought to be added to the definite ascertainable amount at the date of filing of the plaint is interest 'pendente lite' and the amount provided for under O. 34, Rr. 2 and 4, if those three amounts when added together exceed Rs. 10,000, the case is one within the section. AIR (Vol 10) 1923 All 78: 69 Ind Cas 645: 45 All 133: 20 ALJ 903 (DB).

——S. 110 — If included in subject-matter — Interest from filing plaint up to decree.

Interest from the date of the plaint to the decree can be included for the purposes of S. 110. The proper construction to be placed on S. 110 must be taken to be the amount of value which the plaintiff either obtained, or had he been successful, would have obtained in his suit at the date when the decree was passed. AIR (Vol 10) 1923 Mad 135: 43 MLJ 622: 74 Ind Cas 596: 1922 MWN 652: 16 MLW 682: 32 MLT 1 (DB).

——S. 110 — When incluled in subject-matter — Interest up to decree.

Where the amount due on the date of the suit is Rs. 9776, but interest up to the date of the decree and further interest to the date of payment is also claimed in the plaint, and the amount by which the amount said to be due on the date of the suit fell short of Rs. 10,000 by Rs. 224, and this amount represented interest for about 3 1/2 months, and there was no possibility of a decree being granted within 3 1/2 months.

Held, the amount for which a decree was asked amounted to Rs. 10,000. AIR (Vol 10) 1923 Nag 239: 72 Ind Cas 395 (DB).

——S. 110 — When included in subject-matter — Interest after trial Court's decree.

Under S. 110 in order to compute the value of the subject-matter in suit the amount of interest accruing subsequent to the decree of the trial Court should not be taken into consideration. AIR (Vol 8) 1921 Pat 229: 62 Ind Cas 959: 2 PLT 463: 1921 P.H.C.C. 229: 6 PLJ 596 (DB).

——S. 110 — Valuation — Addition of interest.

In calculating the value of the subject-matter for appeal to the Privy Council the appellant is not entitled to add the subsequent interest to the decretal amount. AIR (Vol 7) 1920 All 202: 42 All 445: 2 UP LR (A) 142: 18 ALJ 445: 55 Ind Cas 976 (DB).

——S. 110 — Valuation — Indirectly affecting future claims for more than Rs. 10,000 — Amount swelled by interest.

A decision having been given with regard to a claim of legacy under a will of less than Rs. 10,000 in value, the probability of the decision affecting future claims of other legatees of more than Rs. 10,000 does not give a right of appeal to the Privy Council under S. 110(2), C. P. C.; the second clause of the section refers only to something in the decree affecting the larger subject-matter. 35 A 445, 5 WR 34 PC ref. to. The subject-matter of a suit being below Rs. 10,000, the mere fact of the decree amount having been swelled, on the date of the application for leave to appeal, to more than Rs. 10,000 by the addition of subsequent interest gives no right of appeal to the Privy Council. AIR (Vol 5) 1918 Mad 1178: 32 MLJ 400: 37 Ind Cas 502 (DB).

——S. 110 — Valuation — Subsequent interest — Arrears of pension.

In determining the value of the subject matter of a suit for leave to appeal to the Privy Council the interest payable until realisation of the decree as well as the arrears of pension accrued due since the decree, could not be taken into consideration. AIR (Vol 5) 1918 Pat 566: 4 Pat LW 240: 3 Pat LJ 317: 44 Ind Cas 475 (DB).

——S. 110 — (S. 596, old Code) — Subject-matter in first Court Rs. 10,000 or over and appeal to Privy Council — Same sum or over — 'And', meaning — Cumulative.

For leave to appeal to be given under S. 596, C. P. C., not merely should the subject-matter of appeal to the Privy Council be Rs. 10,000 in value or over, but the value in the first Court should also be Rs. 10,000 or over. 'And' does not mean 'or'. In an appeal to the Privy Council against the decision of a High Court reversing a decree of the Court below, the value of the suit for the purpose of the appeal to the Privy Council is the amount of the decree with interest up to the date of decree; and further interest though ascertainable according to the decree is no part of the value of the suit. (1902) 4 Bom LR 159: 6 CWN 362: 24 A 174 (177): 29 IA 40 (PC).

(e) Interpretation.

(i) General.
(ii) Aggregate value.
(iii) Court of first instance.
(iv) Test.

(i) General.

——S. 110 — Requirements of section — Valuation of subject-matter — Leave to appeal to Federal Court.

Under para. 1 of S. 110, C. P. Code, where the subject-matter of the suit in the Court of first instance was less than Rs. 10,000/-, it must be the same as far as the petitioner is concerned for leave to appeal to the Federal Court. Under para. 2 of the section, the Court has to consider what is the detriment to the petitioner, and if that is less than Rs. 10,000/-, then, whatever may be the value of the property in suit, the case does not fulfil the requirements of the section. The phrase "directly or indirectly" refers to suits in existence and cannot be stretched to refer to suits 'in germio futuri'. AIR (V 37) 1950 EP 195 (DB).

——S. 110 — Applicability — Claim to or question relating to property of value over Rs. 10,000/- — Suit for share in dower of Rs. 40,000/- — Other sharers impleaded as defendant — Dismissal — Reversal by High Court in appeal — Decree for less than Rs. 10,000/- representing share of plaintiff — Application by defendant for leave to appeal to Privy Council — Competency.

A suit by one of the heirs of a Mahomedan lady for his share of the dower of Rs. 40,000/- payable to her impleading the other heirs as 'pro forma' defendants was dismissed by the trial Court; but on appeal, the High Court reversed the decree of the trial Court and passed a decree for the plaintiff's share, amounting to Rs. 6,668/8/8, finding that the total dower was fixed at Rs. 40,000/-. The defendant applied for leave to appeal to the Privy Council. The plaintiff contended that as the decree in his favour was only for a sum below Rs. 10,000/-, the value of the claim or question could not, by any stretch of reasoning, be held to be above Rs. 10,000/-.

Held, that the decree of the High Court was one of reversal of the trial Court's decree, and involv-

ed directly or indirectly a claim or question to or respecting property of value above Rs. 10,000/-, and the applicant was therefore entitled as of right to a certificate of leave to appeal to the P. C., under S. 110, C. P. Code. AIR (V 35) 1948 Pat 372 : 26 Pat 371 (DB).

——S. 110 — Value of subject-matter in appeal to Privy Council — Computation — Decree of affirmance with a slight variation as to certain debts in a partition decree — Leave to appeal to Privy Council — When granted.

The value of the subject-matter in dispute in an appeal to the Privy Council in a partition suit must be taken to be the value of the share in the joint family property in respect of which the appellant is claiming. When there is a slight variation of the decree which is wholly in favour of the proposed appellant and about which he has no grievance and in regard to other matters the appellate decree has affirmed the decree of the trial Court, the appellate decree is in the main one of affirmance within the meaning of S. 110 of the C. P. Code, and the appellant cannot have because of the modification, a right of appeal on other points on which the Courts have concurred without showing that there is a substantial question of law involved. If the subject-matter of the dispute in appeal had been the amount of the decree or the amount of damages, a variation to the prejudice or in favour of the petitioner would not alter the decree of variance into one of affirmance. But where the question in dispute is on a totally different point such as the question of debts due by the family in a partition suit in regard to which the applicant has succeeded and succeeded altogether so that he has no further grievance in the matter, he cannot without showing a substantial question of law have a right to litigate upon other points upon which the Courts have been in agreement. AIR (V 34) 1947 Mad 227 : (1946) 2 MLJ 465 : ILR (1947) Mad 744 : 1947 MWN 26 : 60 LW 151 (DB).

——S. 110 — Partition suit — Appeal to Privy Council — Value of share claimed and not of whole property is to be considered.

The plaintiff as assignee of the purchaser from a member of a Hindu joint family of one sixth-share in the joint family property sued for partition of the family property and to have his one-sixth share allotted to him. The value of the interest which the plaintiff claimed was well under Rs. 10,000/-, probably about Rs. 3,000/-. The total value of the joint family property exceeded Rs. 10,000/-. The trial Court dismissed the suit as barred by limitation. The plaintiff appealed to the High Court but the appeal was dismissed. The plaintiff then applied to the High Court for leave to appeal to His Majesty in Council but the application was dismissed on the ground that the share of the plaintiff in the property of which he sought partition being less in value than Rs. 10,000/-, the subject-matter of the appeal was below the minimum value required by S. 110. Before the Privy Council, the plaintiff based the contention that the High Court had wrongly refused to grant a certificate on the second clause in S. 110, and argued that the decree in the case involved directly or indirectly a question respecting the whole of the joint family property, admittedly of a value exceeding Rs. 10,000/-:

Held, that the High Court was correct in holding that the value of the subject-matter in dispute on appeal to His Majesty in Council must be taken to be the value of the share of the joint family property in respect of which the plaintiff was claiming. The question as to the title of the plaintiff to the share which he claimed in the joint property did not become a question respecting the whole of the joint family estate merely because if his title was established, it would result in the joint family estate being partitioned. AIR (V 20) 1933 All 177 and (1906) 10 CWN 564 : 3 CLJ 257, Impliedly Overruled. AIR (V 31) 1944 PC 65: (1944) ALJ 382 : 48 CWN 820 : (1944) 2 MLJ 218 : 57 MLW 516 (2) : 71 IA 142 : 46 Bom LR 849.

——S. 110 (2) — Fact that question involved may in future arise in suits involving property of value of more than Rs. 10,000/-.

The words "directly or indirectly" in cl. (2) of S. 110, refer to suits in existence and not to suits 'in gremio futuro'. The fact that the questions involved in the suit sought to be appealed against may arise in future litigations involving property of the value of Rs. 10,000/- or upwards will not bring the case under cl. (2) of S. 110, if the subject-matter of the suit is below Rs. 10,000/-. AIR (V 30) 1943 Oudh 266 : 1942 OWN 23 : 204 Ind Cas 608 (DB).

——Ss. 110, 109 — Property mortgaged worth over Rs. 10,000/- — Claim in respect of share worth less than Rs. 10,000/- — Case does not come under S 110, para. 1, or under S. 109 (a).

The case does not come under the first para. of S. 110, Civil P. C. if the value of the mortgaged property is above Rs. 10,000/- but the claim is in respect of its share valued at less than Rs. 10,000/-.

The second paragraph of S. 110 means that the suit must, to satisfy its conditions, involve rights and claims to property which rights and claims are worth Rs. 10,000/- and upwards, not that the rights affect properties whose value is Rs. 10,000/- and upwards. Where the entire value of the property is above Rs. 10,000/- but the claim of the applicants is not worth Rs. 10,000/-, the case does not come under cl. (a) of S. 109. AIR (V 29) 1942 Oudh 174 : 1942 OWN (CC) 1234 : 1941 AWR (CC) 1059 : 197 Ind Cas 313 (DB).

——S. 110 (2) — Suit valued at Rs. 7,699/- for which certificate was issued — Suit decreed but on appeal, dismissed by High Court — Appeal also valued at Rs. 7,699/- — Property in respect of which certificate was issued worth more than Rs. 10,000/- — Case, held covered by S. 110 (2).

The plaintiffs brought a suit for a declaration that a certain property could not be attached and sold in execution of the certificate. They rested their claim in the suit on the ground that they had purchased it in execution of a mortgage-decree obtained by them against the persons who owned the property. The suit was valued at Rs. 7,699/- and odd, because that was the amount for which the certificate was issued. The suit was decreed by the trial Court but on appeal the High Court dismissed it. The appeal was also valued at Rs. 7,699/-. But the property in respect of which the certificate was issued was worth more than Rs. 10,000/-:

Held, that the case was fully covered by S. 110 (2) and was a fit one for appeal to His Majesty in Council from the decree of the High Court. AIR (V 28) 1941 Pat 288 : 22 PLT 284 : 7 BR 812 : 194 Ind Cas 654 (DB).

——S. 110 (2) — Value of property involved in proceeding less than Rs. 10,000/- — Decision of High Court affecting party's whole property worth more than Rs. 10,000/- — Certificate under S. 110 (2).

P and R were co-owners of a village owning one-third and two-thirds of the property respectively. Through the village lands ran two water channels, A and B. P brought under wet cultivation

by means of channel B an additional area which resulted in a suit being filed against him by R. The suit was compromised, whereby P was restrained from cultivating any further area by using the channel. P, however, subsequently brought under cultivation more area by use of the water from channel B. This resulted in execution application being filed by R in which the High Court ultimately held that P was not entitled to draw further water from either channel. P applied for leave to appeal to the Privy Council. The value of the additional land brought under cultivation which resulted in the execution proceedings was under Rs. 10,000/- but the value of the land affected by the decree was of the value of more than Rs. 10,000/-:

Held, that as the decision of the High Court prohibiting P from bringing any further portion of his land under wet cultivation affected his interest in the village which was of far greater value than Rs. 10,000/-, the certificate under S. 110 (2), Civil P. C., could. therefore, be granted. AIR (V 26) 1939 Mad 742 : 49 MLW 786 : 1939 MWN 607 : (1939) 2 MLJ 36 (2) : ILR (1939) Mad 838 : 187 Ind Cas 731 (DB).

——S. 110 (2) The words "some claim or question to or respecting property" in S. 110 (2) must be interpreted to mean some claim or question to or respecting property additional to or other than the actual subject-matter in dispute in the appeal. AIR (V 24) 1937 Bom 326 : 39 Bom LR 332 : ILR (1937) Bom 402 : 170 Ind Cas 717 (DB).

——S. 110, cl. (2) — Value of subject-matter below Rs. 10,000/- — Value more than Rs. 10,000/-, if another appeal pending, by another party affected by decree, was taken into account — Privy Council decision not having any effect on other appeal.

In an application for leave to appeal to the Privy Council, though the value of the subject-matter was below Rs. 10,000/-, it was alleged that there was another appeal pending on behalf of another party affected by the decree and that the value would be more than Rs. 10,000/- if the value of that property be taken into account. It was admitted that the decision in appeal to Privy Council would not have any effect on the other appeal whether by way of 'res judicata' or in any other way:

Held, that the order could not be held directly or indirectly to involve a claim or question to or respecting property involved in appeal within the meaning of S. 110, cl. (2), Civil P. C. AIR (V 24) 1937 Lah 95 : 171 Ind Cas 433 (DB).

——S. 110 — The words "the amount or value of the subject-matter of the suit in the Court of the first instance" in S. 110, Civil P. C., mean the amount or value at the institution of the suit, and not at the date of the decree in the Court of first instance, which meaning is not affected by the alternative condition which follows in the section. AIR (V 23) 1936 Lah 31 : 38 PLR 767 : 170 Ind Cas 459 (DB).

——S. 110 — "Involve directly or indirectly some claim respecting property of Rs. 10,000/- in value or upwards", meaning of.

The words "must involve directly or indirectly some claim or question to or respecting property of upwards Rs. 10,000/- in value" in S. 110, Civil P. C., refer to questions arising between parties to a pending suit and not to questions relating to the title of only one of the parties which might be made the basis of a prospective suit. AIR (V 20) 1933 All 8 : 54 All 431 : 140 Ind Cas 418 (DB).

——S. 110 — Where the plaintiff's suit is dismissed by the High Court on appeal, the maximum value to be attached to his appeal to the Privy Council is the value of his suit as stated in the plaint and accepted by the trial Court. It can make no difference whether that Court allowed the claim in whole or in part or dismissed it altogether. AIR (V 20) 1933 Mad 401 : 37 MLW 491 : 64 MLJ 496 : (1933) MWN 260 : 56 Mad 886 : 143 Ind Cas 139 (DB).

——S. 110 — A Hindu widow got a decree for maintenance which provided that she was entitled to occupy certain premises, and that in case it became necessary for the executors to sell the premises, she should receive further maintenance of Rs. 400/- a month. The executors had an advantageous offer for sale for Rs. 1,95,000, but the widow refused to vacate on the ground that necessity for sale had not arisen. In appeal, the Court ordered her to vacate the premises, whereupon she sought leave to appeal to the Privy Council:

Held, that the value of the subject-matter of the appeal was really the premises she was required to vacate, and that the case fell within the last words of the first paragraph of S. 110, Civil P. C., since the amount or value of the subject-matter was Rs. 10,000/- or upwards.

Held, further, that the case also fell within the second paragraph of S. 110, since the order involved directly a claim or question to or respecting property of over Rs. 10,000/- in value.

Held, also, that the order sought to be appealed from was a final order as it finally disposed of the applicant's right to occupy the premises. AIR (V 19) 1932 Bom 543 : 34 Bom LR 834 : 56 Bom 526 : 140 Ind Cas 254 (DB).

——S. 110 — Valuation — Acquiescence — Undervaluation by plaintiff — Increasing for purposes of appeal to Privy Council not allowed.

Where plaintiff's valuation of the claim in suit is low to the knowledge of the plaintiff and the plaintiff neither increases that valuation nor pays additional court-fee at subsequent stages of the suit, he will not be permitted to change the valuation at the time of leave to apeal to His Majesty in Council. AIR (V 17) 1930 Cal 737 : 34 CWN 671 (DB).

——S. 110 — Affidavit as to value of property — No counter-affidavit filed — Grant of certificate.

Where an affidavit that the decree involves a claim respecting property exceeding ten thousand rupees in value, is filed and there is no counter-affidavit by the respondents, the High Court may assume that petitioner's affidavit is correct. AIR (V 13) 1926 Lah 416 : 94 Ind Cas 554 : 26 PLR 123 (DB).

——S. 110 — Valuation — Decree upheld in part.

The part decreed by the High Court could not be included for purposes of valuation by plaintiff. AIR (V 7) 1920 All 22 : 2 UPLR (A) 155 : 57 Ind Cas 40 (DB).

——S. 110 — Affirming judgment— Substantial question of law involved — But value less than Rs. 10,000/- — Grant of leave.

If the value is less than Rs. 10,000/- and the would-be appellant to His Majesty in Council has lost his case in both the lower Courts he cannot, except in very exceptional cases, get a certificate though a substantial question of law is involved. AIR (V 7) 1920 Low-Bur 90 : 62 Ind Cas 71 : 10 LBR 307 (DB).

——S. 110 — Valuation — Subject-matter of suit less than Rs. 10,000/- — Value increased at time of application for leave to appeal.

The plaintiffs valued their suit at Rs. 7,590/- but at the time of the application for leave to appeal to His Majesty in Council plaintiffs valued the property at Rs. 12,000/-.

Held, that the increase in value 'pendente lite' would not be sufficient to bring the case within S. 110 of the C. P. Code. AIR (V 6) 1919 Pat 486 : (1919) Pat (HCC) 241 : 51 Ind Cas 975 (DB).

——S. 110 — Valuation — Application to set aside sale by a person interested in portion of the property sold.

To determine the value prescribed by S. 110 of the C. P. Code the decree has to be looked at, as it affects the interests of the parties prejudiced by it. Where the detriment to the party seeking relief is estimated at less than Rs. 10,000/- then the matter in dispute in appeal is not of the prescribed value and the decree itself does not involve any claim or question to or respecting property of the prescribed value. AIR (V 6) 1919 Pat 305 : 4 Pat LJ 415 : (1919) Pat HCC 257 : 52 Ind Cas 723 (DB).

——Ss. 109 and 110 — Valuation — Conditions for grant of certificate.

Under para. 1 to S. 110, the real value of the right of an easement, which is the subject-matter of the suit, for the purpose of an appeal to the Privy Council can only be ascertained on the basis of the detriment or injury which the party claiming the right would maintain by its being negatived. Under para. 2 to S. 110, C. P. C. the suit must involve rights and claims to property worth Rs. 10,000/- and upwards; that the rights affect properties whose value is Rs. 10,000/- and upwards is not sufficient. Under para. 3 to S. 110 the case must involve a question of law of general interest or importance and not the application of the law to the particular facts of the case. Per Sadasiva Iyer, J. — 'Property' in para. 2 means rights in property inferior to full ownership where such rights alone are in dispute. AIR (V 5) 1918 Mad 632 : (1917) MWN 414 : 6 LW 12 : 33 MLJ 481 : 40 Ind Cas 680 (DB).

——S. 110 — Valuation of subject-matter — Counter claim more than Rs. 10,000/-.

Plaintiff and defendant each alleged breach of contract by the other making claims and counter-claims. Plaintiff's contention that defendant's counter-claim was not admissible under the C. P. Code being overruled, a decree was passed in defendant's favour, but plaintiff did not re-open the question in the Appellate Court which reversed the first court's decree and made a partial decree in favour of the plaintiff.

Held, that the question of the admissibility of the counter-claim must be taken to have been decided between the parties in accordance with the contention of the defendant and the plaintiff could not be permitted to raise it for showing that defendant's claim of appeal could not come up to Rs. 10,000/- in value. AIR (V 4) 1917 PC 66 : 22 CWN 282 : 46 Ind Cas 576.

——S. 110 — Valuation — Other property affected.

The mere fact that the history of the property in dispute was the same as another valued at more than Rs. 10,000/-, would not bring it under S. 110 of the C. P. C. so as to give the applicant a right of appeal to His Majesty in Council. AIR (V 2) 1915 All 446 : 26 Ind Cas 6 (DB).

——S. 110 — Valuation — Partition decree — Execution.

In execution of a decree in a partition suit involving property of the value of Rupees ten lakhs, the applicants disputed their liability to 4/6ths of an item of Rs. 11,709/-.

Held, that the case did not satisfy the conditions set forth in S. 110, cl. (1) or (2). Consequently leave to appeal to the Privy Council therefrom could not be granted. AIR (V 2) 1915 Lah 150 : 60 PWR 1915 : 140 PLR 1915 : 29 Ind Cas 759.

——S. 110 — Valuation — Subject-matter in appeal less than Rs. 10,000/- — Amount indirectly involved more than Rs. 10,000/-.

Where the value of the proposed appeal to Privy Council was less than Rs. 10,000/- but it raised a question as to the validity of an award affecting property exceeding Rs. 10,000/- in value the case fell within S. 110 (2) and leave to appeal should therefore be granted. (1913) 35 All 445 : 11 ALJ 654 : 21 Ind Cas 617 (DB).

——S. 110 — Valuation — Decree involving indirectly question respecting property of required value.

The plaintiff and defendants were co-sharers in certain zemindaris. The defendants purchased different holdings from different tenants and the plaintiff sued to recover from them the shares of the rent payable by them to the plaintiff as zemindar. The suit was decreed by the Lower Appellate Court but dismissed by the High Court on the ground that no relationship of landlord and tenant existed between the parties. The plaintiff applied for leave to appeal to the Privy Council and showed by affidavit that the defendants held by purchase various holdings in different mauzhas yielding an annual rent of Rs. 800, and that the decision of the High Court could deprive of the plaintiff of that amount annually.

Held, that the decision involved indirectly some claim or question respecting property of the value of Rs. 10,000 or upwards and that leave to appeal to the Privy Council should be granted. (1910) 14 CWN 651 : 6 Ind Cas 598 (DB).

——S. 110 (S. 596 old Code) — Value of appeal — — "Involve indirectly".

A decision of the Court with respect to the apportionment of compensation money upon a reference under the Land Acquisition Act should not be treated as 'res judicata' affecting other parts of the claimant's property held under the same title. 7 C 406 followed 26 M 269, Ref. to; 12 C 414 Dist. When less than ten thousand rupees of compensation money was apportioned by the Land Acquisition Judge and his decision was affirmed on appeal by the High Court:

Held, on an application for a certificate for leave to appeal to His Majesty in Council that the case could not be regarded as indirectly involving a larger amount because other properties not acquired were held under the same title. (1907) 11 CWN 525 : 34 C 466 (468, 469) (DB).

——S. 110 (S. 596 old Code) — Valuation — Leave to appeal to Privy Council:

Under S. 596, C. P. C., in order that a party may have leave to appeal to Privy Council it is necessary that both the subject-matter of the suit and the subject-matter of the appeal should be not less than Rs. 10,000 in value. (1902) 4 Bom LR 159: 6 CWN 362: 24 A 174 (177): 29 IA 40 (PC).

(ii) Aggregate value.

——Ss. 110 and 109 — Valuation — Aggregate value Rs. 10,000 but each suit below Rs. 10,000 — Appeal will not lie.

Where one common judgment is delivered in a number of suits and although the aggregate value is over Rs. 10,000, but each suit separately is below Rs. 10,000 appeal to Privy Council will

not lie. 2 LW 916: 30 Ind Cas 895: AIR (Vol 3) 1916 Mad 943 (DB).

——**S. 110 (S. 596 old Code) — Value of the subject-matter of suit — Aggregate value.**

Several suits were tried together and one judgment was delivered. Leave was granted in two cases in which the value was over Rs. 10,000 in each.

Held—That leave should be granted even in the other cases where though the value when taken separately was individually not more than Rs. 10,000, the aggregate was over Rs. 10,000. (1907) 34 C 400 (402) (DB).

(iii) Court of first instance.

——**Ss. 110 and 109 (c) — Valuation — Court of first instance — Meaning — Arbitrators, if can be described as such — Claim before arbitrators exceeding Rs. 10,000 — Award for a lesser sum — Amount due with interest as per award less than Rs. 10,000 on the date of filing in the High Court of the petition to pass a decree in terms of the award — Decision of the High Court on the petition on the Original Side reversed on appeal — Leave to appeal to the Federal Court against the decision on appeal — If can be granted — S. 109 (c) — Substantial question of law — If sufficient for granting of leave.**

Arbitrators cannot be described as the "Court of first instance" within the meaning of S. 110, C. P. Code. The word "Court" in that section must be understood with reference to the scheme of the Code in general and refers to one of the Courts in the hierarchy of Civil Courts in the country as envisaged by the Code.

A claim before the arbitrators was above Rs. 10,000. But the award was for a lesser amount. An application was made to the Original Side of the High Court to pass a decree in terms of the award. Even on that date the amount awarded together with interest as provided in the award was less than Rs. 10,000. The petition was dismissed but upon appeal this decision was reversed. On an application for leave to appeal to the Federal Court, it was contended that for purposes of S. 110 in regard to valuation "the Court of first instance" must be deemed to be the arbitrators.

Held: As the word "Court" in S. 110 refers to Courts as contemplated by the C. P. Code, in this case "the Court of first instance" must be held to be the High Court on the Original Side and as the value of the subject-matter in that Court was less than Rs. 10,000 leave to appeal could not be granted.

Though a case may involve a substantial question of law, it would not be a ground entitling a party to obtain leave to appeal because it is not every substantial question of law that can be treated as a question of public importance to justify the grant of a certificate under S. 109 (c) C. P. Code. ILR (1950) Mad 245 : 62 LW 288 : 1949 MWN 235 : AIR (Vol 36) 1949 Mad 741 : (1949) 1 MLJ 518 (DB).

——**S. 110, Para 2 — Value of subject-matter of suit less than Rs. 10,000 — Decree of High Court directly involving right valued over Rs. 10,000.**

A common Manager was appointed under S. 95 of the B. T. Act, in respect of several items of immovable property. Thereafter one G purchased an undivided four annas share in two of these items, and brought a suit for a declaration that the appointment of the common manager was illegal and for restoration to him of the said four annas share. To that suit he made all the proprietors parties-defendants. The High Court reversing the decree of the lower appellate Court held that the appointment of the common manager was illegal. The common manager filed an application for leave to appeal to His Majesty in Council. It was admitted that the value of the right of management of the four annas share was only Rs. 2,900.

Held, that as the value of the subject-matter of the suit in the Court of first instance and in appeal was below Rs. 10,000 the case did not fulfil the requirements of the first paragraph of S. 110, C. P. Code, but that the case came under the second paragraph of that section as the decree of the High Court directly involved the question of the management of the entire property, and the value of that right was over Rs. 10,000. (1946) 50 CWN 255 (DB).

——**S. 110 — Valuation — Value of subject-matter in the Court of first instance less than Rs. 10,000.**

The value of the subject-matter of the suit in the Court of first instance must also be Rs. 10,000 or upwards. 39 Mad 843: 30 MLJ 317: 18 MLT 450: (1915) MWN 941: 2 LW 1057: 31 Ind Cas 296: AIR (Vol 3) 1916 Mad 985 (DB).

(iv) Test.

——**S. 110 — Valuation — Test.**

A suit for a declaration that the plaintiff was the sole owner of certain property of the value of over Rs. 10,000 and that the defendants A and B who had obtained decrees against the husband of the plaintiff had no right to proceed against it in execution and valued at Rs. 17,500 was decreed. But B who held a decree for a sum less than Rs. 10,000 appealed against the decree and his appeal was allowed. On a question whether the plaintiff could appeal to the Privy Council,

Held, that as the plaintiff was directly interested in the property which was worth more than Rs. 10,000 and the relief claimed was the sole ownership of that, the case satisfied the requirements of S. 110 (b) of the C. P. Code and leave to appeal could be granted. ILR (1947) All 806 : 1947 ALJ 315 : AIR (Vol 35) 1948 All 51 (DB).

——Section 110 does not speak of the valuation of the suit as put in the plaint but of the value of the subject-matter in dispute or of the value of the property affected by it. AIR (Vol 20) 1933 All 15 : (1932) ALJ 382 : 54 All 941 : 143 Ind Cas 450 (DB).

——**S. 110 — Valuation — Test of — Date of the High Court's decree.**

For the purpose of S. 110, C. P. Code the value of the share which the appellant claims and not the value of the entire family property is the test. Such value ought to be taken as at the date of the decree of the High Court under appeal. 44 Bom 104: 22 Bom LR 243: 55 Ind Cas 972: AIR (Vol 7) 1920 Bom 418 (DB).

——**S. 110 — Valuation — Test of — Suit for accounts.**

The value of the subject-matter of a suit cannot exceed the pecuniary jurisdiction of the Court of institution and the value in appeal cannot be greater than that of the suit from which it arises. The real market value of the matter in dispute is not the test to decide if an appeal lies to the Privy Council. Where a suit for accounts is valued at Rs. 101 and tried in the court of a second class sub-judge the value of the subject-matter of the suit for purpose of appeal to the Privy Council cannot exceed Rs. 5,000; in any event Para 2 of S. 110, C. P. C., has no application where the suit is for money and the plaintiff seeks the same relief in appeal. Where the pecuniary conditions have not been satisfied, no leave to appeal to Privy Council could be granted even though

the case involves some substantial question of law. (1913) 15 Bom LR 1021 : 21 Ind Cas 783 (DB).

(f) Mesne profits.

——S. 110 — "Subject-matter" — Valuation of — Suit to declare several alienations by Hindu alienor invalid — Alienees different — Suit founded on common cause of action — Value of all alienated properties — If to be taken — Mesne profits — Not ascertained — If to be included.

In a suit to have it declared that various alienations effected by a Hindu alienor were invalid founded on a common cause of action, the value of the subject-matter of the suit, for purposes of S. 110, C. P. Code, is the value of all the properties, though the alienees are different; and if such value exceeds Rs. 10,000 a certificate under S. 110, C. P. Code, will issue.

Obiter: The mere fact that mesne profits have not yet been ascertained is no ground for not including the value of the mesne profits for the purpose of ascertaining the value of the subject-matter of the appeal to His Majesty in Council under S. 110, C. P. Code. AIR (Vol 33) 1946 Mad 458: (1946) 1 MLJ 245: 223 Ind Cas 398: 1946 MWN 401 (DB).

——S. 110 — Amount of mesne profits accrued up to date of certificate, if can be added.

It is not open to an applicant to add to the value of the subject-matter in dispute the amount of mesne profits which have accrued up to the date of the certificate for leave to appeal to His Majesty in Council if the value of the subject-matter in the trial Court was less than Rs. 10,000. AIR (Vol 24) 1937 All 169: (1937) ALJ 38: ILR (1937) All 405: 1936 AWR 1297: 167 Ind Cas 670 (DB).

——S. 110 — Decree for mesne profits of suit property obtained in another suit, if can be added.

Where the subject-matter of a suit in the Court of first instance was less than Rs. 10,000, in order to make up the valuation, the applicants for leave to appeal to Privy-Council cannot add the amount of the decree for mesne profits of the property obtained in a separate suit. AIR (Vol 23) 1936 Lah 31: 38 PLR 767: 170 Ind Cas 469 (DB).

——S. 110 — If included in subject-matter.

In ascertaining the amount or value of the subject-matter of a suit, in the Court of first instance, for the purpose of S. 110, where the suit involved a claim for mesne profits, the mesne profits which might be awarded by the Court, whether they had actually accrued at the date when the suit was instituted or whether they were future mesne profits should be taken into consideration. AIR (Vol 16) 1929 Pat 547: 117 Ind Cas 189 (DB).

——S. 110 — If included in subject-matter.

In arriving at the value of the suit for the purposes of S. 110, the Court is entitled to take into account not merely the mesne profits claimed up to the date of the suit but also the future mesne profits and in any case up to the date of the decree of the trial Court. (1928) 107 Ind Cas 828 (DB).

——S. 110 — Mesne profits after High Court's decree — If part of subject-matter.

Mesne profits subsequent to the date of the High Court decree, which have been awarded to the decree-holders cannot be taken into consideration in making an estimate of the value under paragraph 2. AIR (Vol 13) 1926 Bom 265: 94 Ind Cas 755: 50 Bom 160: 28 Bom LR 454 (DB).

——S. 110 — Mesne profits and interest — Distinction.

There is no distinction between interest and mesne profits in respect of claims to include them in the subject matter of the suit. AIR (Vol 13) 1926 Rang 45: 91 Ind Cas 647: 3 Rang 405 (DB).

——S. 110 — When part of subject-matter.

In ascertaining the amount or value of the subject-matter of a suit in the court of first instance for the purpose of S. 110, where the suit involves a claim for mesne profits, the mesne profits which might be awarded by the court whether they had actually accrued at the date when the suit was instituted or whether they were future mesne profits, should be taken into consideration in assessing the value of the subject-matter of the suit. Where past as well as future mesne profits are awarded in the decree of the lower Court but only the profits up to the institution of the suit are calculated, and calculation of future profits is postponed till the final decision of appeal, such future profits are not to be excluded in computing the valuation of the appeal under S. 110. AIR (Vol 8) 1921 Pat 115: 63 Ind Cas 492: 2 PLT 675: 6 PLJ 246 (DB).

——S. 110 — Valuation — Mesne profits.

The value of a suit for possession of land and mesne profits for the purpose of S. 110, C. P. C. is the actual value of the land and the mesne profits up to the date of the appellate decree. AIR (Vol 5) 1918 Pat 377: 5 Pat LW 327: (1918) Pat HCC 246: 3 Pat LJ 377: 46 Ind Cas 137 (DB).

——S. 110 — Value of subject matter of appeal — Plaint value when determining factor.

The stamp law does not prevent a party from obtaining leave to appeal by proving that the real value of the subject matter does not fall short of the appelable amount. But a defendant who had previously adopted the value given in the plaint for the purpose of an appeal preferred by him should not be allowed to contest the valuation on the principle that a party cannot both approbate and reprobate. In a suit for recovery of possession of immoveable property with mesne profits the subject matter to be valued would include mesne profits claimable from the institution of the suit to the date of the delivery of the possession or until the expiration of 3 years from the date of the decree with interest. (1910) 14 CWN 872 (873 874): 6 Ind Cas 792 (DB).

(g) Objection to.

——S. 110 — Valuation — Approbate and reprobate — Plaint giving low valuation — Defendant disputing and alleging higher value but not pressing plea — Suit proceeding on plaintiff's valuation — Application for leave to appeal to Federal Court on allegation of higher value — Plea by defendant of lower value — If barred.

Where in a suit the defendants disputed a low valuation given by the plaintiffs and alleged a higher valuation, but did not press their point and accepted the valuation of the plaintiff and the suit proceeded on the basis of the valuation given by the plaintiffs, the defendants are not estopped from taking objection to a higher valuation given by the plaintiffs in an application for leave to appeal to the Federal Court, so as to make out that the property was worth more than Rs. 10,000. The principle of approbate and reprobate does not arise in such a case so as to preclude the defendants from contending that the value of the properties is not such as to entitle the plaintiffs to the grant of leave. AIR (Vol 37) 1950 Pat 305. (DB).

——Ss. 110 and 109 (c) — Claim for damages valued at Rs. 6,000 and for mandatory injunction at Rs. 100 — Contract relations between parties

affecting much larger amount — Value of subject-matter of suit exceeded the claim and applicant, held could show that value exceeded Rs. 10,000 — Leave, held should also be granted under S. 109 (c).

The applicants claimed only Rs. 6,000 as damages, but on the basis of a contract between the parties they claimed a mandatory injunction valued at Rs. 100 for court-fee purposes. The question of the contract relations between the parties affected a much larger amount than Rs. 6,000; Rs. 6,000 represented the damages for a period of about two years, and the claim for damages under the contract was a recurring claim. Even for the next period of three years, the claim in another suit was Rs. 10,000:

Held, that though only Rs. 6,000 was actually claimed in the suit, that claim did not represent the true value of the subject-matter of the suit in the Court of first instance. The applicant could show when applying for a certificate of leave to appeal that the value exceeded Rs. 10,000 although court-fee was paid on a lesser amount. AIR (Vol 31) 1944 Lah 190: ILR (1944) Kar 163: 220 Ind Cas 314 (DB).

——S. 110 — Estoppel.

If a party takes advantage of the valuation put upon the subject matter by the other party, he cannot be permitted to allege that the original valuation was incorrect. AIR (Vol 14) 1927 Mad 862: 104 Ind Cas 577 (DB).

(h) Practice.

——S. 110 — Value of subject-matter — Appeal to Federal Court — Application for leave — Report of valuation called for from lower Court — — Finding of lower Court as to value — When to be challenged — Principles to be considered.

Where in proceedings for leave to appeal to the Federal Court under S. 110, C. P. Code, the High Court calls for a report from the Court below as to the true value of the subject-matter of the suit at the time of the institution of the suit and at the time of the application for leave to appeal to the Federal Court, and the lower Court gives a valuation in considering whether the valuation given by the Court is acceptable or whether there are good grounds for the finding of that Court as to the value of the subject-matter, what has to be looked is the principle adopted in arriving at the valuation and not the precise particulars in the statements of the various witnesses examined by the lower Court or the documents admitted in evidence and considered by that Court unless it is shown that a wrong principle has been adopted, the valuation arrived at by the lower Court has to be accepted. AIR (Vol 37) 1950 Pat 305 (DB).

——S. 110 — Claim in suit for less than Rs. 10,000 — Findings on questions relating to other property valued at more than Rs. 10,000 recorded but not necessary for decision of suit — Value of appeal.

Where the real claim, in suit is not more than Rs. 10,000 the mere fact that the Court has recorded findings on other questions relating to other property worth more than Rs. 10,000, not at all necessary for the decision of the suit, does not make the subject-matter of the suit, worth more than Rs. 10,000. AIR (Vol 16) 1929 Nag 85: 110 Ind Cas 855.

——S. 110 — Suit for right of way.

Where the plaintiff claimed a right of way over a piece of land valued at Rs. 1500 and forming a part of a survey number valued at Rs. 10,000, the plaintiff having a right to fence the way from the remaining land. Held the dispute could not be said to relate to the whole of the survey number and therefore plaintiff's claim was not of the value of Rs. 10,000. AIR (Vol 15) 1928 Mad 785: 111 Ind Cas 795 (DB).

——S. 110 — Dispute between riparian owners as to right to water — Valuation of claim for appeal to Privy Council.

Para 2, S. 110, C. P. Code relates not only to claims to property of Rs. 10,000 in value but to questions respecting property of the like amount and there is no doubt that that part of the section was introduced to cover claims relating to property of considerable value where the actual value of the relief claimed can only with difficulty be assessed, for instance, in cases where an injunction is sought regarding dealing with certain valuable property or in a case where the rights of irrigation are sought by one side and denied by the other in the case of a village of very considerable area and value. AIR (Vol 15) 1928 Pat 191: 106 Ind Cas 538 (DB).

——S. 110 — Under-valuation by plaintiff — Estoppel.

The mere fact that a low valuation is put on a plaint for the purpose of Court-fee and consequently for the purpose of jurisdiction should not be allowed to operate as estoppel against the plaintiff on the question of value for the purpose of Privy Council appeals and the High Court is entitled to go into the real value for the purpose of considering whether a certificate should be granted when it is not a case in which the higher valuation would have meant that the trial would have to be in a different Court. AIR (Vol 14) 1927 Cal 225: 99 Ind Cas 921: 44 CLJ 572: 31 CWN 268 (DB).

——S. 110 — Mortgage suit for more than Rs. 10,000 — Property sought to be excluded from mortgage security worth less than Rs. 10,000 — Appeal against order excluding such property — Value for appeal.

The plaintiffs sued for the enforcement of a mortgage claim amounting to Rs. 36,000 and odd against several properties. The defendants who were impleaded as subsequent mortgagees of a certain plot denied that it was covered by the plaintiff's mortgage. On appeal by the defendants who valued the appeal at Rs. 9,000, the High Court held that the plot was not included in the plaintiffs' mortgage. The plaintiffs applied for leave to appeal to the Privy Council.

Held, that the subject-matter in dispute was really the whole debt for purposes of valuation for Privy Council appeal. AIR (Vol 14) 1927 Pat 391: 103 Ind Cas 831 (DB).

——S. 110 —Petitioner praying leave in respect of decision involving a claim of Rs.3,900 only.

A dispute arising out of a contract of sale was referred to arbitrators: the arbitrators were unable to agree and ex parte awards were made, one in favour of the petitioner for Rs. 81,000 and odd, the other in favour of the respondents for Rs. 3,900 and odd. Subsequently the High Court on application of the respondents, set aside the award in favour of the petitioner. The petitioner then raised a suit to set aside the award in favour of the respondents. The High Court in its original jurisdiction set it aside, but on appeal the Appeal Court reversed and dismissed the suit. The petitioner applied for leave to appeal, but this was refused upon the ground that the sum involved was neither directly nor indirectly of the value of Rs. 10,000.

Held, that the case neither fell within para 1 nor para 2 of S. 110 and that the petition was rightly

refused. AIR (Vol 12) 1925 PC 159: 49 MLJ 20: 22 MLW 255: 30 CWN 98: 27 Bom LR 867: 52 Cal 650: 52 IA 207: 41 CLJ 623: 88 Ind Cas 445 (PC).

——S. 110 — Suit for declaration without consequential relief.

On an application by the defendant for leave to appeal to the Privy Council against the appellate decree in a suit where the suit was for declaration without consequential relief falling under Sch. II, Cl. 17 of the Court-Fees Act, the value given in the plaint for purposes of jurisdiction must be held to be the market value of the subject matter of the suit, and where it has been stated to be Rs. 10,000 the defendant having accepted the valuation so given, it is not open to the plaintiff to show that the value of the subject-matter is less than Rs. 10,000. AIR (Vol 12) 1925 Mad 1223: 49 MLJ 309: 91 Ind Cas 572 (DB).

——S. 110 — Order indirectly involving claim over Rs. 10,000.

Where the applicant's interest in the property was less than Rs. 10,000 but the property in dispute was worth over Rs. 10,000 leave to appeal was granted. AIR (Vol 10) 1923 Bom 176: 25 Bom LR 77: 72 Ind Cas 127 (DB).

——S. 110 — Value in suit and in appeal.

To satisfy the requirements of S. 110 the subject-matter in the Court of first instance must be Rs. 10,000, and in addition the amount or value of the subject matter on appeal must also be Rs. 10,000 or upwards or the decree must involve some claim or question to or respecting property of like amount or value. The latter provision is to be read as an alternative to the second restriction in the earlier part of the section and is not intended to be a separate provision so as to do away with the first paragraph of the section. The amount or value of the subject-matter of a suit is clearly the amount the plaintiff claims together with, at most, interest that had accrued up to date of decree. AIR (Vol 10) 1923 Rang 71: 1 Bur LJ 62: 11 LBR 335: 68 Ind Cas 690 (DB).

——S. 110 — Certificate how far conclusive.

The ruling provision as to certificates of value applicable at the time the appeal was filed, was No. 2 of Schedule to Order in the Council of 10th April, 1838, which was to the effect that the certificate should be deemed conclusive of value and not liable to be questioned on appeal by any party. AIR (Vol 9) 1922 PC 257: 43 MLJ 323: 20 ALJ 937: 36 CLJ 450: 45 Mad 475: 74 Ind Cas 584.

——S. 110 — Interference by Privy Council.

The Privy Council will not interfere with any question of valuation unless it can be shown that some item has improperly been made the subject of valuation or excluded therefrom, or that there is some fundamental principle affecting the valuation which renders it unsound. AIR (Vol 8) 1921 PC 50: 39 MLJ 195: 48 Cal 110: 47 IA 255: 18 ALJ 1095: 22 Bom LR 1370: 3 PWR 1921: 28 MLT 149: 2 UP LR 124: 25 CWN 289: 13 MLW 49: 57 Ind Cas 606.

——S. 110 — Easement right.

In the case of an easement, the value of which falls much below Rs. 10,000, there is no right of appeal although it affects property worth over Rs. 10,000. AIR (Vol 80) 1921 Bom 266: 23 Bom LR 374: 63 Ind Cas 588 (DB).

——S. 110 — Final order affecting property over Rs. 10,000.

Where the value of the suit in Trial Court exceeded Rs. 10,000 but the Court awarded a decree for less than Rs. 10,000 as damages for the tort complained of, viz., the erection of the bund and the alleged consequent inundation of plaintiff's paddy-fields, and on appeal the decree was set aside, thereby preventing the plaintiffs from suing again for its removal and forcing them to acquiesce for the future in the alleged extensive damage to their fields worth more than Rs. 10,000,

Held, that the decree or final order involved indirectly a question respecting property worth over Rs. 10,000 and an appeal under S. 110 was competent. The second paragraph of S. 110 is intended to deal with property other than that forming part of the actual subject-matter in dispute and which would be affected by the final decree or order. AIR (Vol 8) 1921 Low Bur 48: 11 LBR 152: 66 Ind Cas 606 (DB).

——S. 110 — S. 110 and O. 45 R. 5 — Valuation — Single suit on different causes of action — Several defendants — Separate appeals by defendants — Single appellate decree — Subject matter of each appeal.

Plffs. as reversioners sued for recovery of possession of properties alleged to have formed part of the estate of the last male owner and in the possession of different alienees who were impleaded as defts. Plff. had really different causes of action against various defts., but they were allowed according to a well established practice to join all of them in one suit. The first Court gave a decree in favour of plffs. The several defts. filed separate appeals to the High Court as regards the properties in their possession. Only one appellate decree was drawn up by the High Court in accordance with R. 105 of the Rules of Practice.

Held, that leave could be granted only in those cases whose subject matter was of the value of Rs. 10,000 or upwards, under S. 110 of the C. P. Code. AIR (Vol 6) 1919 Mad 275: 42 Mad 228: 36 MLJ 119: 25 MLT 190: 10 LW 13: 49 Ind Cas 434 (DB).

——S. 110 — Valuation — Suit for injunction and declaration in Bom. Presidency in a second class sub-judge's court.

In the Bom. Presidency a plff. can sue for a declaration and injunction in a 2nd-class sub-judge's court in spite of the pecuniary limit of the Judge's jurisdiction (Rs. 5,000) being exceeded by the property to be affected by the injunction. And so a plff. in such a case is not, by reason of the suit being decreed, to be taken to make any representation to the deft. regarding the real or market value of the property to be affected. AIR (Vol 3) 1916 Bom 66: 40 Bom 477: 18 Bom LR 469: 37 Ind Cas 371 (DB).

——S. 110 and O. 45, R. 2. — Valuation — NWP and Assam Civil Courts Act, S. 21.

When the plff. in his plaint alleged the value of the subject matter to be Rs. 3,000 put the Dt. Judge on appeal held it to be Rs. 24,000 under S. 21, N. W. P. and Assam C. C. Act, an application for leave to appeal to P.C. must be dismissed. AIR (Vol 3) 1916 Pat 157: (1917) Pat HCC 301: 42 Ind Cas 966 (DB).

——S. 110 — Valuation — Small amount at issue.

It is wrong to put a party to the great expense of a Privy Council appeal where the amount at issue is very small. The proper course for the appellant is to make an application direct to Privy Council after the refusal by the High Court. (1909) 13 CWN 1127: 3 Ind Cas 786 (DB).

——S. 110 (S. 596 old Code) — Value claimed by plaintiff over Rs. 10,000 — Practice.

Where a suit for damages is ultimately dismissed by the High Court the value claimed is the value of the subject matter of the suit and the appeal.

The plaintiff sued for specific performance of an agreement to take a lease and in the alternative Rs. 30,000, as damages. The first court dismissed the suit for specific performance, but directed an enquiry as to damages without laying down any principle as to how it should be assessed — The High Court dismissed the whole suit. The Privy Council granted special leave. (1906) 33 C 893 (894) : 33 IA 106: 3 ALJ 740: 6 CLJ 682: 11 CWN 946: 17 MLJ 454: 2 MLT 448 (PC).

——S. 110 (S. 596 old Code)—Privy Council appeal — Leave — Value — Libel suit — Practice — Inquiry:

The plaintiff in a suit for damages for libel cannot ensure an appeal to the Privy Council by merely placing his damages at a sufficiently high figure. Leave to appeal from an appellate judgment of the High Court dismissing, on the ground of privilege, a suit for damages for libel was refused in the view that on the finding of the Court of first instance not reversed by the appellate Court, the plaintiff had sustained no substantial damage. Where there is a contest as to the true value of the matter in dispute, it has been the invariable practice, a practice sanctioned by the Judicial Committee, to ascertain by evidence and enquiry what the true value is. (1905) 9 CWN 370 (371) (DB).

——S. 110 (S. 596 old Code) — Privy Council, leave to appeal to — Value of matter in dispute in appeal — Decree involving some claim or question to or representing property of the prescribed value.

To determine the value prescribed by S. 596, C. P. C., the decree is to be looked at as it affects the interests of the party prejudiced by it. Where the detriment to the party seeking relief is estimated at less than Rs. 10,000, the value of the matter in dispute in appeal is not of the prescribed value, and the decree itself does not involve any claim or question to or respecting property of the prescribed value, the case does not fulfil the requirements of S. 596 of the Code. (1904) 6 Bom LR 403 (406) (DB).

——S. 110 (S. 596 old Code) — "Value of subject matter" — Leave to appeal to Privy Council — Value at variance with the value fixed for Court fees — Perpetual Injunction — Practice:

Notwithstanding the fact that having regard to S. 7 of the Court Fees Act, Sub-Section 4, the value of a suit for perpetual injunction was fixed very low, the petitioner having regard to the nature of the relief sought, is entitled to show the real value of the subject-matter when he applies for a certificate for leave to appeal to the Privy Council. (1903) 31 C 301 (303) (DB).

(i) Standard of.

——S. 110 — Declaration that a document is void — Value over Rs. 10,000 — Grant of certificate.

The High Court reversed the decree of the trial Court and granted a declaration that the deed in question was void, and that the plaintiff was entitled to the possession of the property mentioned in the deed.

Held, that it is not necessary for the purpose of an application for leave to appeal to His Majesty to inquire into the question as to whether the property actually handed over to defendant applicant is worth Rs. 10,000 or not, if whatever the value of that property may be, it is clear that the whole of the property as to which the question arose in the appeal & in respect of which the decree has been passed in High Court is worth more than Rs. 10,000, and that certificate to appeal must therefore issue. AIR (Vol 10) 1923 Bom 59 (DB).

——S. 110 — No question of law — Leave to appeal.

As the High Court held that there was legal necessity for a portion, it varied the decree of the lower Court, allowing the whole claim in favour of the plaintiff reversioner on the ground that the sale was without legal necessity. The defendant-purchaser applied for leave to appeal to His Majesty in Council.

Held, no question of law arose and value of the appeal is value of the property as to which legal necessity was proved. AIR (Vol 9) 1922 Pat 555: 3 Pat LT 550: 68 Ind Cas 663 (DB).

——S. 110 — Valuation — Test of — Court fee.

Under S. 110, the value of the subject-matter of the suit is real market value. The fact that for the purpose of stamp duty the plff. under the option given to him by S. 7 of the Court Fees Act valued it at less than its market value cannot deprive him of his right to appeal to the Privy Council.

Where for the cancellation of a deed of sale, plff. valued the suit at Rs. 5,250 and paid court fee thereon but as a matter of fact the market value the property was more than Rs. 10,000; Held, that for the purposes of S. 110, C. P. C. the value of suit was more than Rs. 10,000. AIR (Vol 5) 1918 Mad 1099: 5 LW 542: (1917) MWN 422: 39 Ind Cas 911 (DB).

——S. 110 — Valuation — Appeal from portion of the decree — Effect of.

From a mortgage decree for Rs. 38,000, one of the defts. who was not a party to the mortgage. but who subsequently became owner of one tenth share of the hypotheca, applied for leave to appeal to the Privy Council. The one tenth share of the hypotheca was worth less than Rs. 10,000.

Held, that the subject matter of the appeal to the Privy Council was the value of the shares claimed by the appellant and the High Court erred in granting a certificate on the basis that the subject-matter was the amount of the decree. AIR (Vol 3) 1916 PC 18: 38 All 488: 14 ALJ 1002: 20 CWN 1279: 20 MLT 211: (1916) 2 MWN 200: 31 MLJ 571: 78 Bom LR 850: 24 CLJ 303: 5 LW 456: 35 Ind Cas 939.

——Ss. 110 and 109 — Valuation — Total amount recoverable above Rs. 10,000.

Where decrees obtained in a number of rent suits follow a single judgment and the total amounts recoverable exceed Rs. 10,000, though the amount involved in each decree is small, the condition as to pecuniary value, is satisfied and special leave can be granted. AIR (Vol 1) 1914 Mad 140: (1914) MWN 162: 22 Ind Cas 390 (DB).

——S. 110 — Valuation — Subject-matter — Appeal to C. P. C.

In a suit for foreclosure where the mortgagor is not made personally liable, the value of the subject matter in dispute is the amount claimed if it be less than the value of the property and the market value of the property if that is less than the amount claimed. (1911) 13 CLJ 505: 10 Ind Cas 990 (DB).

——S. 110 (S. 596 old Code) — Privy Council — Leave to appeal to.

The High Court granted leave to appeal to the Privy Council, where the case involved a question of law and the point in dispute though not measurable in money was of considerable importance, being the extent of the control acquired by one who has built a Parsi fire temple. (1904) 6 Bom LR 286 (286, 287) (DB).

——S. 111.

——S. 111 — Scope — If governs Cl. 31, Letters Patent (Pat.) — Order of single Judge in civil revision — Appeal to Supreme Court — Maintainability.

There is no conflict between S. 111, C. P. Code, and Cl. 31 of the Letters Patent (Pat.); the latter is governed by the former and no appeal therefore lies to the Supreme Court under S. 111, C. P. Code, from an order of a single Judge of the High Court passed in the exercise of revisional jurisdiction. AIR (Vol 38) 1951 Pat 548.

——S. 111 — Leave to appeal to Privy Council from decision of single Judge of High Court in second appeal — If can be granted — Leave to appeal under Letters Patent refused.

S. 111, C. P. Code, is a bar to leave to appeal to His Majesty in Council being granted from a decision of a single Judge of a High Court sitting in second appeal, even where leave to appeal from it to Division Bench under the Letters Patent has been rejected. The section does not however affect the power of the Privy Council to grant special leave to appeal. AIR (Vol 36) 1949 Pat 77 (DB).

——S. 111 — An award of a Civil Court under S. 26, Land Acquisition Act (as amended) is a decree and judgment. So also is the decision of the High Court in appeal. AIR (Vol 31) 1944 Nag 284: 1944 NLJ 267: ILR (1944) Nag 780 (DB).

——S. 111 — Effect of, on S. 109 (b).

Section 111, Civil P. C., does not entirely abrogate S. 109(b) of the Code. AIR (Vol 30) 1943 Bom 196: 45 Bom LR 384: 207 Ind Cas 400 (DB).

——S. 111 applies to all Chartered High Courts, whether established before or after Code — No conflict between S. 111 and cl. 29, Lahore Letters Patent.

Clause 29 of the Lahore Letters Patent permits appeals to His Majesty in Council from: (1) any final judgment, decree or order of the High Court made on appeal, and (2) any final judgment decree or order made in the exercise of original jurisdiction by Judges of the High Court or of any Division Bench of the Court. In either of these cases, however, the condition must be satisfied that from such judgment, decree or order "an appeal does not lie under the provisions contained in cl. 10, Letters Patent". A decree or order passed by a Single Bench of Lahore High Court on second appeal from the appellate decree of a Subordinate Court is, under cl. 10, Lahore Letters Patent, appealable to a Bench of two or more Judges of the High Court and, therefore, the condition is not satisfied and consequently no appeal lies to His Majesty in Council from such a decree or order. There is thus no conflict between S. 111 of the Civil P. C., and cl. 29, Lahore Letters Patent. AIR (Vol 29) 1942 Lah 169: 44 PLR 318: ILR (1942) Lah 592: 201 Ind Cas 468 (FB).

——S. 111 — Leave to appeal to His Majesty in Council from decision of Single Judge — Whether can be granted — Prohibition under S. 111 is unconditional.

Where a decision sought to be appealed from is that of a Single Judge, leave to appeal to a Division Bench from whose judgment has been rejected, appeal to His Majesty in Council is prohibited by S. 111, Civil P. C. The prohibition in S. 111 is unconditional. AIR (Vol 23) 1936 Pat 106: 2 BR 171: 17 PLT 173: 160 Ind Cas 150 (1): (1936) PWN 214 (DB).

——S. 111 — Letters Patent (Bombay), cl. 39 — Judgment of Single Judge — Appeal to Privy Council, competency of.

Under S 111 of the Civil P. C., no appeal lies to His Majesty in Council from the decree or order of one Judge of a High Court, passed in the exercise of its appellate or revisional jurisdiction. To this extent S. 111, Civil P. C., overrides cl. 39 Letters Patent. AIR (Vol 18) 1931 Bom 503: 33 Bom LR 1106: 134 Ind Cas 1164 (DB).

——S. 111 and Letters Patent, Ss. 39, 44 — Single Judge's decree.

By S. 44 of the Letters Patent, the Letters Patent are subject to imperial legislation. Since the amendment of the Letters Patent the judgment of a single Judge sitting in revision is not appealable to two Judges and therefore may be regarded as a final decree of a High Court from which, had it stood alone, a right of appeal to the Privy Council will be competent by S. 39 of the Letters Patent. But it is subject to S. 111, C. P. Code and so no appeal lies to the Privy Council from the decree of a single Judge of a High Court. AIR (Vol 11) 1924 Mad 399: 75 Ind Cas 604: 46 Mad 958: 18 MLW 655: 1923 MWN 719: 46 MLJ 117 (DB).

——S. 111 — "Single Judge" — Meaning of.

S. 111 applies to a single judge of a High Court established under the Charter Act, 1861. AIR (Vol 4) 1917 Lah 448: 127 PWR 1917: 131 PLR 1917: 42 Ind Cas 893.

——S. 111-A.

——S. 111-A, O. 45, R. 7 — Certificate under S. 205, Government of India Act, 1935 (25 and 26 Geo. V, Ch. 42), given — Further certificate, if essential — Person aggrieved if, and when can go to Federal Court.

Where a judgment, decree or final order involves a substantial question of law as to the interpretation of the Act and the Court delivering the judgment or passing the decree or final order considers that a substantial question of law is involved as to the interpretation of Govt. of India Act, 1935 or any Order in Council made thereunder, it is its clear duty as the law now stands, to give a certificate under S. 205, Govt. of India Act. When that certificate has been given, no further certificate is required and the person aggrieved is entitled to go to the Federal Court, provided that he complies with so much of R. 7 of O. 45, as is incumbent upon him i.e., makes the necessary deposit to cover the expenses of translating, transcribing, indexing and transmitting the record to the Federal Court. AIR (Vol 29) 1942 Mad 70: 54 MLW 295: (1941) 2 MLJ 514: 200 Ind Cas 886 (DB).

——S. 111-A — Object of S. 111-A.

The object of S. 111-A, is to bring the Civil P. C., into line with S. 205, Govt. of India Act. The two provisos make it perfectly clear that nothing in the Code shall be read as affecting the right given to a party to appeal to the Federal Court under sub-s. (1) of S. 205 when the High Court has passed a final judgment, decree or order and has certified that a substantial question of law as to the interpretation of the Govt. of India Act is involved. AIR (Vol 27) 1940 Mad 890: ILR (1941) Mad 43: (1940) 2 MLJ 170: 52 MLW 240: (1940) MWN 849: 193 Ind Cas 865 (DB).

——S. 112.

See also, Civil P. C., O. 45.

1. Applicability and scope.
2. Appreciation of evidence.
3. Concurrent findings.
4. Costs.
5. Criminal matter.
6. Local laws and customs.
7. New plea.
8. Privy Council procedure.
9. Question of fact.
10. Security.
11. Special leave.

1. Applicability and scope.

——S. 112 — The discretion which S. 112 affirms and maintains, applies to the rejecting as well as to the receiving of appeals and the prerogative is not wholly or finally concluded for either pur-

pose by the provisions of S. 109. AIR (Vol 26) 1939 PC 122: 1939 AWR 76: 5 BR 570: 1939 OWN 471: 43 CWN 733: 14 Luck 252: (1939) 2 MLJ 181: 70 CLJ 66: 66 IA 160: 41 Bom LR 1036: ILR (1939) Kar (PC) 234: 180 Ind Cas 1001.

——S. 112 — Defence raised in trial but not taken in High Court.

When an application is made to raise a defence not raised in the High Court though taken in the trial Court, it cannot be said that in no case could such leave to be granted. The Board, acting under the prerogative, must never abrogate their duty to tender to His Majesty in such a matter any advice which the nature of the case seems, in justice, to be called for. But the circumstances in which such an application will be entertained are necessarily exceptional. Apart from special circumstances there is no distinction in principle between the position of an appellant who abandons in the High Court a ground of appeal of which he had given notice and the position of a respondent in the High Court who does not raise a point in his favour which was open to him without notice. It is quite true that it would be open to the Board on proper terms to refer to the High Court the question for their consideration. But even that the Board would not do except under special circumstances. AIR (Vol 22) 1935 PC 108: 1 BR 563: 39 CWN 834: (1935) MWN 726: 1935 OWN 711: 42 MLW 172: 69 MLJ 158: 37 Bom LR 625: 61 CLJ 477: 57 All 314: 62 IA 115: 155 Ind Cas 743.

——S. 112 — Where the appellants did not seem to have insisted upon a point in the Courts in India, although it was included in the memorandum of appeal to the High Court:

Held, that in spite of this the Privy Council was bound to consider the point which had been clearly raised in the appeal to His Majesty in Council. AIR (Vol 21) 1934 PC 213: 11 OWN 1084: 40 MLW 383: (1934) ALJ 918 : 67 MLJ 608 : (1934) MWN 1005 (2): 60 CLJ 267: 39 CWN 1: 36 PLR 305: 36 Bom LR 1179: 15 PLT 763: 4 AWR 358: 56 All 634: 61 IA 378: 151 Ind Cas 41 (PC).

2. Appreciation of evidence.

——S. 112 — Contention that contract was illegal being not in writing — Plea not raised in pleadings nor in issue — Contention requiring evidence as to circumstances.

There are contracts known as hedge contracts which do not require to be in writing and where a party alleges their invalidity in respect that they should be in writing, this is clearly a matter which should be raised in the pleadings and put in issue. Where it was not raised in the pleadings and was not the subject of an issue, the contention cannot be raised in an appeal before the Privy Council. The opposite party is entitled to notice of such a contention and the exact nature of the contract should have been determined on evidence as to their circumstances. AIR (Vol 25) 1938 PC 4 : 1938 OWN 10 : 4 BR 190 : (1938) ALJ 77 : (1938) MWN 83: 1938 AWR 7: 32 SLR 235: 172 Ind Cas 330.

——S. 112 — Effect — Privy Council will not ordinarily differ.

Their Lordships of the Privy Council would be slow to differ from the trial Judge's view as to the effect of evidence taken by him in a case where the language used often has a local significance by no means identical with the English words into which the native words are translated. AIR (Vol 23) 1938 PC 147 : 44 MLW 73 : 162 Ind Cas 461.

——S. 112 — Their Lordships of the Privy Council will give full importance to the fact that the trial Judge saw the witnesses and heard them give their evidence, but that importance is greatly diminished if it is found that the Judge's decision in material respects is based on inadmissible evidence. AIR (Vol 22) 1935 PC 175: 1935 OWN 863: 1 BR 771: 69 MLJ 433: 37 Bom LR 826: (1935) MWN 1182: 157 Ind Cas 4.

3. Concurrent findings.

——S. 112 — Their Lordships of the Privy Council will not be prepared to depart from their usual practice of not disturbing concurrent findings supported by evidence on issue of fact recorded by the Courts in India. AIR (Vol 32) 1936 PC 332: 3 BR 97: 1936 OWN 1192: 17 PLT 905: 41 CWN 97: 45 MLW 10: (1937) MWN 42: 16 Pat 1: 63 IA 441: 165 Ind Cas 347 (PC).

——S. 112 — The general rule of practice of their Lordships of the Privy Council is that they will not make a fresh examination of facts for the purpose of disturbing concurrent findings recorded by two Courts in India. AIR (Vol 23) 1936 PC 198: 2 BR 603: 71 MLJ 31: 40 CWN 1007: 17 PLT 477: 44 MLW 84: (1936) MWN 652: (1936) ALJ 819: 38 PLR 829: 1936 AWR 690: 38 Bom LR 751: 19 NLJ 189: 64 CLJ 111: 58 All 397: 63 IA 295: 162 Ind Cas 993 (PC).

——S. 112 — Appellant, whether can question — Contract Act (IX of 1872), S. 16.

It is not open to the appellants in appeal to the Privy Council to go behind the concurrent findings in the case.

Held, that the finding of the lower Courts that the defendants have failed to establish that in the transaction in question the plaintiff was in a position to dominate the will of the defendants, was destructive of the case of undue influence set up by the defendants, having regard to the terms of S. 16 of the Indian Contract Act. Even if there had been a finding that the plaintiff had obtained an unfair advantage over the defendants, that would not have established a case of undue influence in the absence of a finding that the plaintiff was in a position to dominate the will of the defendants. AIR (Vol 22) 1935 PC 146: 1935 OWN 851: 1 BR 817: 42 MLW 286: 39 CWN 1130: 69 MLJ 335: 16 PLT 571: 37 Bom LR 800: 1935 MWN 1139: 157 Ind Cas 1.

——S. 112 — Concurrent findings of the Courts below, proceeding upon an appreciation of the evidence adduced by the parties, will not be disturbed by the Privy Council. AIR (Vol 22) 1935 PC 92: 1935 OWN 547: 1935 AWR 651: 1 BR 495: (1935) MWN 508: 41 MLW 659: 68 MLJ 612: 61 CLJ 257: 155 Ind Cas 385.

4. Costs.

——S. 112 — Both parties misleading the lower courts.

Where the appellant before the Privy Council contributed to mislead the courts by advancing a theory as to court-fees which was as unsound as that of the respondents, even though the former had paid more than the proper amount of court-fee, their Lordships directed the respondent who lost in the Privy Council to pay half the appellant's costs in the High Court and in England. (1908) 12 CWN 169: 10 Bom LR 1: 14 Bur LR 41: 7 CLJ 36: 35 C 202: 5 ALJ 10: 17 MLJ 618: 2 MLT 506 : 35 IA 22 (27) (PC).

——S. 112 — Order making costs of application for leave to appeal to Privy Council costs of appeal — Appeal dismissed by Privy Council for want of prosecution — Cost of application — Right of respondent to.

An order granting leave to appeal to the Privy Council, provided that the costs of the application for leave to appeal to the Privy Council, should be costs in the appeal. The appeal was subsequently dismissed by the Privy Council for want of prose-

cution. The respondents applied to the High Court for an order as to their costs.

Held, that the order passed by the High Court should be corrected, and that the costs of the respondents should be awarded. (1902) 4 Bom LR 947: 27 B 124 (125) (DB).

5. Criminal matter.

——S. 112 — Contempt proceedings.

Sections 109, 110 and 112 have no application to proceedings for contempt for publication of article in newspaper. Such proceedings are in the exercise of the inherent jurisdiction of the High Court and of a criminal nature. Section 112 (2) expressly makes the Code inapplicable to matters of criminal jurisdiction. AIR (Vol 22) 1935 All 811: 1935 AWR 669: (1935) ALJ 810: 57 All 910: 155 Ind Cas 188 (DB).

6. Local laws and customs.

——S. 112 — Decisions of local Courts familiar with local laws and customs on such points are entitled to great weight and should not be lighty interfered with. AIR (Vol 20) 1933 PC 46: 37 MLW 401: 143 Ind Cas 147.

7. New plea.

——S 112 — Where a plea depending upon facts requiring evidence was not raised in the trial Court, and the High Court held that the question, depending as it did upon facts for which evidence would be necessary, was not open before them:

Held, that the plea could not be raised before the Privy Council. AIR (Vol 25) 1938 PC 20: 18 PLT 1001: 4 BR 198 (2): (1938) ALJ 72: 47 MLW 3: 1938 OWN 158: 1938 RD 214: (1938) MWN 145: (1938) 1 MLJ 209: 17 Pat 69: 40 Bom LR 292: 1938 AWR 19: 32 SLR 276: 66 CLJ 485: 42 CWN 593: 65 IA 45: 172 Ind Cas 443.

——S. 112 — It would be contrary to natural justice that a party should, before the Privy Council, be allowed to maintain a contention which he abstained from arguing in the Courts in India. AIR (Vol 23) 1936 PC 89: 1936 OWN 235: 2 BR 305: 17 PLT 175: 43 MLW 441: 160 Ind Cas 901.

——S. 112 — Where the appellants maintained that a transaction was a genuine sale and the finding being against them on this issue in the lower Courts, they contended on appeal before the Board that the transaction should be considered as a gift:

Held, that as this was not pleaded nor included in the issues and there was no investigation into the facts in order to ascertain whether the gift was valid according to the requirements of the personal law of the parties, the appellants could not be permitted to set up this new plea. AIR (Vol 20) 1933 PC 164: 57 CLJ 459: 65 MLJ 131: 38 MLW 296: 10 OWN 889: 143 Ind Cas 209.

——S. 112 — In an appeal to the Privy Council the appellant cannot be allowed to raise a point not raised in the pleadings and on which there is no evidence before ths Board. AIR (Vol 20) 1933 PC 117: 64 MLJ 513: 37 MLW 622: 7 CWN 688: (1933) MWN 1384: 143 Ind Cas 32.

8. Privy Council procedure.

——S. 112 — Raising of questions by originating summons not appropriate method.

Where, though the raising of certain questions by originating summons was not an appropriate method of dealing with those questions, but since the three Courts below had delivered their judgments on the footing that the questions were properly raised before them, the Privy Council in appeal followed the same course and expressed their opinion on the materials submitted to them. AIR (Vol 28) 1941 PC 75: 8 BR 154: 53 MLW 266: 196 Ind Cas 871.

9. Question of fact.

——S. 112 — Question whether lady was or was not pardanashin — New plea.

The question as to whether the executant was or was not a pardanashin woman within the strict sense, and was or was not entitled to the special protection afforded to women of that class, is a question of fact and when no issue was framed, and the point was not raised at the trial, it cannot be raised for the first time in the appeal before the Privy Council. AIR (Vol 27) 1940 PC 147: 1940 OWN 787: 7 BR 49: 52 MLW 448: (1940) ALJ 662: 42 PLR 691: (1940) MWN 1011: 42 Bom LR 1139: 45 CWN 259: 1940 AWR 143: ILR (1940) Kar (PC) 341: 67 IA 377: 189 Ind Cas 890.

——S. 112 — Trial Court and High Court taking opposite views.

Where the main questions that arise are pure questions of facts on which the trial Judge and the High Court have taken opposite views, and a question of fraud is involved in appeal, their Lordships will bear in mind the importance of attaching weight to the views of the trial Judge and also to the circumstance that so far as the issue of fraud is involved in the case, those who allege fraud ought to establish it by something more than grave suspicion, or in other words, that the charge ought to be clearly established. AIR (Vol 23) 1936 PC 179: 1936 OWN 432: 2 BR 548: 44 MLW 78: (1936) MWN 812: 64 CLJ 90: 162 Ind Cas 539.

——S. 112 — Where in appeal before the Board the first point raised was with reference to the suggested blending or throwing of property self-acquired by the appellant's father into the common stock with the ancestral property which he held, the second point was the issue as to whether the joint family had any interest in the business partnership, to use that phrase in a very broad sense, which had existed between the respondent and the appellant's father for some fifteen years from 1905; and the third question raised was with regard to whether the four deeds dated in 1920 by which the partnership was finished up and the various properties directly or indirectly concerned with the partnership were dealt with, was a family settlement carried out on the assumption that the joint family properties were involved:

Held, that each of those three questions in the circumstances of the case was a pure question of fact, however much incidentally there might have been questions of law involved on particular points, and since on those three questions of fact the Courts below have found concurrently against the appellant, the Board would not depart from the practice of not interfering with concurrent findings of fact. (1936) 161 Ind Cas 589: 2 BR 435 (1): 70 MLJ 574: 38 Bom LR 477: 43 MLW 710: (1936) MWN 581: 38 PLR 607: 1936 OWN 565: 63 CLJ 410: 1936 AWR 502 (1) (PC).

10. Security.

——S. 112 — S. 112 (b), O. 45, R. 7 — Privy Council Rules, 1920, R. 9 — R. 9 prevails over O. 45, R. 7.

There being a conflict between O. 45, R. 7, Civil P. C., and R. 9 of the Privy Council Rules, the latter prevails. Consequently, the High Court can, for reasons, extend the time for making the deposit beyond six weeks from the grant of the certificate. (Poverty or inability to raise funds held no cogent reason for extension of time). AIR (Vol 29) 1942 Lah 279: ILR (1942) Lah 548: 45 PLR 43: 203 Ind Cas 273 (DB).

——S. 112, O. 45, R. 7 — Privy Council Rules, R. 9 — Bombay High Court, Appellate Side Rules,

R. 111 — Appeal to Privy Council — Power of High Court to change form of security — Exercise of such power.

Under R. 9 of the Privy Council Rules, the High Court has jurisdiction, not only to extend the time for making the deposit and for furnishing the security, but also to change the form of the security.

The High Court should, however, be reluctant to change the form of security except for good cause because the form of personal bond provided by R. 111 of the Bombay High Court, Appellate Side Rules or even a mortgage bond is not in all respects as effective as the deposit of cash or Government securities.

Where the appellant was a minor and the property of his guardian was under attachment so that it was impossible for him to furnish the security in the form of cash or Government securities, and the appellant was prepared to pay the amount of expenses of translating, transcribing and indexing and transmitting to His Majesty in Council correct copy of the whole record under cl. (b) of R. 7, the High Court allowed the appellant to give a surety who was prepared to execute a mortgage of his property in favour of the Registrar of the High Court as also a personal bond as provided by R. 111. AIR (Vol 18) 1931 Bom 278: 33 Bom LR 487: 132 Ind Cas 438 (DB).

11. Special leave.

——S. 112 — No objection as to value of suit or that case is otherwise not fit one for appeal can be raised.

When appeal is admitted by the special leave granted by His Majesty in Council, an objection cannot be taken on behalf of the respondents that the appeal to His Majesty in Council is incompetent as the sum involved is below Rs. 10,000, and the case is otherwise not a fit one for appeal under the Civil P. C. AIR (Vol 30) 1943 PC 143: (1943) ALJ 458: (1943) 2 MLJ 397: 48 CWN 7: 56 MLW 600: 10 BR 174: 1943 AWR 31: 1943 OWN 519: ILR (1943) All 727: 70 IA 171: 1944 MWN 99: 77 CLJ 488: 46 Bom LR 503: ILR (1944) Kar PC 77: 209 Ind Cas 344.

——S. 112 — Leave granted on one point — Other point not allowed — Former depending on latter — Appeal fails.

When a case was heard before their Lordships on an application for special leave to appeal, their Lordships held that they were not prepared to allow any question of quantum to be discussed and they gave leave on the single point of principle as to what was the area for which compensation should be assessed. At the final hearing it appeared, that if the question of quantum were open, a wrong determination as to the exact title might affect the determination with regard to the whole of the land, when one was in fact assessing compensation upon the footing that part of the land may not have been, or was not, in fact, the appellant's :

Held, that that was merely a question of quantum which was not to be discussed according to the order in granting leave to appeal, and as there was nothing further to be discussed, the appeal would fail. AIR (Vol 22) 1935 PC 197: 162 Ind Cas 982.

——S. 112 — Granting of special leave on ex parte application, whether precludes Board from considering competency of appeal.

The fact that special leave to appeal was granted on an ex parte application does not preclude the Board, when the true facts are brought before it, from going into the question of whether the appeal is competent or not. AIR (Vol 18) 1931 PC 22 (1): 59 MLJ 444: 52 CLJ 429: 32 Bom LR 1576: 35 CWN 33: 33 MLW 74: 12 PLT 1: 10 Pat 86: (1931) MWN 286: 130 Ind Cas 612: 57 IA 279.

——S. 113.

——S. 113 — Reference to Full Bench — Point specifically raised — If can be referred to Full Bench when different view had been taken in case wherein it was not specifically raised.

A case in which a point was specifically raised should not be referred to a Full Bench merely because a different view has been taken in a case where the point was not specifically raised. AIR (Vol 30) 1943 Bom 348 : 45 Bom LR 754 : 211 Ind Cas 12 (DB).

——S. 113 — A Division Bench from which no appeal lies except to the Privy Council has power to refer a point of law to a Full Bench, subject to the sanction of the Chief Justice. A Single Judge is only entitled to refer to a Division Bench. AIR (Vol 26) 1939 Lah 517 : 41 PLR 261 : ILR (1940) Lah 88 : 186 Ind Cas 450.

——S. 113 — Where the Munsif does not feel any doubt about his competency to entertain the suit that was filed before him, reference under S. 113 read with O. 46. R. 1, Civil P. C., is not permissible. AIR (Vol 28) 1941 Oudh 83 : 1940 OWN (CC) 1050 : 1940 RD 529 : 1940 AWR (CC) 466 : 16 Luck 492 : 191 Ind Cas 753 (DB).

——S. 113 — Single Judge of Small Cause Court, reference by.

A Single Judge of a Small Cause Court can make reference to High Court. AIR (Vol 24) 1937 Sind 318 : 172 Ind Cas 805 (DB).

——S. 113 — Parties added at appellate stage — Effect of.

The fact that the plaintiffs were no parties to the suit itself and were added as parties at the appellate stage does not make any difference as to the applicability of the principle of res judicata. AIR (Vol 21) 1934 Pat 270 : 151 Ind Cas 70.

——S. 113 — The mere fact that the matter involved is one of some difficulty for decision is no ground for referring a second appeal to a Bench of two Judges. AIR (Vol 18) 1931 All 207 : (1931) ALJ 267: 129 Ind Cas 717.

——S. 113 — Reference to Division Bench on point of law, legality of.

Obiter— There is no provision in the Code or in the rules of the High Court under which a reference can be made by a Single Judge to a Division Bench for the expression of an opinion on a point of law only. AIR (Vol 18) 1931 Pat 379 : 32 Cr LJ 1197 : 11 Pat 143 : 12 PLT 601 : 134 Ind Cas 619.

——S. 113 — "Court" — Deputy Commissioner.

Reference made by a Deputy Commissioner for a decision as to the legality of an action of a Subordinate Judge in the matter of the issue of a temporary injunction is not a reference made by a 'Court' within the meaning of the Code. 5 OWN 891: AIR (Vol 15) 1928 Oudh 485: 113 Ind Cas 800 (DB).

——S. 113 — Reference — Ground for.

Where it was perhaps somewhat difficult to hold that the Judge making the reference entertained any reasonable doubt as to what his decision should be, or as to what decision was correct, but the respondent withdrew any objection on this ground, as he said the questions that arose would affect a very large number of cases and must affect a very large amount of money, reference was entertained. 76 Ind Cas 519 : 1 Rang 220 : AIR (Vol 10) 1923 Rang 193 (DB).

——S. 114.

See also Civil P. C., O. 47 R. 1.

1. Certificate as to sufficient grounds.
2. Competency in letters patent appeals.
3. Consent decree.
4. 'Decree or judgment of court.'
5. Effect of review.
6. Effect of appeal on review.
7. Error of law apparent on face of record.
8. Error of expression in judgment.
9. Insufficient grounds for review.
10. Scope.
11. Sufficient grounds.

1. Certificate as to sufficient grounds.

——S. 114 — Certificate as to good grounds.

Under the rules of the Peshawar Judicial Commissioner's Court, no legal practitioner shall be heard in support of an application for review, until he has certified that the grounds contained therein are good and sufficient. AIR (Vol 24) 1937 Pesh 43 : 1937 Pesh LJ 43 : 168 Ind Cas 938.

2. Competency in letters patent appeals.

——Ss. 114, 117, O. 47, R. 1 — Letters Patent (All), Cl. 10 — Application for review of judgment in Letters Patent appeal, whether lies.

Held, by the Full Bench (Mukherji, J., dissenting).— No application lies for review of a judgment passed in a Letters Patent appeal.

The procedure in a Letters Patent appeal like the procedure in any other civil appeal is governed by the Code. But a Bench hearing a Letters Patent appeal derives its jurisdiction to hear the appeal from the Letters Patent and not from the Code.

The right to apply for review is a right which like the right to appeal must be created by a definite provision of statute. AIR (Vol 18) 1931 All 244 : (1931) ALJ 187 : 53 All 535 : 132 Ind Cas 24 (FB).

——S. 114, O. 47 R. 1 — Review against decision in Letters Patent appeal, competency of — Power to review, whether exists apart from statute.

An application for review does not lie against a decision of the High Court on appeal under the Letters Patent.

Per Courtney-Terrell C. J., — The ordinary principle which governs all tribunals is that when once the Judges have signed and delivered their judgment, they are functus officio and the only remedy of a person aggrieved by the judgment is to take the case to an appellate tribunal if an appeal is allowed by the law. The provisions for review constitute an exception to the general rule which forbids a Judge from reversing or modifying his judgment when once the judgment has been pronounced and it being an exception to a general rule of principle, it is only exercisable in circumstances where it is distinctly provided for by statute. AIR (Vol 18) 1931 Pat 409 : 12 PLT 652: 134 Ind Cas 630.

——S. 114 — Letters Patent appeal.

The provisions of S. 114 and the rules under O. 47, apply to an application for review of a decree in any appeal under the Letters Patent. 101 Ind Cas 766: 29 Bom LR 371: AIR (Vol 14) 1927 Bom 232.

3. Consent decree.

——S. 114 — Consent decree — Review of, on ground of fraud or mistake does not lie — Remedy is by way of separate suit.

A review of a consent decree on the ground that it was obtained by fraud, and, therefore, equally on the ground that it was obtained by mistake, cannot be had, and the consent decree can be set aside only by means of a separate suit. AIR (Vol 23) 1936 Rang 389 : 164 Ind Cas 785 (2).

4. "Decree or judgment of Court."

——S. 114, O. 47, R. 1 — Bench of Judges each delivering separate judgment — Judgment of one alone, whether can be basis of decree — Mistake apparent in one of them — Review, if can be granted.

Where the two Judges constituting a Bench dictate two separate judgments, the judgment of any one of them cannot form a basis of a decree, and without there being an expression of concurrence in any of them, of the other, it cannot be a judgment of the Court; it is in this sense that the term "judgment" is employed in S. 114 and in O. 47, R. 1, Civil P. C. Under these provisions any person considering himself aggrieved by a decree or order on account of some mistake or error apparent on the face of the record may apply for "a review of judgment" to the Court which passed the decree or made the order.

Where two judgments constitute the "judgment" of one single Court, if one is vitiated by mistake or error apparent on the face of the record, that one cannot be a valid material on which a decree can be founded. The necessary consequence of the situation is, that the other judgment, though not vitiated by such mistake or error, cannot by itself constitute the proper basis of the decree of the Court, for either one conjoint judgment or two concurring judgments are needed as the basis of the decree of the Court. AIR (Vol 24) 1937 Rang 56 : 167 Ind Cas 449 (DB).

5. Effect of review.

——S. 114 — Effect of.

The decree made on the review even if it does not modify the decree originally passed, is a new decree superseding the original one and therefore no appeal can lie from the decree originally passed. 107 Ind Cas 751 : AIR (Vol 15) 1928 Cal 418.

——S. 114 — Revision from.

Ordinarily an order rejecting an application for review is not open to revision. 71 Ind Cas 160 : AIR (Vol 11) 1924 Lah 400.

6. Effect of appeal on review.

——S. 114 and O. 47, R. 1 — Review application — Appeal also filed subsequently — Review application, if can be heard.

The filing of an appeal subsequent to the filing of an application for review does not make the hearing of the review application incompetent. AIR (Vol 35) 1948 A 353: ILR (1948) All 532: 1948 ALJ 312: 1948 OWN 261: 1948 ALW 256 (FB).

——S. 114 — After appeal

In the exercise of the inherent powers it is not open to the High Court to disregard the express provisions of the Code and entertain an application for review of a judgment against which an appeal was preferred to His Majesty in Council but was dismissed for want of prosecution. AIR (Vol 14) 1927 Bom 232: 101 Ind Cas 766: 29 Bom LR 371.

——S. 114 (S. 623 Old Code) — "From which no appeal shall have been preferred" — Appeal preferred and withdrawn — Dismissal under S. 551, C. P. C. — Review.

Where there has been an appeal there still may be a review of the judgment of the court against whose decree the appeal was preferred, provided

the appeal to the higher court is withdrawn. Where, however, an appeal is preferred but the same is rejected under S. 551, C. P. C., the Court of first instance cannot entertain an application for review of judgment. (1906) 8 Bom LR 842: 30 B. 625 (630) (DB).

——S. 114 (S. 623 old Code) — Review — Jurisdiction of Court to entertain review pending appeal.

Where an application for review is presented by a party and an appeal is afterwards referred, the Court to which the application for review was made is not thereby deprived of jurisdiction to entertain the application; but in such a case the jurisdiction ought to be exercised with the greatest care and only in a very strong case. (1904) 27 Mad 602: 14 MLJ 321 (overruled.) (1906) 19 MLJ 388: 32 M 416: 6 MLT 135: 2 Ind Cas 802 (804) (FB).

7. Error of Law apparent on face of record.

——S. 114 — Error of law involving lack of jurisdiction apparent on face of record should be corrected as early as possible, without driving parties to appeal or revision.

When there is an error of law which obviously and without research into the rulings involves a lack of jurisdiction to pass the order of which review is sought though, technically an error of law, is apparent on the face of the record & should be corrected at the earliest possible time without driving the parties to the expense of an appeal or revision petition to which there would be no answer. AIR (Vol 26) 1939 Mad 293: (1939) 1 MLJ 120: 49 MLW 147: (1939) MWN 443: 189 Ind Cas 320.

——S. 114 — Wrong interpretation of certain ruling by predecessors, whether justifies review.

Where the predecessor of the Judge gives a wrong interpretation to a certain ruling, it cannot be considered an error of law apparent on the face of the record so as to justify a review. AIR (Vol 24) 1937 Lah 791: 175 Ind Cas 15 (2).

8. Error of expression in judgment.

——S. 114 (S. 623 old Code) — Inaccurate expression in judgment — Mistake corrected.

The judgment of the High Court contained the following sentence:— "This under the Mohamedan Law would be what is known as an ariat, and therefore invalid". An application for review was presented contending that an ariat was valid and expressions were wrong.

Held that an ariat was valid under the Mahomedan Law and it was not meant to decide otherwise in the judgment. The expression "and therefore invalid" was incorrect and was ordered to be expunged.

Per Banerji J.— Strictly speaking this application for review of judgment is not maintainable under S. 623 of the Code of Civil Procedure, as the applicant was not aggrieved by the decree or order passed in the case. (1908) 5 ALJ 405 (406): 30 All 309: 1908 All WN 133.

9. Insufficient grounds for review.

——S. 114, O. 47, R. 1 — Review — Judgment-debtor dying on the day or a day before judgment in a suit by reversioner for a declaration against decree-holder that deed of relinquishment by judgment-debtor is valid — Deed, held null and void — Reversioner applying for review on the ground that after death of judgment-debtor, her life-interest vanished and decree-holder cannot have any right on property — If sufficient cause for review.

A Court hearing an application for the review of a decree has no jurisdiction to order a review because it is of opinion that a different conclusion of law will be arrived at, and R. 1 of O. 47, must be read as in itself definitive of the limits within which review is permitted, and the words "any other sufficient reason" must be taken as meaning 'a reason sufficient on grounds at least analogous to those specified immediately previously'.

A judgment-debtor died on the day or a day before the judgment in a suit by her reversioners against decree-holder was delivered, decreeing that a deed of relinquishment of properties in suit executed by her in favour of her reversioners was null and void. The reversioners applied for review of the judgment on the ground that the judgment-debtor had no more than a life-interest in the said property, that on her death the question of the validity of the deed of relinquishment became immaterial, that her life interest vanished with her death, and that the reversioners were entitled to a declaration that the properties in suit belonged to them at the date of the said judgment and were not liable to be sold in execution of the decree. The Subordinate Judge who passed the decree allowed the application for review:

Held, that the death of the defendant was not sufficient reason to grant review within the meaning of O. 47, R. 1 (i) Civil P. C. AIR (Vol 21) 1934 PC 213: 11 OWN 1084: 40 MLW 383: (1934) ALJ 918: 67 MLJ 608: (1934) MWN 1005 (2): 60 CLJ 267: 39 CWN 1: 36 PLR 305: 36 Bom LR 1179: 15 PLT 763: 4 AWR 358: 56 All 634: 61 IA 378: 151 Ind Cas 41.

——S. 114, O. 47 R. 4 — Review.

It is a wrong procedure for a lower Court to review its former order merely on the ground that a ruling of the High Court had not been brought to its notice on the previous occasion. AIR (Vol 18) 1931 All 91: 11 LRA Rev. 362: 132 Ind Cas 815: 1931 ALJ 889 (DB).

——S. 114 — Review — Grounds.

Erroneous view of evidence or of law is no ground for review. AIR (Vol 17) 1930 Cal 701.

——S. 114 — Subsequent events.

The decree of the Privy Council reversing the decree of the High Court is no ground for review of the judgment passed prior to the decision of the Privy Council, on the strength of the judgment of the High Court. The ground of amendment must be something which existed at the date of the decree and the section does not authorise the review of a decree which was right when it was made, on the ground of the happening of some subsequent event. AIR (Vol 9) 1922 Mad 227: 70 Ind Cas 741: 43 MLJ 33.

10. Scope.

——S. 114 — Review from order, competency of.

Review of an order is competent and it depends upon circumstances whether the order passed in review is a correct order or not. AIR (Vol 27) 1940 Lah 276: 42 PLR 124: 189 Ind Cas 466.

——S. 114 — All rules of procedure contained in S. 114, and O. 47 are consistent with the provisions of R. 5 made under S. 44 Ben. Municipal Act 1932. AIR (Vol 22) 1935 Cal 773: 40 CWN 124: 63 Cal 487: 165 Ind Cas 537.

——S. 114 — Person not party to suit or appeal — Whether can file suit to set aside decree or should file review application.

Persons who have never been parties in the proper sense of the word might or might not have to file a suit to set aside the decree but persons who have never been parties to a suit or to an appeal at all need neither file a suit to set aside the original decree or the appellate decree, nor need they file an application for review.

In a mortgage suit, father and son were defendants, and a decree was passed against both. In an appeal filed by the father alone, the son was not impleaded but the Court substituted a decree

ordering the son to pay the whole amount out of his pocket and the decree was sought to be executed by arresting him:

Held, that the Appellate Court had no power to do so, nor was the son bound to apply for review of the appellate decree as he was not a party to the appeal. AIR (Vol 22) 1935 Rang 364: 159 Ind Case 186

——S. 114 — Probate proceedings.

The powers of review given by the Code of Civil Procedure can be exercised by a Court which has been dealing with a contentious matter in proceedings for the grant of letters of Administration. AIR (Vol 12) 1925 Rang 314: 91 Ind Cas 509: 3 Rang 261 (DB).

——S. 114, O. 47 Rr 2, 3 (O. C. Ss. 623, 624, 626) — Admission of review — "Any other sufficient reason", meaning and scope of.

No appeal lies against an order which is not passed in contravention of the provisions of S. 624 or S. 626 of the Code of Civil Procedure (Act XIV of 1882), S. 623 of the Code of 1882 in dealing with the discovery of new and important matter or evidence clearly indicates that that matter or evidence must be in existence at the time of the decree. The words "for any other sufficient reason" in S. 623 do not apply and cannot apply to something which came into existence after the decree was made, and the section does not authorise the review of a decree which was made on the ground of the happening of some subsequent event, and a Court commits a material irregularity in admitting a review on such a ground. (1910) 11 CLJ 26: 14 CWN 244: 5 Ind Cas 182 (183)

——S. 114 — Review — Setting up new case in.

After the decision of the case in defendant's favour by the appeal Court, it was urged on behalf of the plaintiff upon review that the defendant should be held liable for the acts of his servants.

Held, that the Court had properly refused to permit a new case to be set up at that stage. (1910) 14 CWN 86: 5 Ind Cas 50 (55) (PC).

11. Sufficient grounds.

——S. 114 — Erroneous view of law — Refusal to consider findings of fact — Review, if can be granted.

Where the Judge erroneously holds that he was bound by the findings of fact of the lower Court which is tantamount to a refusal to consider the case upon those issues, there is sufficient cause for review. AIR (Vol 26) 1939 Rang 59: 179 Ind Cas 946 (DB).

——S. 114 and O. 47, R. 1 — Sanction to prosecute — Leave to appeal to Privy Council granted.

If sanction is granted to the Public Prosecutor to prosecute an attorney, an appeal against that sanction is an attack on his power to prosecute. The order granting leave to appeal is an order affecting his authority to prosecute the appellant and hence he can apply for review of the order granting leave. AIR (Vol 1) 1914 Cal 557: 41 Cal 734: 16 CWN 593: 15 Cr LJ 52: 22 Ind Cas 324 (DB).

——S. 115.

See also Civil P. C., Ss. 107 & 151.

1. Addition of parties.
See also Note 5.
1-A. Amendment of pleadings and plaints.
See also Note 33.
2. Amendment of decrees.
See also (i) Note 11,
(ii) Civil P. C., Ss. 151 & 152.
3. Appeal.
See also Notes 6, 26 & 33.
4. Arbitration.
See also Note 5.
5. Case.
See also Notes 4, 5 & 19.
6. Conversion of appeal.
See also Notes 4, 5 & 19.
7. Court.
See also Note 36.
8. Court-fee.
9. Criminal prosecution.
10. Delay.
See also Notes 4 & 22.
11. Discretion.
See also Notes 4, 33 & 37.
12. Error of Law.
See also Notes 15 & 23.
13. Finding of fact.
See Notes 13 & 23.
14. High Court.
See also Govt. of India Act, 1915, S. 107.
15. Illegality.
See also Notes 12 & 23.
16. Inherent powers.
See also Note 20.
17. Injunction.
See Civil P. C., O. 39.
18. Interference.
See Notes 14, 33 & 35.
19. Interlocutory order.
See also Notes 4, 5 & 35.
20. Jurisdiction.
21. Leave to sue.
22. Limitation.
See also Notes 10 & 12.
23. Material irregularity.
See also Notes 12, 15 & 20.
24. New plea.
25. Order.
26. Other remedy.
See also Note 33.
27. Powers of High Court.
See Note 14.
28. Procedure.
See Note 33.
29. Question of Law.
See Notes 12 & 24.
30. Question or finding of fact.
See also Note 23.
31. Record of case.
32. Remand.
See Note 23.
33. Revision.
See also Notes 4, 6 & 26.
34. Sale.
See Note 23.
35. Scope.
36. Subordinate Court.
37. Withdrawal of suit.
38. Who can invoke.

1. Addition of parties.
See also Note 5.

(a) Case, if decided.
(b) Improper addition.
(c) Refusal to add.

(a) Case, if decided.

——S. 115 and O. 1, R. 10 — Case decided — Refusal to add party.

An order refusing to implead a person as a party under O. 1, R. 10 C. P. Code is a case decided and may be challenged in revision. The trial of a case without impleading the proper parties may amount to an irregular exercise of jurisdiction. AIR (Vol 35) 1948 Oudh 44: 1947 OWN 236: 1947 OA (CC) 167: 1947 AWR (CC) 167.

——S. 115 — Order refusing to add person as party, if revisable.

An order refusing to add a person as a party

amounts to a "case decided" within the meaning of S. 115, Civil P. C., and is revisable.

Where it is impossible to decide a case properly without adding the applicants, as parties to the case, the dismissal of an application to implead them as parties amounts to an irregularity in the exercise of jurisdiction and is therefore, revisable.

Held, that the applicants were necessary parties and that it was necessary to implead them to avoid multiplicity of suits. AIR (Vol 30) 1943 Oudh 315 : 1943 OWN 138: 209 Ind Cas 308.

——S. 115 — Persons applied to be made defendants to a suit brought for specific performance of a contract of sale of certain field on the ground that they were members of a joint Hindu family along with the defendants and were interested in the field. The application was dismissed.

Held, that there was no case decided and the only inconvenience which was sought to be avoided was a possibility of multiplicity of judicial proceedings which was not sufficient to call extraordinary interference. AIR (Vol 17) 1930 Nag 51: 121 Ind Cas 672.

——S. 115 and O. 1, R. 10 (2) — Addition of parties—Striking out party.

An order of a Court under O. 1, R. 10, striking out a deft. is not open to revision as it does not decide anything between the parties. (1912) 14 Ind Cas 263 (All) (DB).

(b) Improper addition.

——S. 115 and O. 1, R. 10 — Addition of parties — Revision.

A person cannot be impleaded on allegations based on hearsay. Illegal and improper impleading of a person is a ground for revision by High Court. (1912) 15 OC 304: 16 Ind Cas 592 (DB).

——S. 115 and O. 1, R. 3, and O. 2, R. 3 (1) — Addition of parties — Causes of action — Suit by co-mortgagee against mortgagor and co-mortgagee for foreclosure or share of amount paid — Cause of action — Same transaction — Revision.

A, a co-mortgagee brought a suit against the mortgagor for foreclosure and joined the other co-mortgagee as deft. who refused to join as plff. and claimed against him his share of the amount which the mortgagor was alleged to have paid. The plff. was ordered to amend the plaint as the causes of action were improperly joined and the parties were improperly joined. It was held that the order for amendment was wrong and could be set aside in revision and that the cause of action against both co-mortgagee and mortgagor was one as the main question was what payments were made to the co-mortgagee. (1911) 7 NLR 130: 12 Ind Cas 357.

(c) Refusal to add.

——S. 115 — Order refusing to make certain persons parties to a suit.

Ordinarily, the High Court will be most reluctant to interfere with an order refusing to make certain persons parties to a suit, but where the lower Court has omitted to take into consideration certain matters and it is said that the order of the Court really amounts to a refusal to exercise a jurisdiction vested in it, the High Court will interfere. AIR (Vol 21) 1934 Pat 425: 15 PLT 602: 148 Ind Cas 347.

——S. 115 — Where in a rent suit a person, who alleged that he had purchased the holding and the landlord had recognised him by the acceptance of rent, applied to be impleaded as party, held in revision that the Court ought to have impleaded him. AIR (Vol 17) 1930 Pat 592: 11 Pat LT 628: 128 Ind Cas 790.

——S. 115 — Conflict of findings — Possibility of.

Although ordinarily High Court in revision should not interfere with the order of the trial Court refusing to add a person as party defendant, still if such person is necessary to avoid likelihood of conflicting findings High Court should, setting aside trial Court's order, add that person as defendant. AIR (Vol 16) 1929 Mad 403: 115 Ind Cas 812.

——S. 115 — An order refusing to make a person a defendant can be revised under S. 115. AIR (Vol 16) 1929 Oudh 148: 116 Ind Cas 58: 6 OWN 118.

——S. 115 — High Court will not interfere in revision with an order refusing an application for addition of a party as a co-respondent in a suit under the Indian Divorce Act. AIR (Vol 15) 1928 Cal 114: 54 Cal 1038: 107 Ind Cas 475 (DB).

——S. 115 — Necessary party — Failure to implead.

The order of the District Judge who decides the case without joining a necessary party on an erroneous view of the law is open to revision. AIR (Vol 15) 1928 Lah 414: 10 LLJ 161: 108 Ind Cas 391.

——S. 115 — Where in a proceeding to set aside an ex parte decree the heirs of a deceased plaintiff were not made parties to the application, but the Court comes to the finding that it was not necessary to bring his heirs on the record, the finding cannot be interfered with under S. 115. AIR (Vol 13) 1926 Pat 29 (2): 90 Ind Cas 329.

——S. 115 — It is not a case of failure to exercise jurisdiction justifying interference in revision if the lower Court rejects an application under O. 1, R. 10, C. P. Code, on the ground that it was made too late. (1921) 64 Ind Cas 563 (Cal).

——S. 115 and O. 1, R. 13 — Addition of parties — Non-joinder of parties — Revision.

Where the right to raise an objection as to non-joinder came into existence during the suit, and such objection was not taken in the trial Court, it cannot be raised in revision. AIR (Vol 6) 1919 Cal 919: 46 Ind Cas 648 (DB).

——S. 115 and O. 1, R. 10 — Addition of parties — Scheme suit — Persons claiming to be trustees.

The High Court in revision set aside an order of the Lower Court refusing to add persons 'bona fide' claiming to be trustees as parties to a scheme suit. The framing of a scheme would mean the loss of their right. AIR (Vol 6) 1919 Mad 439: 50 Ind Cas 58.

——S. 115, O. 1 R. 10 (2) and O. 31, R. 2 — Addition of parties — Government of India Act, S. 107.

In a suit by a widow as the administratrix, a person claiming as adopted son of her husband applied to be made a co-plff. on the ground that the widow was guilty of laches and collusion. The widow admitted the fact of adoption but denied authority. Held, that the applicant ought to have been joined as co-plff. and the High Court could interfere under S. 115 of the C. P. Code or S. 107 of the Government of India Act. AIR (Vol 5) 1918 Cal 909: 44 Ind Cas 564 (DB).

——S. 115 — Addition of party — Scheme suit.

The action of a court in a suit under Section 92, C. P. Code refusing to implead as a party defendant the son of a hereditary trustee, amounts to an illegality and the High Court has power to interfere under Section 115, C. P. Code and S. 107 Government of India Act. AIR (Vol 5) 1918 Mad 1071: 6 LW 9: (1917) MWN 550: 38 Ind Cas 133 (DB).

——S. 115 and O. 1, R. 10 — Addition of parties — Improper refusal.

Where an application under O. 1, R. 10 of the C. P. Code asking that a certain person be added as a party defendant to a suit and praying for permission to amend the plaint accordingly is re-

jected, no appeal lies against the order rejecting the application. Where, however, it appears that the Court has exercised wrong discretion in rejecting the application, the High Court can interfere, in revision or under Section 107 of the Government of India Act. AIR (Vol 5) 1918 Pat 488: 47 Ind Cas 725 (DB).

——S. 115 and O. 1, R. 10 — Addition of parties — Order refusing to make a transposition of parties when open to revision.

Though the High Court will not interfere in revision with an order of a Lower Court refusing to make a transposition of the parties, a revision will lie when such a order of refusal is expressly based on a supposed jurisdiction in the court. AIR (Vol 3) 1916 Cal 80 (2): 20 CWN 752: 34 Ind Cas 186 (DB).

——S. 115 — Revisional jurisdiction of High Court — Lower court's order refusing to add petitioners as parties.

The High Court can interfere in the exercise of its revisional jurisdiction with the order of refusal of the original court to add the petitioners as defendants. (1910) 12 CLJ 267 (270): 6 Ind Cas 570 (DB).

——S. 115 — Addition of parties — Refusal — Revision.

An order of Lower Court improperly refusing to add a person as a party is subject to revision by the High Court as the order of the Lower Court has been made in the exercise of its jurisdiction illegally and with material irregularity. (1910) 11 CLJ 420: 6 Ind Cas 546 (DB).

——S. 115 — High Court's power of revision.

The High Court is not precluded by the terms of S. 115, C. P. C. from interfering with an order granting or refusing applications for adding parties. (1910) 14 Cal WN 703 (708): 11 CLJ 426: 6 Ind Cas 549 (DB).

1A. Amendment of pleadings and plaints.

See also Note 33.

——S. 115 and O. 6, R. 17 — Revision — Competency — Order refusing leave to amend pleadings.

An order refusing leave to amend a pleading is certainly open to revision. AIR (Vol 37) 1950 Ajmer 32 (1).

——S. 115 — Refusal to amend.

A revision against an order refusing to allow amendment of pleadings is maintainable. AIR (Vol 33) 1946 Nag 5: ILR (1945) Nag 634: 1945 NLJ 526.

——Ss. 115 and 96 — Specific jurisdiction conferred on existing Court.

Where special jurisdiction is conferred on an existing or established Court without more, it will attract all the incidents of the ordinary jurisdiction of such Court including the right of revision as much as the right of appeal from its decisions, if provided by statute. AIR (Vol 31) 1944 Cal 401: 48 CWN 699 (DB).

——S. 115 — Order allowing amendment of plaint.

No revision lies from the order allowing amendment of plaint. AIR (Vol 28) 1941 Oudh 623: 1941 RD 850: 1941 AWR (CC) 873: 1941 OWN (CC) 1100: 196 Ind Cas 432.

——S. 115 — Appellate order amending plaint and remanding case.

In view of the amendment made to O. 41, R. 23 by the Oudh Chief Court by addition of words "have not been decided", no appeal lies against the appellate order allowing an amendment of the plaint and remanding the case to the trial Court for trial de novo in the light of the amended plaint. A revision, however, can be maintained. AIR (Vol 27) 1940 Oudh 367: 1940 OWN (CC) 500: 1940 AWR (CC) 248: 16 Luck 65: 188 Ind Cas 893 (DB).

——S. 115 — Amendment.

Order allowing amendment of plaint is not revisable. (1939) 41 PLR 146.

——S. 115, O. 6, R. 17 — Amendment of plaint.

The Court of revision has only to see whether, either by a change in the nature of the suit, or by the effect of the amendment in depriving the defendant of the plea of limitation, or for some other reasons, the defence of the action would be unfairly affected. AIR (Vol 19) 1932 Mad 603: (1932) MWN 290: 141 Ind Cas 420.

——S. 115 — The Court has power to grant leave to amend the plaint based on a hundi into one based on the original cause of action and an order allowing such amendment is not liable to be set aside in revision. AIR (Vol 17) 1930 Lah 559.

——S. 115 — Order 6, Rule 17, confers ample powers upon the Court to amend the pleadings; and where the trial Judge has, after examining the arguments advanced on both sides, granted leave to amend the plaint, revision would not be allowed though his conclusion may be wrong in law. AIR (Vol 14) 1927 Lah 847: 9 LLJ 357: 103 Ind Cas 701 (DB).

——S. 115 — There is no right to apply in revision against an order permitting the plaintiff who sues for a bare declaratory decree to amend his plaint so as to include a prayer for the consequential relief of possession. AIR (Vol 12) 1925 Rang 199: 86 Ind Cas 509: 4 Bur LJ 1.

——S. 115 and O. 6, R. 17 — Amendment of plaint — Revision.

An order refusing leave to amend the plaint under O. 6, R. 17 can be set aside in revision. AIR (Vol 4) 1917 Lah 59: 26 PR 1917: 40 Ind Cas 65.

——S. 115 — Amendment of pleading — Revision.

A Court is not empowered to accept additional written-statement to meet allegations not raised in the plaint. The proper course is to amend the plaint, if allowable, direct filing of written statement, frame issues and decide. AIR (Vol 3) 1916 Mad 903: 29 MLJ 53: 30 Ind Cas 41.

——S. 115 — Material irregularity — New defendants added — Plaint not amended — Revision.

When on the addition of new defendants the plaint is not amended and both parties went on with the trial as if it had been amended and the added defendants were not prejudiced by the omission, Held, it was a mere irregularity and no revision will lie. AIR (Vol 2) 1915 Mad 335: 1 L W 775: 25 Ind Cas 607 (DB).

——S. 115 — Amendment of plaint — Revision.

An erroneous order refusing to allow a petition for amendment of a plaint is not open to revision. 8 Ind Cas 8, not foll. AIR (Vol 1) 1914 Mad 298: 1 LW 230: 24 Ind Cas 779.

——S. 115 — Amendment of plaint — Order refusing — No interference.

Plff. asked for permission to amend the plaint by substituting a new genealogical table for that given already but the court rejected the application. Held, that this was not a fit case in which the High Court should interfere with the discretion of the Court below in revision. (1912) 16 Ind Cas 404 (All) (DB).

——S. 115 — Amendment of plaint — Revision.

Where a Dt. Judge refused to amend the plaint as such amendment materially altered the nature of the suit and passed an order under O. VI, R. 17, C. P. C., the High Court cannot interfere in revision, even though the Dt. Judge exercised his discretion wrongly unless he acted with such material irregularity as to justify interference in

revision. (1912) 22 MLJ 136: 10 MLT 549: (1911) 2 MWN 257: 12 Ind Cas 173.

2. Amendment of Decrees.

See also (i) Note 11 (ii) Civil P. C., Ss. 151 and 152.

(a) Correction of errors
(b) Discretion
(c) Order to amend
(d) Other remedies
(e) Refusal to amend
(f) Refusal to excrcise jurisdiction
(g) Scope

(a) Correction of errors.

——S. 115 — Proportionate costs awarded in judgment — Total costs entered in decree.

Where the claim is reduced and proportionate costs awarded in the judgment but total costs are entered in the decree, the High Court in revision will order the decree to be corrected. AIR (Vol 22) 1935 All 280: 1935 AWR 32: (1935) ALJ 260: 153 Ind Cas 510.

——S. 115 — Clerical error.

An accidental slip or omission or a clerical mistake both in judgments and decrees can be corrected under S. 152, and if this correction is not allowed then a revision lies under S. 115 (b) to the High Court. AIR (Vol 16) 1929 Lah 400.

——S. 115 — Amendment of decree — Power to correct — Costs.

The High Court can correct an incorrect figure entered in a decree as vakil's fee owing to a mistaken calculation, but not an omission to enter proportionate costs which could have been corrected by an appeal. AIR (Vol 1) 1914 Mad 143: 24 Ind Cas 878 (DB).

(b) Discretion.

——S. 115 — Application for amendment of decree under S. 152 rejected — Revision lies. (1934) 148 Ind Cas 130: 34 PLR 802.

——S. 115 — Court has discretion to make an amendment or refuse the same under S. 152 and the High Court will not interfere in revision unless the decision is obviously wrong and unjust. AIR (Vol 20) 1933 Oudh 425: 10 OWN 988: 147 Ind Cas 253.

——S. 115 — Where a Dt. Judge, in the exercise of his discretion vested in him under S. 152, refused to correct a decree passed by a Court subordinate to him and confirmed by him on appeal on the ground that the applicant was guilty of laches: Held, that the discretion was rightly exercised and that the High Court would not interfere. AIR (Vol 12) 1925 All 187: 47 All 44: 5 LRA Civ 753: 82 Ind Cas 1030 (DB).

(c) Order to amend.

——S. 115 — Order directing amendment of decree under S. 8, U. P. Debt Redemption Act, passed without jurisdiction — Order is not revisable (Per Full Bench, Malik and Varma JJ. contra).

An order directing amendment of the decree under S. 8, U. P. Debt Redemption Act, was passed in 1941. The amendment order was passed without jurisdiction. The decree amended was passed in 1931. The decree-holder preferred a revision application against the order directing amendment, in the bona fide belief that a remedy by way of appeal was not open to him:

Held (Per Full Bench; Malik and Verma JJ. contra) that the revision application should be dismissed.

Per Iqbal Ahmad, C. J. and Yorke, J.—The amended decree was appealable to the District Judge under S. 96, Civil P. C., read with S. 24, U. P. Debt Redemption Act.

Per Allsop, J.—An appeal must be either against the amended decree itself or against the direction that the decree should be amended.

Per Iqbal Ahmad, C. J. and Allsop, J.—As the word 'appeal' in S. 115, Civil P. C., is not restricted to a first appeal but also includes a second appeal and as the second appeal against appellate decision of the District Judge could have been preferred to the High Court, the revision application against the order amending decree, could not be entertained.

Per Allsop and Yorke, JJ.—Assuming that the application for revision could be entertained, the High Court should not interfere in the exercise of its discretion as the appeal was entertainable whether by the High Court or a lower Court, from the decree in respect of which an application for revision was filed.

Per Iqbal Ahmad, C. J.—For the purposes of limitation governing appeal from the amended decree the actual date of the decree and not the date that the decree was "deemed to bear" under S. 8 (2), U. P. Debt Redemption Act, was the relevant date.

Per Allsop, J.—The decree-holder would not necessarily be prevented from filing an appeal from amended decree by the law of limitation, because in the first place there are the provisions of S 5, Lim. Act, and in the second place the appellant would probably be entitled to deduct from the period of limitation the whole period up to the time when the amended decree was reduced to writing.

Per Malik and Verma, JJ.—The revision application could be entertained by the High Court and should be allowed.

On the date on which the revision application was filed, there was no order of the first Court or the Appellate Court from which an appeal could be filed to the High Court. The revision application, therefore, could be entertained under S. 115.

Per Malik, J.—Even if it were to be conceded that an appeal could be filed from the amended decree, there was no reason why it should not be possible for the party aggrieved by the order to file a revision in the High Court against the order directing amendment of the decree. The proceedings for amendment of the decree were separate proceedings which must be considered as a case decided by the order directing amendment of the decree. AIR (Vol 33) 1946 All 89: 1946 ALJ 3: 225 Ind Cas 200 (FB).

——S. 115 — An order amending decree under S. 152 without jurisdiction is an order relating to jurisdiction and is revisable. AIR (Vol 27) 1940 Mad 538: (1940) MWN 184: (1940) 1 MLJ 310: 51 MLW 252: 191 Ind Cas 76.

——S. 115 — Order of amendment of decree under Ss. 151 and 152.

The order of amendment of a decree made under Ss. 151 and 152, Civil P. C., does not itself amount to a decree. Hence an application for revision of such order is maintainable. AIR (Vol 26) 1939 Bom 389: 41 Bom LR 800: 184 Ind Cas 775.

——S. 115 — An order under S. 152 (S. 206 of C. P. C. 1882) directing amendment of a decree, not in conformity with judgment, is not a decree and therefore not appealable but revision lies. 24 PR 1911: 186 PLR 1911: 56 PWR 1911: 10 Ind Cas 850.

(d) Other remedies.

——Ss. 115, 151 — Appeal must be against amended decree — No revision lies.

When there is an amended decree, an appeal must be filed against that decree and no revision can be entertained. AIR (Vol 29) 1942 Mad 519:

55 MLW 187: (1942) 2 MLJ 38: 202 Ind Cas 380 (DB).

——S. 115 — Decree in accordance with judgment — Remedy.

Where in a mortgage suit a judgment contains two contradictory directions as regards the decree and the decree is technically in accordance with the earlier and operative part of the judgment, no application under S. 152 for the amendment of the decree lies. There is also no revision against an order rejecting such an application. The proper ccurse for the decree-holder is tc renew their application under O. 34 R. 6. AIR (Vol 17) 1930 Lah 589.

——S. 115 — As an amended decree supersedes the original decree and against the amended decree an appeal lies, no revision lies against an order amending the decree. AIR (Vol 14) 1927 Cal 114: 45 CLJ 213: 31 CWN 615: 98 Ind Cas 89.

(e) Refusal to amend.

——Ss. 115, 151 — Order refusing to amend decree — Interference under S. 115 or S. 151.

Even if it may not be competent for the Oudh Chief Court under S. 115, Civil P. C., to interfere with the decision of the lower Court refusing to amend the decree, where there has been a miscarriage of jusice, the Chief Court can, under S. 151, interfere with the order. AIR (Vol 29) 1942 Oudh 392 : 1942 OWN 335 : 1942 AWR (CC) 220 : 200 Ind Cas 608.

——S. 115 — Application for amendment of decree under S. 8, U. P. Debt Redemption Act — Rejection of, on ground that transaction was not loan — Order, if revisable.

Where an application for amendment of a decree under S. 8, U. P. Debt Redemption Act is rejected on the ground that the transaction was not a loan within the meaning of the Act, the order of the Court cannot be revised as there is neither a failure to exercise jurisdiction nor material irregularity in the exercise of jurisdiction within the meaning of S. 115, Civil P. C. (1942) 203 Ind Cas 234 : 1942 OWN 624.

——S. 115 — Application by transferee of decree without getting himself substituted rejected — No revision.

The mortgaged property had been erroneously described in the mortgage-deed and the error therein had been repeated in the plaint, the preliminary decree, the final decree and the execution application. Following upon the passing of the final decree, the plaintiffs applied to the Court for the amendment of the decrees, the plaint and the mortgage-deed. This application was rejected. A puisne mortgagee who claimed to be the transferee of the decree but who had not got himself substituted in the place of the plaintiffs applied subsequently for the amendment but his application being rejected, he applied to the High Court under S. 115, Civil P. C., against the order rejecting his application:

Held, that in the circumstances, it was not expedient that the High Court should interfere with the order in virtue of the powers under S. 115. AIR (Vol 25) 1938 All 466 : 1938 AWR 460 : (1938) ALJ 854 : 176 Ind Cas 879 (1) (FB)..

——S. 115 — Application under Ss. 151 and 152 to amend decree rejected — Revision, if lies.

A revision lies from an order rejecting an application to the Court to amend the decree in exercise of its powers under Ss. 151 and 152, Civil P. C. As an amendment under S. 152 can be made at any time, the question of limitation does not arise in such application. AIR (Vol 24) 1937 Lah 894 : 39 PLR 769 : 175 Ind Cas 634.

——Ss. 115, 151 — Order refusing to amend decree.

Even if it be held that upon a strict construction of S. 115, the High Court is precluded from interfering in revision with an order refusing to amend a decree, it is still open to it to interfere under S. 151 of the Code. AIR (Vol 24) 1937 Oudh 246 : 1937 OWN 268 : 13 Luck 186 : 167 Ind Cas 586 (DB).

——S. 115 — Where the Court had power under S. 152 to amend the decree, but the application for amendment is rejected, the case falls under S. 115 and the Chief Court can interfere in revision. AIR (Vol 18) 1931 Oudh 422 : 8 OWN (CC) 1121 : 134 Ind Cas 1009 (DB).

——S. 115 — Where an amendment under S. 152, C. P. Code was wrongly refused and led to gross injustice,

Held, revision should be allowed. 76 Ind Cas 198 : AIR (Vol 11) 1924 Lah 621.

——S. 115 — Amendment of decree — Rejection of amendment petition — No irregularity.

A Sub-Judge rejecting a petition for amendment of a decree holding that the expression "future interest" in the decree means interest from the date of decision not from the date of institution of suit, commits no irregularity and the High Court cannot interfere in revision whether his decision is right or wrong. 26 Ind Cas 808: AIR (Vol 2) 1915 All 1 (DB).

(f) Refusal to exercise jurisdiction.

——S. 115 — Refusal to amend decree.

Where the lower Court refuses to amend the decree under S. 152, though it could do it, the order amounts to refusal to exercise jurisdiction vested in it and revision against the order is maintainable. AIR (Vol 23) 1936 Pesh 196 : 165 Ind Cas 904 (1).

——S. 115 — Refusal to amend decree under S. 152, amounts to failure to exercise jurisdiction vested in the Court and revision lies against the order. Even if no revision lies, the High Court can interfere under S. 151. AIR (Vol 22) 1935 Oudh 461 : 1935 OWN 968 : 11 Luck 413 : 157 Ind Cas 810 (DB).

——S. 115 — The Court has jurisdiction to refuse amendment and the failure by the Court to exercise this jurisdiction on the ground that it had no such power amounts to material irregularity in the exercise of its jurisdiction, so that revision of its order is permissible. 88 Ind Cas 396 : 23 ALJ 518 : 6 LRA Civ 423 : AIR (Vol 12) 1925 All 556 (DB).

——Ss. 115, 151 and 152 — Amendment of decree — Refusal — Revision.

Upon an application by the mortgagor for the amendment of the decree, the Court refused to order the amendment as "uncalled for."

Held, that the order was tantamount to a refusal to exercise the jurisdiction and the High Court's interference in revision was justified. 16 ALJ 749 : 47 Ind Cas 830 : AIR (Vol 5) 1918 All 208 (DB).

(g) Scope.

——S. 115 — Revision is maintainable against an order for amendment of decree under S. 152. AIR (Vol 28) 1941 Oudh 66 : 1940 AWR (CC) 429 : 16 Luck 252 : 1940 OWN 1010 : 191 Ind Cas 185.

——S. 115 — Amendment of decree, if can be granted under revisional powers.

The Chief Court of Oudh has power under its revisional jurisdiction to amend the decree so as to make it conform with the judgment and it is neither necessary nor convenient to send

back the case to the lower Court for amendment of the decree. Where a suit is compromised and the compromise is made a part of the decree which goes beyond the terms of the compromise by adding some provisions in the decree which are no part of the compromise, the Chief Court would allow the application for amendment of the decree and order that the provisions of the decree which go beyond the terms of the compromise be deleted. AIR (Vol 25) 1938 Oudh 107 : 1938 OWN 331 : 1938 AWR 26 : 1938 RD 405 (2) : 14 Luck 13 : 175 Ind Cas 865 (DB).

——S. 115 — Decision under S. 152 granting application for amendment of a preliminary decree which has become final is revisable and not appealable. AIR (Vol 23) 1936 Oudh 81 : 1935 OWN 1322 : 159 Ind Cas 269 (DB).

——S. 115 — Amendment of decree — Original court — Appellate decree.

No appeal lies against an order of amendment of an appellate decree by the original Court but the High Court will interfere in revision. 28 Ind Cas 586 : AIR (Vol 2) 1915 Mad 1068.

——S. 115 — Amendment of decree — Refusal — Revision.

Application for revision lies against an order refusing the amendment of an order absolute so as to bring it into conformity with the judgment. (1910) 6 Ind Cas 707 (All).

3. Appeal.

See also Notes 6, 26 and 33.

——S. 115 — Appeal from order passed under S. 115.

No appeal lies from an order passed by the Judge under S. 115. AIR (Vol 22) 1935 All 889 : (1935) ALJ 940 : 1935 AWR 1006 : 156 Ind Cas 389 (DB).

4. Arbitration.

See also Note 5.

(a) Appointment irregular.
(b) Case decided.
(c) Delay.
(d) Decree on award
(e) Filing of award.
(f) Illegality and material irregularity.
(g) Interlocutory orders.
(h) Jurisdiction in.
(i) Misconduct of arbitrator.
(j) Objections as to.
(k) Revision.
(l) Setting aside.
(m) Supersession of.

(a) Appointment irregular.

——S. 115, Sch. II, Para 1 — Reference to arbitration not proper — Substantial justice done in case.

A suit was instituted against two persons who were described as the owners of a firm. The suit was for the recovery of damages for breach of contract entered into by the two firms. The summons issued to them was taken by one M, a son of one of the defendants and M filed a written statement purporting to be on behalf of the firm. The case was referred to arbitration at the instance of the plaintiffs and M:

Held, that although M had no power to refer to arbitration, yet as he was managing the business, substantial justice had been done, and the High Court was not bound to, and would not, interfere with the award. AIR (Vol 20) 1933 All 924 : 147 Ind Cas 746 (DB).

——S. 115 — An order under the last portion of R. 17 (4) directing a party to nominate an arbitrator or appointing one itself, can be passed only when an order under the earlier portion ordering an agreement to be filed is in existence and where such an order is passed without an order under earlier portion, it is liable to be revised. 94 Ind Cas 483 : AIR (Vol 13) 1926 Lah 505.

(b) Case decided.

——S. 115 — Matter referred — Judge adding issue against party's wishes.

Where the Judge has in effect decided that whether the plaintiff likes it or not some particular issue, not agreed by the plaintiff to be referred to arbitration, is despite his objections, to be referred to arbitration, that is "a decided case" within the meaning of S. 115. The Judge in such a case deals with the matter referred to arbitration within the meaning of para. 3 (2) of Sch. II, when he allows the amendment of the written statement, and, in effect, directs the arbitrator to add to the issues referred, a further issue on a question upon which, by necessary implication, the parties have already agreed and which agreement by necessary implication is involved in the issues referred. The Judge deals with the matter referred to arbitration in a manner not provided in the schedule. AIR (Vol 29) 1942 Sind 7 : 198 Ind Cas 847 (DB).

——S. 115, Sch. II, Para. 13 — Order awarding arbitrator's fees under Para. 13, Sch. II.

An order awarding fees to the arbitrator under Para. 13, Sch. II is a 'case decided' within meaning of S. 115, Civil P. C., and revision against the order is maintainable. AIR (Vol 27) 1940 Sind 190 : ILR (1940) Kar 34 : 190 Ind Cas 880 (DB).

——S. 115 — An application under S. 19 Arbitration Act is not an interlocutory proceeding or a mere branch of a suit within the meaning of S. 115. It is a case in itself and hence an application in revision would lie. "Case" in S. 115 has wider denotation than a suit. AIR (Vol 23) 1936 Sind 205 : 166 Ind Cas 541 (DB).

——S. 115 — Arbitration proceedings entered by the parties in the course of the trial of a suit are proceedings in that suit and do not constitute a separate case within S. 115. AIR (Vol 20) 1933 Lah 692 : 34 PLR 651 : 14 Lah 715 : 143 Ind Cas 309 (DB).

——S. 115 — Where the controversy between the parties is whether the arbitration should be superseded or should be continued and the sole arbitrator refusing to act and the Court settles that controversy by directing that the arbitration should continue and appointed another person to act as arbitrator, the order is one deciding a case within the meaning of S. 115. 115 Ind Cas 611 : 51 All 501 : 1929 ALJ 182 : AIR (Vol 16) 1929 All 144 (DB).

(c) Delay.

——S. 115 — Long delay in referring matter to arbitration — Court refusing to enforce arbitration clause — Discretion.

A long delay by the defendants in referring the matter to arbitration justifies the Court in refusing to enforce the arbitration clause. The matter is one of discretion, and where no sufficient reason is made out, the High Court will not interfere with the lower Court's discretion. AIR (Vol 20) 1933 Lah 1007 : 150 Ind Cas 252 (1) (DB).

(d) Decree on Award.

——S. 115 — Decree not in excess of award — Revision — Validity of award — If can be challenged. See AIR (Vol 36) 1949 Nag 349: ILR (1949) Nag 272.

——Ss. 115, 152, Sch. II, Paras 12, 14 — Award made decree — Subsequent objection to award and decree on ground that there was clerical mistake in award as to rate of interest — Court examining arbitrator and taking other evidence and correcting error — Section 92, Evi. Act (1 of 1872), held, did not apply to case — Court, held did not act illegally in exercise of its jurisdiction. AIR (Vol 29) 1942 Oudh 426: 1942 OWN 429: 1942 AWR (C C) 269: 201 Ind Cas 127.

——S. 115 — No revision lies where decree is passed in terms of award. (1936) 38 PLR 783.

——S. 115, Sch. II, Paras 15, 16 — Objections to validity of award rejected — Judgment in terms of award — Revision.

Where an objection to the validity of an award is rejected and the Court proceeds to pronounce judgment and pass a decree in terms of the award the decree is final and cannot be challenged either by way of appeal or revision. The applicant will be debarred from obtaining redress under S. 115, Civil P. C., even if the arbitrator had exceeded his jurisdiction or had acted without jurisdiction.

Per Zia-ul-Hasan, J. — It is doubtful if their Lordships of the Judicial Committee intended to lay down in (29 IA 51) a universal rule that in no case whatsoever an order passing a decree in terms of an award of arbitrators is revisable by the High Court. AIR (Vol 23) 1936 Oudh 1: 1935 OWN 1036: 1935 OLR 553: 11 Luck 441: 158 Ind Cas 11 (DB).

——S. 115 — It cannot be laid down as a general rule that the High Court cannot interfere in revision under S. 115, Civil P. C., with a decree passed in accordance with an award. Revision is permissible if the arbitrators or the Court have exceeded their juisdiction or acted with material irregularity in exercising their jurisdiction. AIR (Vol 22) 1935 Mad 184: 41 MLW 51: (1935) MWN 263: 155 Ind Cas 381.

——S. 115, Sch II Para 15 — Decree in accordance with award.

No appeal or revision lies against a decree passed in accordance with the award made by an arbitrator. AIR (Vol 21) 1934 Oudh 494: 11 OWN 1203: 10 Luck 228: 152 Ind Cas 90 (DB).

——S. 115 — Where objections to an award have been heard and disposed of by a Court of competent jurisdiction, a finality attaches to the decree passed in accordance with the award and the matter cannot be allowed to be challenged in revision even if the award is 'ab initio' invalid. AIR (Vol 19) 1932 All 76: (1931) ALJ 906: 134 Ind Cas 30.

——S. 115, Sch II, Para 16 — Decree in accordance with award — Appeal — Revision.

Under Paras 15 and 16 of Sch II even in the case of an invalid award if the party concerned fails to impeach it before the Court making the reference or if his objection on the ground of the invalidity of the award is disallowed and a decree is passed in accordance therewith, the award becomes final and the decree passed thereupon is not open to appeal or revision. AIR (Vol 19) 1932 Oudh 156: 9 OWN (C C) 191: 7 Luck 622: 137 Ind Cas 151 (DB).

——S. 115 — Award — Decree passed on.

A party is entitled to be protected by the law against a decision by arbitrators on points not referred to therein at all and against a decree of Court based on such a decision, all the more so because he has not right of appeal. AIR (Vol 13) 1926 Mad 201: 49 MLJ 523: 91 Ind Cas 745 (DB).

——S. 115 — An application can be entertained under S. 115 against a decree passed in terms of an award. AIR (Vol 12) 1925 Bom 341: 87 Ind Cas 9[illegible]: 49 Bom 535: 27 Bom L R 423 (DB).

——S. 115 — A revision lies against a decree passed upon an award, where the Court which passed the decree committed an error in procedure or has misused the jurisdiction prescribed by the Civil Procedure Code. Where the finding of the lower Court has proceeded on a misconception of evidence, this would be an error in procedure justifying the interference in revision. AIR (Vol 8) 1921 Lah 396: 64 Ind Cas 363: 22 PLR 1922.

——S. 115 — As under para 16 of second schedule, C. P. C., there is no appeal from a decree in accordance with the award, a revision under S. 115 would be still more objectionable. But if the Lower Court acted without jurisdiction, or acted with material irregularity in dealing with the award, the High Court will interfere in revision on making out a proper case. (1915) 31 Ind Cas 459 (U. P. B. R.)

——S. 115 (S. 622 Old Code) — Decree neither in excess of nor in accordance with, award — No revision.

There is no revision of a decree in pursuance of an award which is neither in excess of, nor not in accordance with, the award. (1902) 4 Bom LR 161: 6 CWN 226: 12 MLJ 77: 25 PR 1902: 29 C 167: 29 IA 51 (60, 61) (PC).

(e) Filing of Award.

——S. 115 — The order of the appellate Court setting aside the order of the trial Court and rejecting the application to file an award is revisable. AIR (Vol 16) 1929 Lah 367: 110 Ind Cas 302 (DB).

——S. 115 — An order filing an award not appealable under para 16 Sch. 2 cannot be set aside in revision. AIR (Vol 14) 1927 Pat 135: 1926 PHCC 161: 7 PLT 739: 95 Ind Cas 321 (DB).

——S. 115 — Revision lies from the order of a Judge directing an award to be taken off the file. AIR (Vol 11) 1924 Sind 75: 83 Ind Cas 353: 17 SLR 133 (FB).

——S. 115 — No notice of.

A High Court has jurisdiction under S. 115 of the Civil Procedure Code to interfere with a decree passed in terms of an award where no notice was given of the filing of the award as required by Sch. II, para 10, C. P. Code. (1921) 63 Ind Cas 243 (Cal).

——S. 115 — Award — Filed out of time — Revision.

Section 115, C. P. C., would not necessarily apply though the Court accepting an award has erroneously decided some of the mixed questions of law and fact, as to the validity of an award delivered out of time. AIR (Vol 6) 1919 Pat 93: 4 Pat LJ 265: 50 Ind Cas 52 (DB).

(f) Illegality and Material Irregularity.

——S. 115 — Judgment-debtors jointly and severally liable for sum due to decree-holder — Application for reference to arbitration by decree-holder and only some of them — Reference ordered by Court:

Held, that the reference was illegal and should be set aside and that the application in revision against the order was competent. AIR (Vol 22) 1935 All 34: (1934) ALJ 1181: 4 AWR 890: 57 All 482: 152 Ind Cas 397.

——S. 115, Sch. II, Paras 1, 7 — Time not granted to file objections — Material irregularity — Revision.

Where no time is granted to file objections to an award, the Court acts with material irregularity within the meaning of S. 115, Civil P. C. AIR (Vol 20) 1933 All 313: (1933) ALJ 149: 145 Ind Cas 403 (DB).

——S. 115 — Court should not interfere with awards of arbitrators unless it finds, not only an illegality committed, but some substantial harm resulting from that illegality. AIR (Vol 18) 1931

All 761: (1931) ALJ 682: 53 All 778: 137 Ind Cas 514 (2) (DB).

——S. 115 — Where the Court has considered the objections to the award and has come to a wrong decision as to whether there had been any irregularity on the part of the arbitrator, no revision lies under S. 115, C. P. Code, although it is not the law that in no possible case could a revision be entertained against a decree passed in accordance with an award if the procedure of the Lower Court had been altogether irregular and illegal. AIR (Vol 10) 1923 Oudh 235: 74 Ind Cas 401: 26 OC 107.

——S. 115 — Award — Material irregularity — Court giving advice to arbitrators.

It is not an irregularity in the Court to help the arbitrators with advice and orders when asked for. AIR (Vol 2) 1915 Lah 253: 28 PR 1916: 11 PWR 1916: 31 Ind Cas 700 (DB).

——S. 115 and Sch. II, para 16 — Award — Revision.

Interference in revision is not justified where there is no irregularity in the proceedings or error in procedure or misuse of a jurisdiction and the decree of the court is passed in accordance with an award of arbitrators. 9 PR 1913: 248 PLR 1913: (1912) 16 Ind Cas 896 (DB).

——S. 115 — Award — Revision.

The High Court should not interfere with the award if no illegality is apparent and the irregularities in procedure are formal. (1911) 2 MWN 223: 21 MLJ 1005: 12 Ind Cas 269 (DB).

——S. 115, (Ss. 622, 623 Old Code) — Material irregularity — Judge refusing to file award basing his decision on a point not raised in the issues — Order set aside. (1906) 8 Bom LR 570 (575)

(g) Interlocutory orders.

——S. 115, Sch. II, Para 15 — Order, pending suit, setting aside award and superseding arbitration.

It follows from the language of S. 115 that there must be a separate record of a case decided by a subordinate Court which could be called for by the High Court for the purpose of passing such order as it thinks fit. The proceedings for arbitration in the course of a pending suit are of an interlocutory character and part of the suit itself. The word "case" is of a larger amplitude than the word "suit" and would include proceedings under the Guardians and Wards Act, Prov. Insol. Act, Religious Endowments Act and Succession Act, etc.

Consequently, no revision lies against an order passed by the lower Court in a pending suit setting aside the award under Para. 15 of Sch. II and superseding the arbitration. This is also clear by the reference to S. 104 (1) (a), which makes no provision for an appeal against such orders. AIR (Vol 26) 1939 Oudh 238: 1939 OWN 716: 1939 AWR 101: 183 Ind Cas 378 (DB).

——S. 115 — Order setting aside award filed by arbitrator.

The proceedings for arbitration in the course of a pending suit are of an interlocutory character and part of the suit itself. No application under S. 115 lies against the order passed by the Judge, setting aside an award filed by an arbitrator. (1939) 183 Ind Cas 837: 1939 OWN (C C) 751: 1939 AWR (C C) 108.

——S. 115 — Order making reference to arbitration — Whether interlocutory order and open to revision.

The reference to arbitration is a branch or ramification of the main suit which will have to be disposed of subsequently whatever the result of the reference may be, and the order making interlocutory order, and as such is not open to revision. AIR (Vol 23) 1936 Lah 538: 38 PLR 121: 160 Ind Cas 1052.

(h) Jurisdiction in.

——S. 115, Sch. II, Para 15 — Person party to arbitration challenging reference in appeal as without jurisdiction — Appellant, even if successful, is generally not entitled to costs — But in revision such person should be given no relief.

A person who was a party to arbitration, even if successful in appeal challenging the reference as being without jurisdiction, is generally deprived of costs. But in revision such a person should not be given any relief. AIR (Vol 29) 1942 Cal 230 ILR (1941) 2 Cal 366 : 199 Ind Cas 740.

——S. 115 — Reference relating to dispute between M's widow A, B and C over estate left by M — Reference empowering arbitrator to decide dispute in such manner as he thought just and equitable — Arbitrator, held had power to charge with A's maintenance property belonging to B which was in his possession and which did not come to him under award. In a revision against an order of Court directing award to be filed an objection can be taken only on the question of jurisdiction. AIR (Vol 29) 1942 Sind 79: ILR (1942) Kar 36: 202 Ind Cas 152 (DB).

——S. 115, Sch. II Paras. 20 and 21 — Jurisdiction of arbitrators to proceed with arbitration challenged on ground of its subject-matter being subject of pending suit — Revision lies. AIR (Vol 29) 1942 Sind 41: ILR (1941) Kar 570: 199 Ind Cas 291 (DB).

——S. 115 — Award — Interference by the High Court.

Though the High Court is reluctant to interfere with awards, the parties having been content to submit the matter in dispute to lay Judges of their own choosing, nevertheless if there is question of jurisdiction involved, the High Court may interfere and will do so to remedy injustice. AIR (Vol 24) 1937 Sind 174: 30 SLR 478: 170 Ind Cas 102 (DB).

——S. 115 — Jurisdiction under, exercise of — Arbitration — Principle of finality.

Jurisdiction under S. 115 is not to be lightly exercised: it is an extraordinary jurisdiction and should be used only on appropriate occasions. The principle of finality in cases of arbitration should be borne in mind. AIR (Vol 23) 1936 Sind 172: 30 SLR 271: 166 Ind Cas 365 (DB).

——S. 115, Sch. II, Para 3 — Whole case referred to arbitration — Court, if should frame issues noting points in dispute — Plea of jurisdiction — Power to refer.

Where the whole case is referred to an arbitrator who is called upon to decide all points in dispute between the parties, it is not necessary for the Court to frame issues noting the points in dispute between the parties and refer them specifically to the arbitrator.

Where a plea as to jurisdiction depends on questions of fact as well as of law, an arbitrator has full power to decide the question, and a Court will not be acting illegally in referring such a question to an arbitrator. AIR (Vol 19) 1932 All 665: 54 All 297: 143 Ind Cas 191 (DB).

——S. 115 — The High Court can interfere in revision if necessary in cases where reference to arbitration has been made contrary to the provisions of C. P. Code, Sch. 2, para 1, and the question whether the Court had jurisdiction to grant a decree in terms of the award was involved and decided by trial Court. AIR (Vol 17) 1930 Sind 256 (DB)

——S. 115 — A Court acts without jurisdiction in referring a dispute to arbitration where a party interested in the dispute does not join in making the reference, and with material irregularity in

not affording an opportunity to a party to file objections within the statutory period and the order can be set aside in revision. AIR (Vol 16) 1929 Lah 171: 114 Ind Cas 712.

——S. 115 — Power to make order of reference attacked — High Court can revise the order — C. P. Code, Sch. 2, para 1.

Where the jurisdiction of the Court to make the order of reference is attacked, the High Court has power to revise the order in revisional jurisdiction. AIR (Vol 14) 1927 Cal 52: 44 CLJ 224: 98 Ind Cas 803 (DB).

(i) Misconduct of Arbitrator.

——S. 115 — Mistaken view of lower Court as to what constitutes misconduct on part of arbitrator or whether ground for interference in revision.

The High Court cannot interfere in revision, merely because the lower Court has taken in the exercise of its jurisdiction a mistaken view as to what does or does not constitute misconduct on the part of an arbitrator. AIR (Vol 27) 1940 Nag 386: 1940 NLJ 393: ILR (1940) Nag 659: 192 Ind Cas 371.

——S. 115 — Court has every jurisdiction to decide whether certain act amounts to misconduct on the part of the arbitrator. If in deciding the question the Court takes erroneous view of law or makes an incorrect inference from facts, all that can be attributed to the Court is error of judgment and it cannot be said that there was any illegality or irregularity in the exercise of jurisdiction. AIR (Vol 22) 1935 All 456: 1935 AWR (HC) 514: 157 Ind Cas 1017 (DB).

——S. 115 — Order that the award cannot stand.

The question whether the award is bad on the face of it or whether there is misconduct on the part of the arbitrators is entirely a question for the trial Judge and his order cannot be disturbed unless facts are gone into and the High Court comes to a finding upon those facts. The High Court has no jurisdiction to adopt that course. Besides, an order of the trial Court of this character, viz., that the award cannot stand, is not open to revision under S. 115, for the reason that it is not a case which had been decided, but is in the nature of an interlocutory order preceding the hearing of the case itself. AIR (Vol 21) 1934 Pat 550: 1 BR 37 (1): 15 PLT 693: 152 Ind Cas 309.

——S. 115 — Where the procedure or jurisdiction of the Judge is not attacked but only his findings as to misconduct of the arbitrator, there is no right of revision. AIR (Vol 16) 1929 Lah 688: 11 LLJ 275: 119 Ind Cas 721.

——S. 115 — Private inquiries by arbitrator is not misconduct if authorised by agreement of reference — Order superseding arbitration holding it to be misconduct is without jurisdiction — Revision lies.

Where the parties had expressly authorised the arbitrator to arrive at a decision, either of his own personal knowlelge, or in whatsoever manner he might think proper and the Court below superseded the award on the ground of misconduct of the arbitrator because he had made "private inquiries about subject-matter in dispute behind the back of the parties".

Held, that the Court below acted illegally and with material irregularity, in thus ignoring the terms of the agreement of reference to arbitration by which the parties had in fact given the arbitrator the widest possible powers and had expressly bound themselves to abide by his decision in whatsoever manner he might see fit to arrive at it and that the case fell within the revisional jurisdiction of the High Court. AIR (Vol 9) 1922 All 69: 20 ALJ 125: 64 Ind Cas 934 (DB).

——S. 115 — When the question was whether the parties by their agreement of reference to arbitration had agreed that the arbitrator might supplement his knowledge by listening to ex parte statements behind the back of the parties and the lower Court decided that the terms of the agreement did not empower the arbitrator to act as he did, in appeal it was opined that the Court below had misinterpreted the terms of the agreement of reference.

Held, the appellate Court ought not to interfere in revision. AIR (Vol 9) 1922 All 64: 20 ALJ 117: 65 Ind Cas 779 (DB).

——S. 115 (S. 622 old Code) — Revision — Erroneous decision on question of law.

The decision of a Court that an award was not bad on the ground that the arbitrator had drafted the plaint for one of the parties, the other party not having been aware of the same until after the award, though perhaps erroneous, is not liable to be set aside in revision under S. 622, C. P. C. (1904) 18 MLJ 249 (249).

——S. 115 (S. 622 old Code) — Arbitrator — Award — Misconduct of arbitrators — Revision.

An order under S. 521, Civil Procedure Code, setting aside an award made under Chapter XXXVII of the Code on a reference to arbitration in the course of a suit on the ground of the arbitrator's misconduct is not subject to revision under S. 622 of the Code of Civil Procedure, 1882. (1902) 4 Bom LR 267: 26 B 551 (551) (DB).

——S. 115 (S. 622 old Code) — Jurisdiction of High Court to revise an order setting aside a decree on award — Misconduct of arbitrator.

A High Court has power under S. 622 of the Civil Procedure Code to revise an order setting aside a decree based on award. (1902) 6 CWN 614 (615) (DB).

(j) Objections as to.

——S. 115 — Objections to award on the ground that the guardian had not obtained leave of the Court, dismissed, and a decree in terms of award ordered — Revision lies against the order, provided the requirements of Section 115 are otherwise fulfilled. AIR (Vol 26) 1939 Bom 296: 41 Bom LR 485: 183 Ind Cas 753.

——S. 115 — The decision of the Court overruling an objection relating to the invalidity of the order of reference and passing a decree in accordance with award can be challenged by an application in revision but not by an appeal. AIR (Vol 24) 1937 All 65: (1936) ALJ 1333: 1936 AWR (HC) 1223: ILR (1937) All 317: 167 Ind Cas 99 (FB).

——S. 115 — Objection to filing of unregistered award not taken in lower Court — High Court would not interfere.

When objection to the filing of a private award on the ground that it was not registered was not taken in the trial Court or lower Appellate Court:

Held, that had this point been raised in the trial Court, the award could have been registered within four months of the time it was given, and this would have cured the irregularity, and hence the High Court would not interfere in revision. AIR (Vol 24) 1937 Cal 201: 171 Ind Cas 507 (DB).

——S. 115 — Objection to award disallowed — Decree in terms of award — Revision is a matter of discretion and the decree will not be interfered with on a mere technical plea. AIR (Vol 20) 1933 Oudh 327: 10 OWN 669: 150 Ind Cas 291.

——S. 115 — Order disallowing objection to award.

A revision is competent from an order disallowing objections to an award where the applicant wishes to challenge the validity of the order of reference itself. AIR (Vol 19) 1932 All 665: 54 All 297: 143 Ind Cas 191 (DB).

——**S. 115 — Invalid reference.**

Where the award made by the arbitrators on reference is impeached on the ground that the reference itself is bad, the High Court can revise the proceedings and, if necessary, set aside the order of reference with the result that the award will fall through. AIR (Vol 15) 1928 All 740: 50 All 955: 110 Ind Cas 881: 26 ALJ 1009 (DB).

——**S. 115 — Not signed by one arbitrator.**

The High Court in the exercise of its revisional jurisdiction, cannot set aside the decree passed in accordance with an award on the ground that one of three punchas refused to sign the award. AIR (Vol 14) 1927 All 573: 100 Ind Cas 76.

——S. 115 — If a Court refuses to hear a valid objection properly raised before it or entertains matters which are outside its jurisdiction, then the High Court can interfere under section 115 not with the arbitrators, nor with the award, but with the exercise of the jurisdiction of the Court in dealing with the application. AIR (Vol 11) 1924 All 788: 82 Ind Cas 16: 46 All 686: 22 ALJ 676: 5 LRA Civ 465 (DB).

——S. 115 — Where the objection as to non-joinder is not taken in the memorandum of objections to the award presented in the lower Court and it is not shown that the parties not joined in reference were necessary parties to the suit between the plaintiff and the petitioner, the High Court will not interfere in revision. AIR (Vol 10) 1923 Mad 502: 44 MLJ 359: 73 Ind Cas 202: 17 MLW 424: 32 MLT 298: 1923 MWN 296.

——**S. 115 and Sch. II para. 10 — Award — Objections — Order rejecting — Revision.**

An order rejecting the objections to an award without adequate enquiry into them is liable to be set aside in revision. AIR (Vol 2) 1915 Lah 352: 96 PLR 1915: 30 PWR 1915: 28 Ind Cas 427.

(k) Revision.

——S. 115 — There is no bar to the question of applicability of the Arbitration Act to the suit in question being taken up for the first time in revision. (1940) 42 PLR 555.

——S. 115 — In the case of an award, revision would be more objectionable than an appeal. AIR (Vol 23) 1936 All 740: (1936) ALJ 53: 1936 AWR (HC) 150: 160 Ind Cas 868 (DB).

——S. 115 — An order refusing stay under S. 19, Arbitration Act, is subject to revision under Section 115. AIR (Vol 18) 1931 Lah 644: 13 Lah 59: 33 PLR 887: 132 Ind Cas 850 (DB).

——S. 115 — Where the Court, wrongly holding that the parties were bound to refer the dispute between them to arbitration, stayed the suit.

Held, High Court could interfere in revision. AIR (Vol 15) 1928 Bom 275: 52 Bom 420: 30 Bom LR 661: 111 Ind Cas 641 (DB).

——**S. 115 — Sch. II para. 16 — Award — Revision — Other remedy open.**

A decree which is not in accordance with an arbitration award being appealable, no revision lies to the High Court, if there has been no appeal against such a decree. (1912) 14 Ind Cas 284 (2): 120 PWR 1912: 118 PLR 1912.

——S. 115 — Where in arbitration proceedings an appeal is not allowed, revision would be still more objectionable. 1 PLR 1911: 12 PWR 1911: (1911) 9 Ind Cas 385.

(l) Setting aside.

——**S. 115 — Order setting aside award.**

An order setting aside an arbitration award is not a case decided within the meaning of Section 115, Civil P. C., and therefore, no revision lies from such an order. AIR (Vol 19) 1932 All 452: (1931) ALJ 842: 53 All 1006: 136 Ind Cas 568 (DB).

——**S. 115, Sch. II, R. 15 — Order setting aside award.**

No application lies under Section 115 against an order passed under Schedule II, Rule 15, setting aside an award made on a reference to arbitration in the course of a suit, and directing the trial of the suit to proceed before it. AIR (Vol 19) 1932 Bom 232: 34 Bom LR 376: 138 Ind Cas 215 (2) (DB).

——S. 115 — It is doubtful whether proceeding relating to the setting aside of an award in a suit is a case within the meaning of Section 115 so that the order refusing to set aside the award can be revised. AIR (Vol 16) 1929 Lah 688: 119 Ind Cas 721: 11 LLJ 275.

——S. 115 — A revision lies from an order refusing to set aside an award. AIR (Vol 16) 1929 Lah 369: 111 Ind Cas 145.

——S. 115 — An order superseding an arbitration is a final order so far as the parties to the case are concerned. Therefore, when such an order is passed by a Small Cause Court Judge, the High Court can revise the order. AIR 1925 All 566: Diss. from. (1927) 100 Ind Cas 429: 13 OLJ 507 (DB).

——S. 115 — No revision lies against an order superseding an award made in a pending case and directing the suit to proceed on the merits. AIR (Vol 12) 1925 All 566: 89 Ind Cas 173: 47 All 916: 23 ALJ 656: 6 LRA Civ 459 (DB).

——**S. 115 — Pending suit — No revision lies.**

No revision is maintainable from an order setting aside an award. AIR (Vol 12) 1925 All 458: 85 Ind Cas 502: 47 All 121: 6 LRA Civ 22 (DB).

(m) Supersession of.

——**S. 115 — Order superseding award as in excess of authority.**

No revision lies under Section 115, Civil P. C., against an order superseding award of arbitrators on the ground that the arbitrator had exceeded his authority. AIR (Vol 28) 1941 Nag 263: 1941 NLJ 333: ILR (1942) Nag 414: 196 Ind Cas 770.

——**S. 115, Sch. II, Para. 15 — Court setting aside award and superseding arbitration pending suit — Whether "case decided".**

No distinction can be drawn between an order superseding a reference to arbitration before the award has been delivered and after the award has been delivered. In either case, the result is that the Court begins to hear the suit in accordance with Para. 8 or Para. 15 (2) of Schedule II, Civil P. C. The Court cannot be considered to have decided a case within the meaning of Section 115, Civil P. C., where it has set aside the award and superseded the arbitration pending a suit which is consequently to be tried by the Court. No revision lies from such an order. (Overrules (1) AIR (Vol 18) 1931 All 721: 133 Ind Cas 416: (2) AIR (Vol 16) 1929 All 743: 51 All 1010: 122 Ind Cas 685). AIR (Vol 25) 1938 All 557: (1938) ALJ 813: ILR (1938) All 805: 1938 AWR 605: 177 Ind Cas 981 (FB).

——S. 115 — **Order superseding award in exercise of inherent powers.**

Where the order of the lower Court superseding the award is one made in the exercise of its inherent power, the High Court should not interfere with it in revision. AIR (Vol 23) 1936 Lah 538: 38 PLR 121: 160 Ind Cas 1052.

——S. 115 — **Order of supersession.**

Where after reference to arbitration, an application for supersession is made, the order superseding & terminating the reference amounts to an order deciding a case and is open to revision. AIR (Vol 18) 1931 Lah 318: 32 PLR 391: 133 Ind Cas 879.

5. Case.

See also Notes 4, 5 & 19.

(a) **Amendment of pleadings.**
See also Note 1-A.
(b) **Arbitration proceedings.**
See also Note 4.
(c) **Evidence.**
(d) **Ex parte decrees.**
(e) **Interlocutory order.**
(f) **Limitation.**
(g) **Meaning and scope of.**
(h) **Miscellaneous illustrations.**
(i) **Pauper suits.**
(j) **Questions of jurisdiction.**
(k) **Suit.**
See also Note 5 (g).

(a) 'Amendment of pleadings'.

See also Note 1-A.

——S. 115 — **Amendment.**

In a case where the effect of the order of the trial Court rejecting an application for amendment is to shut out a part of the plaintiff's claim, there is a case decided within the meaning of Section 115, Civil P. C., and revision lies from such an order even though the plaintiff would have a right of appeal on the question if the case is allowed to proceed to judgment. AIR (Vol 28) 1941 Nag 289: 1941 NLJ 340: ILR (1942) Nag 478: 196 Ind Cas 190.

——S. 115, O. 6, R. 17 — **Amendment of plaint refused — No revision lies.**

An order refusing to allow amendment of plaint is not "a case decided" and no revision lies against such an order. AIR (Vol 28) 1941 Oudh 87: 1940 OWN (CC) 1194: 1940 AWR (CC) 474: 191 Ind Cas 729 (DB).

——S. 115 — **Application not for amendment of facts stated in plaint but for elucidating array of parties as described in plaint by certain additions by way of explanatory notes.**

Where an application is not for the amendment of the facts stated in the plaint or of the grounds of claim formulated in it but all that is prayed is that certain additions by way of explanatory notes be made after the description of certain defendants in the plaint, the application is in fact and in substance an application to elucidate the array of the parties as described in the plaint and not an application for amendment of a pleading and the rejection of that application constitutes the decision of a case within the meaning of Section 115, Civil P. C. A revision lies against such an order. AIR (Vol 27) 1940 All 448: (1940) ALJ 445: ILR (1940) All 564: 1940 AWR (HC) 410: 191 Ind Cas 294 (DB).

——S. 115, O. 6, R. 17 — **Order refusing to allow amendment of pleading.**

No revision lies from an order refusing to allow an amendment of a pleading. Cases where the amendment comes under some other order of the Court, for example, the addition or substitution of parties, or the striking on a pleading, may amount to a case decided; but an order passed purely under O. 6, R. 17, Civil P. C., is not. AIR (Vol 23) 1936 All 686: (1936) ALJ 923: 1936 AWR (HC) 776: ILR (1937) All 17: 165 Ind Cas 1 (FB).

——S. 115 — **Refusal to allow amendment.**

The refusal to allow an amendment of the plaint is a case decided. AIR (Vol 22) 1935 All 651: 1935 AWR 613: 157 Ind Cas 112.

——S. 115 — **Order refusing application to amend plaint.**

There is a distinction between an order allowing an amendment and an order refusing an amendment. Where a plaint is amended, the amendment appears on the face of the record and the suit proceeds accordingly; but when the amendment is refused, there is a termination of a "case" and as it were, a chapter of the proceedings is closed. The plaintiff by claiming a right to amend his plaint lays a 'case" before the Court and by the Court's order of refusal, the "case" is "decided", the plaintiff being thereby barred from pursuing that portion of his claim. Refusal to allow an amendment of plaint is a 'case decided' as contemplated by Section 115, Civil P. C., and an application for revision is maintainable against it. AIR (Vol 22) 1935 All 353: (1934) ALJ 989: 4 AWR (HC) 802: 57 All 459: 153 Ind Cas 65.

——S. 115 — **Suit for specified sum — Application for amendment to make the suit one for rendition of accounts — Order granting amendment.**

The plaint in a suit, as originally filed, was one for a specified sum of money on the ground that as a result of three transactions between the plaintiff and the defendant, who was his commission agent, the sum was due to the plaintiff. After all the evidence had been recorded, and on account of some admissions made by the defendant in the course of his examination, the plaintiff made an application to amend the plaint so as to make the suit one for rendition of accounts. The amendment was allowed. On an application in revision on the ground that the Court acted irregularly in allowing the plaint to be amended after the case had been closed by the parties:

Held, that the order allowing the plaint to be amended could not be interpreted as a case decided, so as to form the basis of an application in revision under Section 115, Civil P. C. AIR (Vol 20) 1933 All 189: (1933) ALJ 27: 55 All 169: 146 Ind Cas 491.

——S. 115 — The application for leave to amend is not a case, and therefore, no revision can lie against an order refusing to grant leave to amend either under Section 25 of the Provincial Small Cause Courts Act, or under S. 115 of the Code. AIR (Vol 12) 1925 Oudh 254: 77 Ind Cas 553.

(b) Arbitration proceedings.

See also Note 4.

——S. 115 — **Revision — Competency — Lower appellate Court holding reference to arbitration to be invalid and directing case to be tried and disposed of according to law.**

Where a Munsif overruled all objections as to the validity of a reference and passed a decree in terms of the award but the lower appellate Court held the reference to be invalid and directed the case to be tried and disposed of according to law, in revision it was contended that it could not be interfered with in revision.

Held, the order of the lower appellate Court amounted to a "case decided" within the meaning of S. 115, C. P. Code, as the appeal pending before it was a case which was entirely disposed of by it finally by its order.

The lower appellate Court by deciding that there was no valid reference to arbitration and that the case should not have been referred to arbitration but that it should have been tried by the trial Court and in ordering the trial Court to try the case itself, had acted illegally in the exercise of its jurisdiction and its order was therefore revisable. AIR (V 36) 1949 A 771 : 1949 AWR 342 : 1949 ALJ 288 (DB).

——S. 115 — "Case decided" — Order under S. 16, Arbitration Act, remitting order for reconsideration — Revision — Competency.

An order under S. 16, Arbitration Act of 1940, remitting an award for reconsideration by the arbitrators does not "decide a case" within the meaning of S. 115, C. P. Code, and hence such an order, is not open to revision. Since an objection as to improper remission of the award can be taken in appeal against the order setting aside or refusing to set aside the award, a revision application under S. 115 is incompetent and would not properly lie. AIR (V 33) 1946 Sind 141 : ILR (1946) Kar 21 : 227 Ind Cas 129 (DB).

——S. 115 — Trial Court holding that there was no valid reference to arbitration — Appellate order reversing trial Court's order.

Where on an appeal from the trial Court's order that there was no valid reference, the Appellate Court reverses the trial Court's order on the ground that the reference to arbitration is valid and directs the trial Court to deal with the case under the Arbitration Act, the appellate order amounts to a "case decided" within the meaning of S. 115, Civil P. C. AIR (V 30) 1943 Pesh 8 : 205 Ind Cas 319 (DB).

——S. 115, Sch. II, Para. 3 — Judge allowing amendment adding issue against party's wishes after case is already referred to arbitration — It amounts to "case decided" — Judge deals with matter not provided by Sch. II. AIR (V 29) 1942 Sind 7 : 198 Ind Cas 847 (DB).

——S. 115 — Order awarding arbitrator's fees under Para. 13, Sch. II is a "case decided" and revision against the order is competent. AIR (V 27) 1940 Sind 190 : ILR (1940) Kar 34 : 190 Ind Cas 880 (DB).

——S. 115 — Whether an order does or does not decide a case within the meaning of S. 115, Civil P. C., must be considered in each case, and there is no anomaly in holding that an order directing an award to be filed does decide a case within the meaning of S. 115, Civil P. C., while an order setting aside an award under Para. 15 and fixing a suit for final hearing does not so decide a case. AIR (V 26) 1939 Sind 241 : ILR (1940) Kar 22 : 183 Ind Cas 724 (FB).

——S. 115 — An application under S. 19, Arbitration Act is not an interlocutory proceeding or a mere branch of a suit within the meaning of S. 115. It is a case in itself and hence an application in revision would lie. "Case" in S. 115 has wider denotation than a suit. AIR (V 23) 1936 Sind 205 : 166 Ind Cas 541 (DB).

——S. 115 — On a reference being made to an arbitrator whom the Court had no power to appoint "a case" should be considered to have been decided within the meaning of S. 115, so as to empower the High Court to interfere in revision. AIR (V 18) 1931 All 761 : 53 All 778 : (1931) ALJ 682 : 137 Ind Cas 514 (DB).

(c) Evidence.

——S. 115 — Decision in pending case that certain evidence is admissible.

The word "case" in S. 115 of the Civil P. C., must be understood in its broadest and most ordinary sense, but even so a decision in a pending case that certain evidence is admissible does not amount to a case which has been decided:

Held, that even if a case has been decided, the trial Court had committed no illegality or material irregularity and High Court had no power to interfere. (1936) 160 Ind Cas 519 (1) : 18 NLJ 132.

——S. 115 — Order refusing to receive documentary evidence.

An order of refusal to receive documentary evidence cannot be construed to be a decision of a case within the meaning of S. 115. AIR (V 20) 1933 Oudh 345 (1) : 10 OWN 637 : 145 Ind Cas 810 (1) (DB).

——S. 115 — The order of Court overruling the contention that according to the law governing the parties an oral will is not valid, and directing the parties to produce evidence with respect to the oral will is not tantamount to the decision of a "case" and cannot be revised under S. 115. AIR (V 17) 1930 Lah 448.

(d) Ex parte decrees.

——S. 115 — Order under O. 9, R. 13.

Order setting aside ex parte decision under O. 9, R. 13, amounts to a "case decided". AIR (V 25) 1938 Sind 76 : 32 SLR 703 : 174 Ind Cas 572 (DB).

——S. 115 — Proceeding consequent on an application for setting aside a decree ex parte are not a mere branch of a suit, but since they involve the reversal of a final order and decree in a suit, they are in themselves a case. AIR (V 13) 1926 Lah 379 : 95 Ind Cas 124 : 7 Lah 161 : 8 LLJ 267 : 27 PLR 321.

——S. 115 — When an ex parte decree is passed, the suit terminated, and it remains terminated until the proceedings on the application to set aside the decree come to an end. There is no suit pending, either when the application is presented, or when the order disposing of it is passed, and the proceedings, since they involve the reversal of a final order and decree, are themselves a case. AIR (V 13) 1926 Lah 344 : 94 Ind Cas 117 : 8 LLJ 170 : 27 PLR 710.

——S. 115 — The High Court can interfere in revision with an appellate order directing the setting aside of a decree ex parte as the order is a 'case' within S. 115 and not a mere interlocutory order. AIR (V 12) 1925 All 610 : 24 ALJ 56 : 48 All 175 : 6 LRA (Civ.) 601 : 90 Ind Cas 180 (FB).

(e) Interlocutory order.

——S. 115 — "Case decided" — Interlocutory orders — Revision — Order improperly holding document forming basis of suit inadmissible in evidence and excluding same from evidence on record — Revision — Interference.

The word "case" in S. 115 does not mean the whole case always. Any state of facts juridically considered would be a "case"; it would include a decision on any substantial question in controversy between the parties affecting their rights, even though such order be passed in the course of the trial of the suit. An interlocutory order deciding a question of that kind as distinguished from a purely formal and incidental order is a "case decided", and would be subject to revision if the other conditions of S. 115 are satisfied and the order has resulted or is likely to result in such gross injustice or irreparable injury as cannot be remedied otherwise than by the exercise of the

extraordinary jurisdiction of the High Court at that stage.

Where the lower Court improperly holds a document or an instrument, which is the very basis of the suit, to be inadmissible in evidence and thus prevents it from coming in evidence on record, such an order is revisable under S. 115, C. P. Code; if the order is not interfered with, it is likely to result in gross injustice to the plaintiff. AIR (V 38) 1951 Ajmer 72.

——**S. 115 — "Case decided" — Interlocutory orders — Revision — Competency — Order refusing amendment of written statement.**

It cannot be laid down as an invariable rule that no application in revision will lie against any interlocutory order. Each order has to be looked at from the point of view as to whether it is a "case decided" within the meaning of S. 115, C. P. Code. "Case" is not an exact equivalent of a "suit". It is something wider, but not wide enough to include every order passed by a Court during the pendency of a suit. An order refusing to amend a written statement cannot be a "case decided" within the meaning of S. 115, C. P. Code. AIR (V 33) 1946 Sind 36 : ILR (1945) Kar 347 : 221 Ind Cas 641 (DB)

——**S. 115 — "Case decided" — Interlocutory order — Revision — Interference — Rule — Ends of justice.**

The High Court is no doubt ordinarily unwilling to interfere in revision with interlocutory orders, but where the exercise of, or failure to exercise, jurisdiction results or is likely to result in gross injustice or irreparable injury, interference becomes necessary for the ends of justice. AIR (V 37) 1950 MB 24.

——S. 115 — The expression 'case which has been decided' in S. 115, is wide enough to include an interlocutory order. AIR (V 26) 1939 Rang 92 : 181 Ind Cas 527.

——**S. 115 — Tests — Order giving no finality but keeping the suit alive — Whether interlocutory order.**

Per Aston, A. J. C. — The words 'case decided' in S. 115, Civil P. C., cover a decision of a Court of first appeal and since the law regards the substance rather than the letter or form, an order in appeal, whatever its form, which revived a dismissed suit and 'ipso facto' disposed of the appeal and left the Appeal Court 'functus officio', would not be interlocutory order for the purpose of S. 115, Civil P. C. The test whether there is a right of appeal is, under which provision of the Civil P. C. the Court passed or purported to pass or intended to pass the order complained of. A decision of a Court of appeal on an appeal from a decree of a lower Court dismissing a suit, is in a very different category from an order by a Court on some application incidental to its judgment. It is a case decided within the meaning of S. 115, Civil P. C. AIR (V 20) 1933 Sind 279 : 27 SLR 341 : 146 Ind Cas 777 (FB).

——**S. 115, O. 20, R. 12 — Interlocutory order under O. 20, R. 12.**

In order to entitle a party to invoke the aid of revisional jurisdiction of the High Court, it is necessary for him to show that there is a 'case' which has been decided by the lower Court. The term 'case' is of much wider amplitude than a suit. An order under O. 20, R. 12, deciding a question of a claim for mesne profits is not a 'case' within the meaning of S. 115. AIR (V 19) 1932 Oudh 271 : 9 OWN 339 : 138 Ind Cas 30 (DB).

——S. 115 — The word 'case' is wide enough to include any interlocutory order and even though there may be an appeal from the final decree, that consideration will not prevent (in a proper case) interference in revision. AIR (V 18) 1931 Rang 131 : 9 Rang 92 : 132 Ind Cas 707.

——**S. 115 — "Case decided" — Interlocutory order — Meaning.**

Interlocutory orders which do not finally dispose of the case may form the subject of revision if the matter they relate to, stands by itself and failure of justice is apprehended if the order be not revised. (1910) 72 PWR 1910 : 6 Ind Cas 939 (DB).

(f) Limitation.

——S. 115 — Where a Court passes an order holding that the plaintiff's suit is time-barred in respect of certain reliefs, the order is a "case decided" to that extent. AIR (V 25) 1938 Lah 507 : 178 Ind Cas 799.

——**S. 115 — Trial Court dismissing suit as time-barred — Order set aside in appeal and case remanded for evidence as to possession.**

Where the trial Court dismisses the suit as time-barred but the Appellate Court setting aside the order as to limitation re-opens the case and remands it for evidence as to possession, the case cannot be called a 'case decided' and no revision is maintainable. AIR (V 24) 1937 Pesh 21 : 1937 Pesh LJ 21: 167 Ind Cas 924.

(g) Meaning and scope of.

——**S. 115 — Case decided — Meaning.**

It is not possible to involve a clear, hard and fast line between orders which do not amount to the decision of a "case" and orders which do amount to the decision of a "case". The word "case" would seem to be wide enough to cover decisions on any matter in controversy affecting the rights of the parties to a suit. In this view interlocutory orders would be covered by the words "case decided". AIR (Vol 38) 1951 Ajmer 90: 1949 AM LJ 9.

——**S. 115 — Case decided — Meaning.**

The word 'case' in case decided in S. 115, C. P. Code, should be construed to be wide enough to include the decision on any substantial question in controversy between the parties affecting their rights even though such order is passed in the course of the trial of the suit. AIR (Vol 37) 1950 Raj 31 (DB).

——**S. 115 — Scope.**

'Case' in S. 115 has to be interpreted in a very large and comprehensive sense to include any cause which has been judicially decided. AIR (Vol 33) 1946 Nag 5: 1945 NLJ 526: ILR (1945) Nag 634.

——**S. 115 — Word 'case' in S. 115 — Meaning and scope of.**

It is impossible to lay down any exhaustive and complete definition of the word 'case'. The word 'case' is certainly not an exact equivalent of the word 'suit'. It is something wider. It may not at the same time be so wide as to include every order that is passed by a Court during the trial of a suit or proceeding pending before it. It is not correct to lay down as a general rule that no application in revision will lie against any interlocutory order. Each kind of interlocutory order must be looked at from the point of view as to whether it is a 'case decided' within the meaning of S. 115 or not. An order refusing the application to amend a written statement cannot be a 'case decided' within the meaning of S. 115. AIR (Vol 33) 1946 Sind 36: ILR (1945) Kar 347: 221 Ind Cas 641 (DB).

——**S. 115 — Scope.**

The word "case" is of a greater amplitude than the word "suit" and would include proceed-

ings under the Guardians and Wards Act, Prov. Insol. Act, Religious Endowments Act and Succession Act, etc. AIR (Vol 26) 1939 Oudh 238: 1939 OWN (CC) 716: 1939 AWR (CC) 101: 183 Ind Cas 378 (DB).

——S. 115 — **Decision under O. 22, R. 5.**

The plaintiff died during the pendency of a suit and two parties applied to be brought on record as his legal representatives. The Court decided under O. 22, R. 5, in favour of one party:

Held, that these proceedings, so far as the other party was concerned, did not arise in the suit itself and were therefore, not subsidiary proceedings. They were rather collateral proceedings, and were final 'qua' them and amounted to "case decided" within S. 115, and an order passed therein was open to revision. AIR (Vol 22) 1935 Lah 934: 160 Ind Cas 185.

——S. 115 — Per Sulaiman, C. J. — It is not possible to lay down any complete and exhaustive definition of the word "case". The word "case" is not an exact equivalent of the word "suit"; it is something wider. At the same time, it is not so wide as to include every order that is passed by a Court during the trial of a suit or proceeding pending before it. It cannot be a case unless it is a proceeding which can be regarded as something separate and in a sense independent from the suit under hearing, and the termination of that proceeding should be somewhat different from mere orders passed in the ordinary trial of the suit itself. Ordinarily speaking, orders passed by the same Court from time to time during the trial of a suit would not be regarded as so many separate cases decided by the Court, each of them being revisable under S. 115, Civil P. C. But where the case is a proceeding which can be considered separate and distinct and is finally disposed of by an order which terminates it, it may well be considered to be a case decided although the suit has not in one sense been completely disposed of. AIR (Vol 21) 1934 All 620: (1934) ALJ 381: 57 A 17: 3 AWR (HC) 677: 149 Ind Cas 1183 (FB).

——S. 115 — Where a case in which the revisional jurisdiction of the High Court is invoked, happens to be a suit, then the 'suit' is also a 'case' referred to in S. 115, which requires to be decided before the record is called for and it is impossible for a case to be part of a suit, the suit being the unit for the purpose of S. 115. AIR (Vol 20) 1933 Lah 692: 14 Lah 715: 34 PLR 651: 143 Ind Cas 309 (DB).

——S. 115 — **Plaintiff definitely debarred from proving part of his claim, if 'case decided'.**

Where the effect of the order of the Court below is definitely to debar the plaintiff from proving a part of his claim, that is a final decision of the Court on that part of the case, and it can be brought within the meaning of the words 'case decided' under S. 115. Consequently, an application for revision against that order is competent. AIR (Vol 20) 1933 All 374: (1933) ALJ 268: 55 All 256: 145 Ind Cas 859.

——S. 115 — In a suit against a firm an order refusing permission to a partner to file a written statement to resist the claim was passed. Held, that as the order passed was not appealable and the partner would have right of appeal from decree which would be passed against the firm in his absence the case is a "case decided" within S. 115. AIR (Vol 17) 1930 All 701: (1930) ALJ 1212.

——S. 115 — The use of the word "cases" instead of "suit" in S. 115 shows that the section contemplates legal proceedings which are not suits in the strict sense but which are governed by the provisions of the C. P. Code. AIR (Vol 17) 1930 Cal 744.

——S. 115 — **Explained — Order superseding arbitration is revisable.**

The word "case" does not necessarily mean suit but can mean a proceeding. If any proceeding in a suit has terminated, it is a case decided within the meaning of S. 115, although the suit itself has not been finally disposed of. Thus the order superseding the reference to arbitration on an application made for the purpose amounts to an order deciding a case and as no appeal lies from it, it is open to revision. 1929 ALJ 918: 51 All 1010: AIR (Vol 16) 1929 All 743 (DB).

——S. 115 — **Case stayed under S. 10 — Resumption.**

An order by which proceedings are resumed in a suit which had been stayed under S. 10, Civil P. C. is a "case decided" within the meaning of S. 115, Civil P. C. AIR (Vol 15) 1928 Oudh 355: 3 Luck 650 (FB).

——S. 115 — No revision lies from an order of remand by lower appellate Court as there is no case decided. AIR (Vol 10) 1923 Bom 401: 75 Ind Cas 102: 25 Bom LR 452

——S. 115 — An order of remand is not an interlocutory order as it entirely disposes of the case so far as the Court passes it for the time being. AIR (Vol 10) 1923 Oudh 177: 73 Ind Cas 591: 26 OC 10: 10 OLJ 36.

——S. 115 — Where a judge has delivered judgment and all that remains is his preparation of a formal decree, the case must be deemed to have been decided and if an appeal lies against this decree, the High Court will not interfere in revision under S. 115 C. P. C. even though a remedy by way of an appeal may be a most expensive proceeding. AIR (Vol 2) 1915 All 171: 13 ALJ 435: 29 Ind Cas 176.

——S. 115 — The word "case" in S. 115 is a word of wider import than such words as "suit" or "appeal". AIR (Vol 2) 1915 Bom 269: 17 Bom LR 1097: 33 Ind Cas 358: 40 Bom 86 (DB).

——S. 115 — **Case decided — Illegal action.**

The word "case" in section 115 must be understood in its broadest and most ordinary sense. Where a Court improperly orders an amendment of the plaint or permits joinder of defendants, it is a case of illegal action under section 115 (C). (1911) 7 NLR 130: 12 Ind Cas 357.

——S. 115 — "Case" does not only mean proceedings ending in a decree, but it has a wider meaning. (1910) 32 All 23: 7 ALJ 741: 6 Ind Cas 831 (DB).

(h) Miscellaneous Illustrations.

——S. 115 — **"Case decided" — Suit for account — Preliminary decree — Application for final decree — Dismissal for default — Order refusing to restore an application by plaintiff — Revision.**

An order rejecting an application for restoration of an application for a final decree in a suit for account dismissed for default is a 'case decided' and is open to revision under S. 115, C. P. Code, when there has been an irregularity in the exercise of jurisdiction. ILR (1950) All 65 (DB).

——S. 115 — **Case decided — Order on review application.**

The proceeding relating to the application for review is a separate proceeding and as such, when the Court decides that application one way or the other, it amounts to a case decided and a revision would be competent. ILR (1950) All 18 (DB).

——S. 115 — "Case decided" — Order of District Judge fixing remuneration for an auditor under the Guardians and Wards Act proceeding.

During the course of Guardians and Wards Act proceedings an auditor was appointed and the District Judge fixed certain remuneration for him according to his interpretation of High Court Rules. On a question whether his order was open to revision under S. 115, C. P. Code,

Held, Mathur J.: In the peculiar circumstances of the case, it could not be said that the order was not a case decided and that it did not come within the mischief of S. 115.

Sinha, J.: It cannot be said that the order in question is not a judicial order. Unless there is something in the Act "expressly or impliedly ousting its jurisdiction", the High Court has a right to review the order of the District Judge. To hold that the High Court has no jurisdiction to interfere with such an order is to deprive the High Court of the power which the legislature has allowed it, to redress an obvious wrong in certain cases. AIR (Vol 36) 1949 All 117: 1947 ALJ 675: 1948 OWN 57: 1948 ALW 54 (DB).

——S. 115 — Case decided — Order by District Judge on objection by Chief Inspector of Stamps as to insufficiency of Court-fee paid.

The amendments introduced into the Court-Fees Act by Ss. 6-A and 6-B have fundamentally altered the rights of parties in regard to an order as to court-fees. In view of this, an order of District Judge passed on an objection taken by the Chief Inspector of Stamps as to the insufficiency of court-fee paid in the trial Court, has to be held to amount to a 'case decided' within the meaning of S. 115, C. P. Code and liable to be revised by the High Court. ILR (1947) All 433: 1947 AWR (HC) 94: 1947 ALJ 99: AIR (Vol 34) 1947 A 340.

——S. 115 — Substitution of legal representatives — "Case decided" — Test.

In order that a proceeding may be regarded as a 'case decided' it must be shown that it is a proceeding independent of the suit and entirely dissociated from it. A proceeding relating to substitution of a legal representative in place of deceased plaintiff is a proceeding in the suit, and a suit cannot be proceeded with unless a legal representative is substituted to carry on the suit. Hence the proceeding in substitution is not a case decided within the meaning of S. 115. AIR (Vol 34) 1947 Oudh 44: 1946 OACC 206: 1946 All WR CC 206: 1946 OWN CC 301: 226 Ind Cas 439 (DB).

——S. 115 — "Case decided" — Order on application for examination of witness on commission.

An order that a commission shall or shall not issue or that 'viva voce' cross-examination of a witness on commission cannot be permitted is not a "case decided" within the meaning of S. 115, C. P. Code. The aggrieved party has however a remedy by invoking the inherent powers of the Court under S. 151, C. P. Code. AIR (Vol 33) 1946 Sind 30: ILR (1945) Kar 351: 223 Ind Cas 281 (DB).

——S. 115 — Refusal to review order.

Refusal of the District Judge to review his order in appeal confirming the order of the Civil Judge directing the application under U. P. Agri. Relief Act amounts to a "case decided" and can be revised. AIR (Vol 32) 1945 All 377 ILR (1945) All 394: (1945) ALJ 185 (DB)

——S. 115 — Order under S. 15, Payment of Wages Act.

District Court passing an order under S. 15, payment of Wages Act. 1936, decides a 'case' within the meaning of S. 115. AIR (Vol 32) 1945 Nag 244 ILR (1945) Nag 587 : 1945 NLJ 281

——S. 115, O. 32, R. 15—Order dismissing application for appointment of guardian ad litem — Not revisable.

An order dismissing an application for the appointment of a guardian ad litem under O. 32, R. 15 does not amount to a case decided & the order is not revisable. AIR (Vol 32) 1945 Oudh 255 : 1945 AWR (C C)140 : 1946 OWN (C C) 205 : 20 Luck 454 (DB)

——S. 115 — Order staying suit under Soldiers (Litigation) Act.

The order deciding the question of staying the suit under the Soldiers (Litigation) Act is "case decided". AIR (Vol 31) 1944 Pesh 1: 1944 Pesh LJ 1: 211 Ind Cas 313.

——S. 115 — Final decision.

An order of a Court dismissing an application under S. 19, Mad. Agr. Relief Act, although consequent on the withdrawal by the petitioner, is nonetheless a decision within the meaning of S. 115 as it disposes of the application finally. AIR (Vol 30) 1943 Mad 617: (1943) 2 MLJ 31: 214 Ind Cas 282 (DB).

——S. 115 — Order under S. 33, Stamp Act.

An order impounding a document and forwarding it to the Collector for necessary action under the Stamp Act is a case decided within the meaning of S. 115, Civil P. C. inasmuch as the matter which was disputed between the parties 'qua' this aspect of the case relating to the duty liable on the document has so far as the parties are concerned, been finally set at rest and no stage will ever arise later at which the order impounding the document would be liable to be attacked. Hence the order is open to revision.

The fact that the proceedings are being taken in the Court of the Collector pursuant to the order made by the trial Court forwarding the document to him does not deprive the High Court of jurisdiction to go into the matter, inasmuch as, so far as S. 38, sub-s. (2), Stamp Act, is concerned, the Collector derives his jurisdiction only from the order which has been made within the Act and if an order is made which is 'ultra vires', even the Collector's jurisdiction is not being properly exercised. It is important, therefore, for the High Court in revision to determine whether the Civil Court had any authority to impound the document under S. 33, Stamp Act, and if so, whether there was any deficiency in the stamp. AIR (Vol 29) 1942 Lah 265: 44 PLR 188: 203 Ind Cas 7.

——S. 115 — Order refusing to recast certain issue so as to remove burden of proof placed on party, if revisable.

An order passed by the trial Court rejecting an application of the plaintiff to so recast a certain issue framed in the case, as to remove the burden of proof alleged to be wrongly placed upon him holding that the onus was rightly placed upon the plaintiff, is not revisable under S. 115, Civil P. C., as the order does not decide a case within the meaning of S. 115. AIR (Vol 29) 1942 Oudh 431: 1942 AWR (CC) 256 (1): 1942 OWN (CC) 377: 201 Ind Cas 277 (DB).

——S. 115 — O. 1, Rr. 8, 10 — Application to be made party granted — Whether 'case decided' — Order, if open to revision.

There is a distinction between a case where a person applies to a Court to be made a party and his application is refused, and a case where the application is granted. When the application is refused, a case is decided so far as that party is concerned, but not so when he is made

a party. Where an application was presumably made under O. 1, R. 8 (2), Civil P. C., the order granting the application is not open to revision. AIR (Vol 29) 1942 Oudh 340: 1942 OWN (CC) 245: 1942 AWR (CC) 193: 200 Ind Cas 259 (DB).

——Ss. 115, 151 — Remand order under inherent powers.

The Appellate Court while remanding the case under its inherent powers, did not in any way dispose of the suit; it left the suit as it was before the decision of the trial Court, and it did not decide any point in the suit itself:

Held, that although the appeal was decided and the proceedings completed so far as it was concerned, the order of remand did not amount to "case decided" within the meaning of S. 115, Civil P. C., and was not revisable. AIR (Vol 29) 1942 Oudh 334: 1942 OWN (CC) 236: 1942 AWR (CC) 171: 200 Ind Cas 256.

——S. 115 — Application for removal of mutawalli dismissed as non-maintainable — Review application — Previous order set aside and further proceecedings ordered — Revision, held maintainable against order in review — There was, held case decided and order was not interlocutory — Court, held had no jurisdiction to make such order.

On an application for the removal of a 'mutwalli' of a 'wakf' which was partly public and partly private, the District Judge held that the application did not lie and that the 'mutwalli' could be removed only in a proceeding under S. 92, Civil P. C., it being implied in his judgment that the trust was of a public nature. The application was accordingly dismissed. Upon an application for review, the District Judge held that the previous view taken by him was wrong, accepted the review application and set aside his previous order dismissing the original application. Upon an application for revision:

Held, that the District Judge had no jurisdiction to pass the order on review application and the order in review could be challenged in revision under S. 115, Civil P. C. The original proceedings had terminated and were revived by the order which was challenged in revision. There was, therefore, a 'case decided' by this order. An order of this kind, reviving proceedings which had definitely terminated, could not be described as an interlocutory order. AIR (Vol 29) 1942 Oudh 210: 1941 OWN (CC) 1361: 1942 AWR (CC) 11: 18 Luck 48: 200 Ind Cas 142.

——S. 115 — Partition suit — Order appointing Amin to prepare quras and to report in detail all points involved in case.

An order passed in a partition suit appointing an 'Amin' to prepare 'quras' and to make a detailed report on all the points involved in the case, is not 'case decided' within the meaning of S. 115, and consequently, there is no jurisdiction to interfere in revision. It may be a wrong or improper order but the applicant has his remedy against that order by way of appeal from the decree passed subsequently. AIR (Vol 28) 1941 All 50: (1940) ALJ 818: 1940 AWR (HC) 637: ILR (1941) All 132: 192 Ind Cas 883.

——Ss. 115, 105 — Order setting aside dismissal of case for default — Revision, if lies.

Under S. 105 (1), Civil P. C. the propriety of the order setting aside the dismissal of a case for default of the plaintiff cannot be set forth as a ground of objection in the memorandum of appeal from the decree ultimately passed in the suit, and hence where an order sets aside the dismissal for default and restores the case, there is a case decided within the meaning of S. 115 and an application in revision lies against the order restoring the case. (AIR (Vol 20) 1933 Oudh 331: 10 OWN 1316: 143 Ind Cas 221, Overruled.) AIR (Vol 28) 1941 Oudh 367: 1940 OWN (CC) 678: 1941 AWR(CC) 170: 194 Ind Cas 354 (DB).

——S. 115 — Dismissal application under S. 7, U. P. Encumbered Estates Act.

Dismissal of application under S. 7, U. P. Encumbered Estates Act is the termination of a proceeding and comes within the purview of the words "case decided". AIR (Vol 27) 1940 All 387: (1940) ALJ 351: 1940 RD 347: 1940 AWR (HC) 364: ILR (1940) All 499: 190 Ind Cas 504 (DB).

——Ss. 115, 10 — Trial which ought to have been stayed under U. P. Encumbered Estates Act not stayed — Order, if revisable.

An order allowing continuation of the trial of a suit which had been stayed and which ought to have remained stayed under S. 10 of the Civil P. C. is a "decided case" within the meaning of S. 115 of the Code and is capable of being revised by the High Court.

Section 115 of the Civil P. C. gives the Chief Court a discretion to make such order in the case as it thinks fit where it is of opinion that the subordinate Court has acted in the exercise of its jurisdiction illegally or with material irregularity. Where an ordinary Civil Court finds that its jurisdiction to proceed with the trial of a suit is temporarily ousted by the provisions of the Encum. Estates Act, and it elects nonetheless to proceed with the hearing of the suit, it acts with material irregularity; and it cannot be said that when the Court passes such an order, it is any the less a case decided because the decision is not with reference to S. 10 but with reference to the provisions of the Encum. Estates Act. AIR (Vol 27) 1940 Oudh 342: 1940 OWN (CC) 610: 1940 RD 314: 15 Luck 641: 1940 AWR (CC) 284: 187 Ind Cas 835.

——S. 115 — Stranger to proceedings applying for stay of execution — Court refusing stay.

The proceedings which begin with an application for stay by a person not a party to the suit and not originally a party to the execution proceedings and which terminate with an order of refusal has the character of a case complete in itself and an order which is passed upon that application is an order passed in a "case decided" within the meaning of S. 115, Civil P. C. AIR (Vol 24) 1937 All 658: (1937) ALJ 877: 1937 RD 498: 1937 AWR 778: 172 Ind Cas 285 (DB).

——S. 115 — Issues framed — To one of them a note in effect rejecting the plaint to the extent of interest as not showing cause of action, appended, — Note did not amount to rejection of plaint and hence did not give rise to appeal — The note having decided the claim so far as interest was concerned, amounted to "case decided" within the meaning of S. 115 and was open to revision — On merits, it was impossible to maintain the order of the Court. AIR (Vol 23) 1936 Lah 1021: 39 PLR 299: 167 Ind Cas 376 (DB).

——S. 115 — Order of restoration under O. 9, R. 13 and order rejecting to grant the review of the same constitute a 'case'. AIR (Vol 23) 1936 Lah 618: 161 Ind Cas 212.

——S. 115 — Decision that application is maintainable — Quaere.

Whether a decision that an application is maintainable can be called 'case decided' within the meaning of S. 115. AIR (Vol 23) 1936 Nag 280: ILR (1937) Nag 428: 167 Ind Cas 122.

——S. 115 — Order merely framing issue and remitting it for decision of trial Court.

Where an order merely frames an issue and remits the issue for decision by the trial Court, the order cannot be construed as an order deciding the case and hence it cannot be interfered with by way of revision. AIR (Vol 22) 1935 Oudh 333: 1935 OWN (CC) 352: 154 Ind Cas 676 (DB).

——S. 115, O. 39, Rr. 1, 2 — Proceedings for temporary injunction.

The proceedings for a temporary injunction taken under O. 39 must be deemed to be "a case" within the meaning of S. 115, and open to revision as they do not directly affect the ultimate decision of the suit one way or the other. AIR (Vol 20) 1933 Lah 1046: 149 Ind Cas 1064 (DB).

——S. 115 — Order setting aside decree passed in defiance of O. 9, R. 13 — Order amounts to "case decided" and High Court can interfere in revision. AIR (Vol 9) 1922 All 441: 66 Ind Cas 509 overruled. AIR (Vol 18) 1931 All 294: 53 All 612: (1931) ALJ 377: 133 Ind Cas 129 (FB).

——S. 115 — Order refusing permission to file.

In a suit against a firm an order refusing permission to a partner to file a written statement to resist the claim was passed.

Held: that as the order passed was not appealable and the partner would have no right of appeal from decree which would be passed against the firm in his absence, the case is "case decided" within S. 115. 1930 ALJ 1212: AIR (Vol 17) 1930 All 701.

——S. 115 — Where the original Court decides that it has no jurisdiction and sends the suit to District Judge for transfer and the District Judge passes an illegal order for transfer, there is a case decided and revision lies. AIR (Vol 17) 1930 Lah 195.

——S. 115 — The question as to whether a particular person should or should not be the next friend is really ancillary to the suit itself and, it is a case finally decided qua that particular proceeding. It stands on the same footing as giving or refusing leave to sue as a pauper, and therefore, under S. 115 High Court has power to interfere. AIR (Vol 16) 1929 Lah 257: 30 PLR 17: 11 LLJ 130: 113 Ind Cas 901 (DB).

——S. 115 — The order of refusal to issue a commission does not appear to be a case decided within the meaning of S. 115, C. P. Code. AIR (Vol 16) 1929 Sind 92: 23 SLR 403: 116 Ind Cas 97 (DB).

——S. 115 — Any orders, on matters, arising incidentally in the course of the hearing, the object of which is to bring on the record or to exclude from it materials upon which the decision is to be based are not by themselves decisions in a case which can be revised until the case is finally concluded: A Munsif passed an order in a suit that certain issues must be argued and decided before evidence was heard on the other issues. His successor held that it was necessary to hear the full case on the merits before pronouncing judgment and passed an order to that effect.

Held, that the order did not amount to a decision of a case within S. 115. AIR (Vol 13) 1926 Oudh 185: 89 Ind Cas 772.

——S. 115 — Order for transfer is decision of a case within the section and is revisable. AIR (Vol 12) 1925 Lah 189: 78 Ind Cas 614.

——S. 115 — Plaintiff sued for possession of certain properties; part of them under proprietary interest and part occupancy interest in different plots of land. The first Court granted a decree, but the appellate Court was of opinion that a suit for the recovery of occupancy land, even from strangers who are not landlords did not lie in the Civil Court. It thereupon passed an order that the plaintiff should strike out from her plaint her claim for possession of the occupancy lands.

Held, that the order of the lower Court amounted to an order in a case because it finally settled the matter whether a suit for the possession of occupancy land did lie in the Civil Court or not & that the Judge had no jurisdiction to pass the order which he did because such an order was not necessary for the ends of justice to prevent any abuse of the process of the Court. AIR (Vol 12) 1925 Oudh 604: 85 Ind Cas 703.

——S. 115 — Charitable and Religious Trusts Act (XIV of 1920), S. 10.

An order asking defendant to deposit money in Court under S. 10 of Act (XIV of 1920) is a 'case' within S. 115 and revision lies. AIR (Vol 11) 1924 Lah 408: 69 Ind Cas 658.

——S. 115 — An incidental order fixing the remuneration of a Commissioner appointed to examine accounts does not amount to the decision of an case. AIR (Vol 11) 1924 Oudh 348: 76 Ind Cas 503 (DB).

——S. 115 — The order of the Court refusing to adjourn the case for enabling the defendant to pay court-fee fixed on his counter-claim is not revisable, no case having been decided. AIR (Vol 10) 1923 All 118: 20 ALJ 1005: 45 All 218: 4 LRA Civ 40: 69 Ind Cas 921 (DB).

——S. 115 — Case decided — Guardian and Wards Act, S. 34 — Order under Revision.

Orders under S. 34 of the Guardian and Wards Act are open to revision by the High Court. AIR (Vol 10) 1923 Lah 89: 55 Ind Cas 587.

——S. 115 — A mere direction that the defendant should sign the pleas and verify them according to law would probably not be open to revision but when that direction is accompanied by an order that the defendant, is to pay a certain sum as costs the order is a decision of a case with which the High Court can interfere in revision. (1921) 64 Ind Cas 207 (Lah).

——S. 115 — Case decided — Proceedings under the Legal Practitioner's Act — No power to revise.

The High Court cannot in its revisional jurisdiction interfere under S. 115 with an order under S. 36, Legal Practitioner's Act. The enquiry under the Legal Practitioner's Act is in the nature of a departmental inquiry & it may be conducted in such a way that the officer inquiring, acts with substantial justice and gives the person. against whom the proceedings are being taken, an opportunity to defend himself. AIR (Vol 7) 1920 Sind 70: 13 SLR 212: 56 Ind Cas 433 (DB).

——S. 115 — "Case decided" — Meaning of — Order under S. 10 of the Rel. End. Act — Revision — Powers of interference.

If the remaining members of a temple committee have been ordered by the Civil Court to forthwith fill up a vacancy in their body under S. 10 of Act XX of 1863 on their failure to hold an election within three months, the Civil Court has thereafter no jurisdiction to make an order declaring valid an appointment made on election by the persons interested. If it does so, the order is open to revision under S. 115, C. P. C. A. proceeding of the Civil Court under S. 10 of Act XX of 1863 is a judicial and not merely an administrative or ministerial Act. In such matters the Civil Court exercises its powers as a Court of law not merely as a 'Persona Designata' whose determinations are not to be treated as judgments of a legal tribunal. S. 115, C. P. C., applies to jurisdiction alone, the irregular exercise, or non-exercise of it or the illegal assumption of it; it is not directed against conclusions of law or fact in which jurisdiction is not involved. "Case" is not

defined in the Code. It cannot be confined to litigation in which there is a plaintiff who seeks to obtain a particular relief against a deft. before the Court but includes an 'ex parte' application praying that persons in the position of trustees or officials should perform their trust or discharge their judicial duties. AIR (Vol 4) 1917 PC 71: 40 Mad 793: 44 IA 261: 15 ALJ 645: 2 Pat LW 101: 33 MLJ 69: 26 CLJ 143: 19 Bom LR 715: (1917) MWN 628: 6 LW 501: 22 CWN 50: 11 Bur LT 48: 40 Ind Cas 650.

——Ss. 115 and 104, Cl. (1) — Appeal — Case decided in which no appeal lies.

An order passed under S. 104, Cl. (1) is a "case decided in which no appeal lies" within S. 115, and is therefore open to revision. AIR (Vol 2) 1915 Bom 269: 40 Bom 86: 17 Bom LR 1097: 33 Ind Cas 358 (DB).

——S. 115 — Case decided — Summary dismissal of appeal.

Order dismissing an appeal summarily is a decree and is open to revision by High Court, if there is no second appeal provided for. (1913) 36 Mad 128: 10 MLT 261: 21 MLJ 887: (1911) 2 MWN 237: 12 Ind Cas 73 (DB).

(i) Pauper suits.

——S. 115 — 'Case decided' — Order granting application for leave to sue in forma pauperis.

An order granting an application for leave to sue in forma pauperis is a "case decided" within the meaning of S. 115, C. P. Code and hence can be revised. AIR (Vol 35) 1948 All 244: 1948 ALW 86: ILR (1947) All 812: 1948 ALJ 43 (FB).

——S. 115, O. 44, R. 1; O. 33, R. 5 — Leave to appeal in forma pauperis.

An order rejecting or granting an application for leave to appeal in forma pauperis is not an interlocutory order but amounts to a "case decided" within the meaning of S. 115, Civil P. C. and is, therefore, open to revision. AIR (Vol 29) 1942 Oudh 240: 1942 OWN (CC) 106: 1942 RD 181: 1942 AWR (CC) 79: 17 Luck 628: 199 Ind Cas 614.

——S. 115 — Interlocutory order — Pauper application.

The word 'case' used in S. 115 is wide enough to include an interlocutory order and the High Court will interfere even in the case of such orders provided they otherwise fulfil the requirements of S. 115. An order, therefore, in respect of a pauper application is revisable in a suitable case whether the application is granted or rejected. [(1911) 7 NLR 49 Impliedly overruled]. AIR (Vol 25) 1938 Nag 210: ILR (1940) Nag 463: 175 Ind Cas 107.

——S. 115 and O. 33, R. 1 — Case — Leave to sue in forma pauperis.

An application for permission to sue as a pauper is in itself "a case" within S. 115 C. P. C. (1908). An order allowing or refusing an application for permission to sue as a pauper is a final order and not an interlocutory order in the suit, and therefore, open to revision. Interlocutory orders are not open to revision under S. 115. The law requires the presentation of an application to sue as a pauper by the party in person; where only one out of several petitioners presents the petition, it must be rejected as regards the rest. (1909) 12 OC 381: 4 Ind Cas 777.

(j) 'Questions of jurisdiction'.

——S. 115 — Case decided — Decision on preliminary issue of jurisdiction.

No revision lies against a decision on a preliminary issue of jurisdiction because it does not amount to a "case decided" within the meaning of S. 115, C. P. Code. AIR (Vol 37) 1950 All 205.

——S. 115 — "Case" — Meaning of — Decision on question if plaint should be rejected for want of jurisdiction — Revision.

In S. 115, C. P. Code, "case" is not synonymous with a suit when an order is passed in that suit. A case can be a part of proceedings in a suit. A decision on the question whether a plaint should be rejected for want of jurisdiction of Court, should be taken as decision of a case. A revision application against such order can be properly entertained under S. 115, C. P. Code. AIR (Vol 36) 1949 Kutch 5.

——S. 115 — "Case decided" — Order in suit for damages for breach of contract for sale of millets asking plaintiff to withdraw claim as beyond jurisdiction — Revision.

In a suit for damages for breach of contract of sale of certain goods the Munsif split up the claim into two parts, viz., one claiming refund on account of an alleged overpayment and the other claiming damages on account of an alleged failure to supply a certain portion of the goods agreed to be sold. He held that he had jurisdiction to entertain the claim for recovery of overpayment but that he had no jurisdiction to entertain the claim with regard to damages. He passed an order:— I therefore order that the plaintiffs, if they so choose, may withdraw their claim for damages within 10 days of today failing which that claim shall stand dismissed for want of jurisdiction while I shall proceed with the trial for the claim for refund of overpayments.

Held, so far as this part of the order as to the claim for damages is concerned a "case has been decided". Further if that decision is wrong, the lower Court has failed to exercise a jurisdiction vested in it by law. Accordingly a revision petition against the order is entertainable. AIR (Vol 33) 1946 All 512: ILR (1947) All 3: 1946 ALW 378: 1946 AWR (HC) 551: 225 Ind Cas 96 (DB).

——S. 115 — Case dismissed on ground of want of jurisdiction — Revision lies.

Where a suit is dismissed on the ground that the Civil Court has no jurisdiction to take cognizance of it, it amounts to a case decided within the meaning of S. 115, Civil P. C. AIR (Vol 30) 1943 Oudh 307: 1943 AWR (CC) 24: 1943 OWN 101: 19 Luck 381: 206 Ind Cas 358 (DB).

——S. 115 — Issue as to jurisdiction postponed for consideration along with other issues — Whether "case decided".

An order rejecting an application to consider the issue of jurisdiction first, without expressing any opinion as to whether the case could be disposed of on that issue, but merely postponing its consideration with other issues, is not a "case decided" within the meaning of S. 115, since nothing can be said to have been decided which affects the rights of the parties.

[The Court, held exercised a perfectly reasonable discretion in refusing to decide the additional issues, one of them being an issue as to jurisdiction, as preliminary issues when the whole of the plaintiff's evidence on the other issues had already been recorded.] AIR (Vol 30) 1943 Oudh 147: 1942 OWN (CC) 812: 204 Ind Cas 410 (DB).

——S. 115 — Question of jurisdiction raised — Before interfering with order, it must be held that there was "case decided" within meaning of S. 115 — There was held no "case decided".

Where the question raised by the applicant in revision is a question of jurisdiction, S. 115, Civil P. C., is applicable, but before the High Court can interfere with the order of the Judge on the ground that he had exercised a jurisdiction not vested in him by law, it must hold that there is a case decided within the meaning of S. 115.

An application made under Ss. 4, 5 and 30 of the U. P. Agri. Relief Act for the amendment of

the mortgage decree was dismissed for default of prosecution. An application was made under O. 9, R. 9 of the Civil P. C., for restoration, but it was dismissed. The applicant subsequently filed a fresh application for amendment. The decree-holder raised a preliminary objection that the application was barred by the provisions of O. 9, R. 9, Civil P. C., which applied to proceedings under Agriculturists Relief Act in view of S. 141, Civil P. C. The Civil Judge held that those provisions did not apply in view of the fact that a Court was required to comply with the provisions of Ss. 4 and 5 of the Agri. Relief Act "notwithstanding anything contained in the Civil P. C." On application in revision:

Held, that there was no "case decided" within the meaning of S. 115. AIR (Vol 29) 1942 Oudh 79: 1942 OWN (CC) 1138: 1941 RD 930: 1941 AWR (CC) 947: 196 Ind Cas 698 (DB).

——S. 115 — Order passed in assumption of jurisdiction not vested in Court by law is "case decided"—High Court can interfere. AIR (Vol 26) 1939 Bom 279: 41 Bom LR 490: 183 Ind Cas 556.

——S. 115 — Suit on pro-note executed by A, B, C and D — A executing it at place beyond Court's jurisdiction — Note sent to C at Lahore — Under C's instructions note delivered by B to bank in Lahore — Court at Lahore can proceed against A — Court rejecting plaint so far as A was concerned — Order is appealable and even if no appeal is competent, a revision is competent as the proceedings terminated so far as A was concerned, thus there being a "case decided". AIR (Vol 24) 1937 Lah 800: 40 PLR 134: 175 Ind Cas 153.

——S. 115 — A merchant residing at Akola who had had dealings with the defendant an adtia at Bombay sued in Akola for rendition of account and for such balance as may be found due. The trial Court found that the contract of agency took place at Bombay but that in a Pakki Adat system primarily the place for payment is where the constituent resides unless such constituent chooses to get paid in any other place and therefore, held, that the suit had been correctly laid at Akola. On revision against that decision, held that the High Court would interfere where a refusal to interfere might result in deplorable waste of public time and parties' money if they are forced to await the issue of a decree. A too narrow view of the meaning of the word 'case' in S. 115 should not be taken. AIR (Vol 11) 1924 Nag 292: 79 Ind Cas 168 (DB).

——S. 115 — Where on the objection of the defendant that the Court has no jurisdiction to entertain the suit, the Court decides it has jurisdiction, the order does not amount to a decision of a case and no revision lies against it. AIR (Vol 10) 1923 Lah 414: 5 LLJ 140: 11 PWR 1923: 71 Ind Cas 487.

——S. 115 — One of the pleas taken in defence to a certain suit was that the Court had no jurisdiction to entertain the suit which should have been filed in the Civil Court at a different place. The Munsif instead of trying all the issues raised in the case proceeded to receive evidence and hear arguments on the question of jurisdiction only. He disposed of the issue of jurisdiction against the defendants. A formal order was drawn up later on, embodying the decision of the issue. The defendants preferred an application in revision from the said order, seeking the interference of the High Court under S. 115, C. P. Code.

Held (Per Piggott, Ryves and Gokul Prasad, JJ. — Rafiq and Walsh, JJ., Dissenting) that no case had been decided within S. 115 and that no revision lay. 41 All 602, Overruled. (Legal connotation of the term 'case' elaborately discussed.) AIR (Vol 8) 1921 All 1: 43 All 564: 19 ALJ 558: 63 Ind Cas 15 (DB).

——S. 115 — An order of the Court determining the question of jurisdiction is not a decision of a case, either under S. 115 of the C. P. Code or S. 44 of the Punjab Courts Act, and is not open to revision. 41 All 602, Diss. from. AIR (Vol 8) 1921 Lah 184: 59 Ind Cas 680: 45 PLR 1921.

(k) Suit.

See also Note 5(g).

——S. 115 — **Word "case" in S. 115, meaning and scope of — Order staying suit, if revisable.**

Per Full Bench.—The word "case decided" in S. 115, Civil P. C., is wide enough to include interlocutory orders passed in a suit. An order by the Court staying a suit, proceeding before it, on receipt of a robkar from the Debt Concilation Board under S. 25, Punjab Relief of Indebtedness Act, is a case decided within the meaning of S. 115 and is, therefore, revisable by the High Court. [1. AIR (Vol 11) 1924 Lah 425: 84 Ind Cas 259: 5 Lah 288 (FB). 2. AIR (Vol 16) 1929 Lah 662: 123 Ind Cas 116. 3. AIR (Vol 17) 1930 Lah 525: 128 Ind Cas 49: 31 PLR 174. 4. AIR (Vol 20) 1933 Lah 191: 141 Ind Cas 177: 34 PLR 86, Overruled.] AIR (Vol 30) 1943 Lah 65: 45 PLR 85: ILR (1943) Lah 257: 206 Ind Cas 157 (FB).

——S. 115 — An application under S. 10, Civil P. C., for the stay of a suit, if dismissed, does not amount to a case decided so as to be open to revision under S. 115. AIR (Vol 21) 1934 All 520: (1934) ALJ 702: 4 AWR (HC) 960: 149 Ind Cas 176 (DB).

——**S. 115 — Restoring suit.**

An order restoring a suit which has been dismissed for default is a case decided within S. 115, and may be revised by the High Court. AIR (Vol 20) 1933 All 41: (1933) ALJ 4: 144 Ind Cas 141 (DB).

——S. 115 — The proceedings relating to the question of stay are separate and can be treated as a 'case' for purposes of S. 115. AIR (Vol 18) 1931 Lah 503: 132 Ind Cas 222.

——S. 115 — The word "case" is more comprehensive expression than the word "suit". Whereas all cases are not suits, every suit is at least a case. 'Case' referred to in S. 115, must be considered to be 'case' which has been decided. AIR (Vol 17) 1930 All 758 (DB).

——S. 115 — Where the Court below decides that it should proceed with a suit, it does not decide a case within the meaning of S. 115 and no revision lies. The question whether the trial of a particular suit or issue should go on or should be stayed, is no question on the merits of the case but relates to a matter of procedure. AIR (Vol 16) 1929 All 957: 1930 ALJ 235: 121 Ind Cas 97. (DB).

——S. 115 — The words "case decided by a Court" mean a matter which has been disposed of effectually by the Court and not merely for the time being. A purely ad interim order that does not effectually dispose of the matter before the Court would not be case decided. AIR (Vol 16) 1929 All 581: 1929 ALJ 911: 51 All 957: 121 Ind Cas 267 (DB).

——S. 115 — An order by which proceedings are resumed in suit which had been stayed under S. 10, is a "case decided" within the meaning of S. 115, AIR (Vol 12) 1925 Oudh 179: 5 OWN 604: 80 Ind Cas 628 (FB).

——S. 115 — No revision lies against an order refusing to stay a suit under S. 10 of the C. P. Code, there being no case decided within S. 115. AIR (Vol 11) 1924 Lah 567: 75 Ind Cas 101.

——S. 115 — Order of the lower Court staying a suit under S. 10, C. P. Code, is an interlocutory order and not a 'case' decided and no revision lies. The word 'case' does not in every case mean the whole case but may mean a particular branch of a case for which an independent remedy or a dif-

ferent procedure is proved by the Code. AIR (Vol 10) 1923 Lah 615: 73 Ind Cas 247.

——S. 115 — An application under S. 10 of the C. P. Code for the stay of a suit is not a "case", and that an order for stay passed on that application is not a decision of a case within the meaning of that word in S. 115. 60 PR 1897 (FB), Diss. from. AIR (Vol 9) 1922 Lah 54: 4 LLJ 425: 67 Ind Cas 870.

——S. 115 — "Case decided" — Interlocutory order staying suit under S. 10, C. P. C. — Revision.

An application under S. 10, C. P. C., for the stay of a suit is not a "case" and an order for stay passed on that application is not the decision of a case within S. 115 of the Code, and no revision lies from such an order. The word "case" in S. 115 is not confined to a suit but it cannot be construed to mean an interlocutory order in a suit although the order may be of such a nature that it cannot be interfered with even under S. 105 of the C. P. Code when an appeal is preferred from the final decree in the suit. AIR (Vol 7) 1920 All 197 (2): 18 ALJ 431: 58 Ind Cas 90.

——S. 115 and O. 23, R. 1 — Case decided — Withdrawal of suit.

A High Court cannot interfere under S. 115 of the C. P. C. or under the Charter Act with an order of the Lower Court allowing a suit to be withdrawn with liberty to bring a fresh suit because an order allowing a withdrawal is not a decision of a case. AIR (Vol 2) 1915 Cal 100: 41 Cal 632: 26 Ind Cas 203 (DB).

6. Conversion of appeal.

See also N. 4, N. 5, N. 19.

(a) Limitation.
(b) Practice.
(c) Principles of.
(d) Questions of jurisdiction.
(e) Revision petition converted to Appeal.
(f) Small cause suits.

(a) Limitation.

——S. 115 — A petition for revision which is not competent can be treated as a memorandum of appeal provided the petition for revision was presented within 90 days of the order. AIR (Vol 29) 1942 Lah 64: 43 PLR 710: 199 Ind Cas 298.

——S. 115 — Power of Court in revision should not be utilized in order to entertain an appeal where an appeal has been expressly prohibited by the Code or where it has been barred by law of limitation. Hence where no appeal lies from order refusing revision in interlocutory proceedings, the application cannot be treated as revision. AIR (Vol 22) 1935 Pat 177: 2 BR 455: 17 PLT 475: 162 Ind Cas 490 (DB).

——S. 115 — Amendment of plaint — Amendment introducing time-barred cause of action — First Court dismissing suit on merits disallowing amendment — Lower Appellate Court remanding case after allowing amendment sought for — Appeal preferred from order of remand:

Held, that the decision was not on a preliminary point and no appeal lay under O. 41, R. 23 and that though the order was not appealable, the case was pre-eminently one for interference under S. 115, Civil P. C. AIR (Vol 18) 1931 Mad 1: 33 MLW 210: 60 MLJ 713: 132 Ind Cas 311 (DB).

(b) Practice.

——S. 115 — Conversion of second appeal into revision — Practice.

A second appeal which is not competent will not be treated as an application in revision where the respondent has not appeared and the subject-matter of the proceeding is a small sum. AIR (Vol 37) 1950 Assam 114 (DB).

——S. 115 — Remedy open. AIR (Vol 32) 1945 Lah 298: ILR (1946) Lah 427: 222 Ind Cas 177.

——S. 115 — Practice of Oudh Chief Court.

According to the practice of the Chief Court of Oudh an appeal can be treated as a revision. AIR (Vol 30) 1943 Oudh 192: 1942 OWN 801: 204 Ind Cas 531.

——S. 115 — District Judge wrongly holding appeal before him as incompetent — High Court can direct him to hear same under S. 115. AIR (Vol 29) 1942 Cal 230: ILR (1941) 2 Cal 366: 199 Ind Cas 740.

——S. 115 — Sale of house by judgment-debtor — Decree-holder applying for attachment of amount left with vendee for payment to vendor's creditors — Court ordering vendee to pay amount left with him to vendor's creditors within certain time or to deposit it into Court — Appeal by decree-holder — Judgment-debtor, vendee and vendor's creditors impleaded as respondents:

Held, that appeal lay against judgment-debtor only and against the vendor's creditors the appeal might be treated as revision. AIR (Vol 29) 1942 Lah 275: 44 PLR 415: ILR (1943) Lah 17: 203 Ind Cas 462 (FB).

——S. 115 — Court ordering plaintiffs to make good deficiency and preparation of decree to be deferred till deficiency was made good — Deficiency not made good within time allowed — Appeal preferred styling it as under S. 96, Civil P. C., and S. 6(4), Court Fees Act (U. P. Amendment):

Held, appeal could not be treated as revision under S. 115, nor as appeal from decree but as appeal from order under S. 6(4), Court Fees Act (U. P. Amendment). AIR (Vol 28) 1941 All 55: (1940) ALJ 891: 1940 AWR (HC) 577: 193 Ind Cas 133 (DB).

——Ss. 115 and 47 — Order under S. 47 — Appeal or revision.

Sale of judgment-debtor's holding in execution of rent decree — Application for setting aside sale under S. 174, Ben. Ten. Act — Subsequent application before Debt Settlement Board for settlement of debts — Notice under S. 34 of Ben. Agri. Debtors Act — Executing Court refusing to stay further proceedings and proceeding with application for setting aside sale:

Held, that the order came under S. 47, and was, therefore, open to appeal. Application under S. 115, therefore, was not competent. AIR (Vol 28) 1941 Cal 264: 45 CWN 379: 194 Ind Cas 805 (DB).

——S. 115 — Minor bidding at auction-sale but subsequently applying not to confirm sale — Court refusing for want of provision in law — Appeal dismissed — Second appeal, doubtful — Confirmation, held, would give rise to complications — Second appeal was treated as application for revision and sale set aside under S. 151. AIR (Vol 24) 1937 Lah 72: 39 PLR 364: 171 Ind Cas 478.

——S. 115 — Appointment of trustees for waqf property — Trustees dying — Application by certain persons for their appointment — Some persons found managing the property — Application allowed by Court holding that it had jurisdiction to entertain such application without a suit under S. 92 — Appeal by persons in possession — Contention that the Judge was in error in holding that the application was maintainable:

Held, that though the petition did not fall under S. 96, the appeal could be treated as revision. AIR (Vol 24) 1937 Oudh 381: 1937 OWN 730: 13 Luck 523: 168 Ind Cas 803 (DB).

——S. 115 — An appeal filed in contravention of S. 104(2), from order of remand can be treated as revision application. AIR (Vol 22) 1935 Mad 574: 158 Ind Cas 252.

——S. 115 — Order refusing to grant temporary injunction to restrain decree-holder-purchaser from obtaining possession — Order falls under S. 151 and is not appealable — Court, however, entertaining appeal — It is doubtful if second appeal lies — It can, however, be treated as revision. AIR (Vol 21) 1934 Lah 79: 36 PLR 142: 150 Ind Cas 15.

——S. 115 — Suit dismissed against one defendant — Objection by him against attachment by decree-holder rejected — No revision is tenable. [Revision was converted into an appeal.] AIR (Vol 21) 1934 Pat 281: 150 Ind Cas 703.

——S. 115 — Sale of insolvent's holding — Sale, held invalid by Revenue Court — Petition for refund of sale price:

Held, that as no question of title triable under S. 4, U. P. Prov. Insol. Act was involved, no appeal lay from the order dismissing the petition for refund.

Held, also that the appeal could not be treated as a revision petition. AIR (Vol 20) 1933 Lah 628: 34 PLR 183: 145 Ind Cas 337.

——S. 115 — Thiruvenkatachariar, J.—If the error committed by the lower Court is one of the nature specified in S. 115 and the ends of justice require interference on the part of the High Court there can be no objection for treating the appeal memorandum as a civil revision petition, when the appeal fails on the ground that no appeal lies. AIR (Vol 16) 1929 Mad 205: 119 Ind Cas 705 (DB).

——S. 115 — It is an established practice that the High Court can treat a memorandum of appeal as an application for revision when no appeal lies. AIR (Vol 14) 1927 All 563: 49 All 812: 25 ALJ 606: 102 Ind Cas 236 (DB).

——S. 115 — Conversion of — Appeal was converted into revision petition.

(1901) 24 Mad 637 (639) also (1905) 2 ALJ 173 (173); (1902) 29 C 644 (646); (1904) 8 CWN 353 (354); (1901) 24 M 658 (659). See also (1904) 31 C 737 (741, 742); (1907) 17 MLJ 199 (200) also (1907) 1907 AWN 201 : 4 ALJ 492 (494) (DB).

(c) Principles of.

——S. 115 — Practice — Appeal and revision — Appeal not competent, can be heard as revision.

Where, in the memorandum of appeal, it was stated that if an appeal was found not to be competent, it might be regarded as revision:

Held, that the appeal would be heard as revision. AIR (Vol 32) 1945 Lah 34: 46 PLR 348: 219 Ind Cas 162.

——S. 115 — Appeal incompetent — Memorandum, if and when can be treated as revision.

Even if the appeal is incompetent, the High Court can enquire into the merits of the case and if the case is one which should be revised by it in exercise of its powers under S. 115 of the Civil P. C., the High Court can treat the memorandum of appeal as a petition of revision under that section and direct the appellant to put in the additional court-fee that might be required. AIR (Vol 30) 1943 Cal 244: ILR (1943) 2 Cal 204: 47 CWN 400: 207 Ind Cas 609 (DB).

——S. 115 — Appeal known to be incompetent.

Practice of filing an appeal, and then, when, it is found by the Court that no appeal lies, requesting the Court to treat it as a revision is not always desirable. Such a request should not be entertained when it is known from the outset that the appeal is incompetent. AIR (Vol 28) 1941 All 355: (1941) ALJ 513: 1941 AWR Rev 702: 1941 RD 772: 197 Ind Cas 114.

——S. 115 — Second appeal.

A second appeal may be converted into a revision by the High Court. (1940) 42 PLR 555.

——S. 115 — Question, whether appeal or revision lay doubtful — Party asking to treat application in case no revision was maintainable, as appeal — Request granted.

High Court, in exercising its revisional jurisdiction, ought not to interfere with an order against which the law allows an appeal when the party aggrieved has not instituted any appeal.

But where the question whether the applicants should seek their remedy by means of an appeal or by means of revisional application was not altogether free from doubt so much so that the applicants in their application itself made the prayer that if it is held that an appeal lies in the case then the present application may be treated as an appeal, the Chief Court acceded to the applicants' request, and treated the application as an appeal. AIR (Vol 24) 1937 Oudh 523: 1937 OWN 1071: 1937 RD 530: 13 Luck 614: 171 Ind Cas 281.

——S. 115 — Appeal incompetent under O. 47, R. 7, Civil P. C. — Whether can be treated as revision — Refund of court-fee.

Where an ordinary appeal does not lie in view of the restrictive provision of O. 47, R. 7, nevertheless, the Court may treat the appeal as a revision.

When the Court so treats the appeal as revision court-fees which the appellant has paid can be refunded to him. AIR (Vol 23) 1936 Lah 301: 37 PLR 387: 161 Ind Cas 765.

——S. 115 — Treating appeal as revision.

The Court has power to treat an appeal as a petition in revision and to treat a petition in revision as an appeal, if necessary for the ends of justice. AIR (Vol 18) 1931 Pat 97: 12 PLT 505: 131 Ind Cas 533.

——S. 115 — Where no appeal lies from an order, the memorandum of appeal can be treated as an application for revision. AIR (Vol 14) 1927 Cal 850: 55 Cal 219: 47 CLJ 69: 103 Ind Cas 864 (DB).

——S. 115 — Where no appeal lies an appeal to the High Court may be treated as an application for revision. AIR (Vol 10) 1923 Oudh 177: 26 OC 10: 10 OLJ 36: 73 Ind Cas 591.

——S. 115 — The High Court has power to convert a Memorandum of Appeal into a revision-petition in a suitable case. AIR (Vol 8) 1921 Mad 612: 41 MLJ 54: 14 MLW 85: 1921 MWN 487: 63 Ind Cas 730 (DB).

——S. 115 — The High Court is entitled in the exercise of its discretion to convert a second appeal into a revision and interfere. AIR (Vol 7) 1920 Cal 797(1): 64 Ind Cas 712 (DB).

——S. 115 — Appeal — Converted into revision.

Where the Lower Court had made an order without jurisdiction, the High Court converted an appeal from that order into a revision petition and set it aside. AIR (Vol 6) 1919 Mad 949: 25 MLT 153: 9 LW 81: 49 Ind Cas 629 (DB).

——S. 115 and O. 9, R. 4 — Scope of — Interference.

A Court is not entitled indirectly to allow an appeal which is not given by the Code by treating the matter as one in revision. AIR (Vol 5) 1918 All 176: 43 Ind Cas 180 (DB).

——S. 115 — Appeal — Converted into revision.

Where a second appeal is preferred but does not lie under the law, it can be treated as an application for revision. AIR (Vol 4) 1917 Oudh 49: 4 OLJ 374: 41 Ind Cas 125.

——S. 115 — Appeal — Converted into revision.

It is open to the High Court to treat a second appeal as a petition in revision when a ruling has been misapplied owing to the imperfect understanding of its circumstances. AIR (Vol 2) 1915 Lah 100: 45 PLR 1915: 201 PWR 1915: 28 Ind Cas 282.

——S. 115 — Other remedy — Appeal.

Where an appeal lies, a revision application will not be entertained but the revision application may be treated as an appeal. (1915) 29 Ind Cas 678 (UPBR).

——S. 115 — Conversion — Execution — Second appeal converted into revision. (1905) 2 ALJ 749 (751): 28 All 72: 1905 AWN 191.

——S. 115 — Conversion of plaint into application under S. 244. (1905) 32 C 332 (335) also (1905) 28 M 64 (66).

——S. 115 — Second appeal converted into revision petition.

Where a second appeal was dismissed on the ground that no second appeal lay, a revision petition was received and entertained where it was considered that the Court should do so in the interests of justice. (1901) 29 Cal 644 (646) (DB). Also (1901) 24 M 637 (639); (1901)24 M 658 (659); (1905) 2 ALJ 173 (173); (1905) 2 ALJ 749 (751): 28 All 72: 1905 All WN 191; (1910) 20 MLJ 722 (725): 7 MLT 74: 5 Ind Cas 742(1); (1904) 8 CWN 353 (354).

(d) Questions of jurisdiction.

——S. 115 — An appeal preferred in a case in which no appeal lay was treated as an application in revision as the question argued was one of jurisdiction. AIR (Vol 31) 1944 Pat 54: 10 BR 429: 23 Pat 61: 25 PLT 35: 211 Ind Cas 593 (FB).

——Ss. 115, 104 — Points raised relating to jurisdiction — Appeal may be converted into revision.

An appeal may properly be converted into a revision and considered upon its merits, if the points raised go very clearly to the question of jurisdiction. AIR (Vol 29) 1942 All 261: (1942) ALJ 284: ILR (1942) All 360: 1942 AWR (HC) 114: 201 Ind Cas 184.

——S. 115 — Question involving substantial question of law affecting jurisdiction.

If the decretal debt is less than Rs. 500, no second appeal lies under S. 102. But if there is a substantial question of law involved affecting the jurisdiction of the executing Court to enquire into the status of the judgment-debtor, the appeal can be converted into a civil revision. AIR (Vol 27) 1940 Bom 239: ILR (1940) Bom 353: 42 Bom LR 457: 189 Ind Cas 706 (DB).

——Ss. 115, 151, 92 — Amendment in scheme prepared in suit under S. 92 — No appeal but revision lies — Appeal preferred challenging jurisdiction of Court — It can be treated as revision.

No appeal lies from an order of the Court making an amendment in the scheme laid down in the decree in the suit under S. 92, Civil P. C. But where an appeal has been preferred and the appellant challenges the jurisdiction of the Court to pass the order, the appeal can be treated as application in revision. AIR (Vol 27) 1940 Oudh 421: 1940 OWN (CC) 639: 1940 AWR (CC) 298: 15 Luck 730: 189 Ind Cas 696 (DB).

——S. 115 — Assignee of creditor getting money-decree against debtor — Defence of payment — No appeal but separate suit — Court, if can consider finding as to non-payment and pass declaratory decree — Revision, competency of.

In a suit by an assignee of a creditor against the debtor, a simple money-decree was passed in spite of the defence of payment. But the debtor did not appeal against it. Subsequently, the debtor filed a suit claiming that the decree obtained against him was by fraud. On the dismissal of the suit by the trial Court, the debtor went in appeal:

Held, that the Appellate Court could not reconsider the finding as to payment and had no jurisdiction to find that payment had been made and to grant the declaratory decree in the debtor's favour, particularly when there was no credible evidence to support such a finding, and in such a case, revision was competent. AIR (Vol 23) 1936 Pesh 176: 164 Ind Cas 856.

——S. 115 — No appeal lies against an appellate order disallowing an objection under O. 21, R. 90. But the memorandum of second appeal may be treated as an application in revision. AIR (Vol 20) 1933 All 654: 145 Ind Cas 731.

——S. 115 — Appeal — Converted into revision — Question of jurisdiction — Mad. Est. Land Act, S. 192.

The High Court has power to treat an appeal as a revision under S. 115, C. P. C. especially when the question in issue is one of jurisdiction; S. 115, C. P. Code is not controlled by S. 192 of the Mad. Est. Land Act. AIR (Vol 5) 1918 Mad 191: 41 Mad 554: 34 MLJ 309: 23 MLT 251: 7 LW 508: (1918) MWN 327: 45 Ind Cas 471 (DB).

(e) Revision petition converted to appeal.

——S. 115 — Where a revision application is found incompetent because an appeal is maintainable, the applicant may be allowed to convert his petition in revision to a memorandum of appeal when the requisite court-fees have already been paid. AIR (Vol 30) 1943 Cal 177: 47 CWN 263: 76 CLJ 319: 206 Ind Cas 392 (DB).

——S. 115 — Revision treated as second appeal by request of party — It cannot subsequently maintain that revision was maintainable.

Where the applicants themselves applied that their application for revision might be treated as a second appeal and their request was granted, they cannot subsequently maintain that their revision was maintainable. AIR (Vol 29) 1942 Oudh 174: 1941 OWN 1234: 1941 AWR Rev 1059: 197 Ind Cas 313 (DB).

——S. 115 — Treating revision petition as appeal.

It is open to the High Court in a proper case to treat an application for revision as an appeal. AIR (Vol 19) 1932 Bom 77: 33 Bom LR 1593: 135 Ind Cas 812.

——S. 115 — It is always open to the High Court to allow an application under S. 115, C. P. Code, to be converted into an appeal. AIR (Vol 14) 1927 Cal 581: 31 CWN 653: 102 Ind Cas 513 (DB).

——S. 115 — Practice.

An application for revision of the lower appellate Court's order dismissing the appeal from an order granting temporary injunction restraining execution of a decree was treated as an application to revise the order of the trial Court. AIR (Vol 14) 1927 Mad 687: 38 MLT 358: 26 MLW 899: 102 Ind Cas 700.

——S. 115 — Revision — Conversion into appeal.

A revision filed after the expiry of the period of limitation prescribed for an appeal cannot be converted into an appeal. But in the case on hand the facts were so peculiar and the order of the Court below was so manifestly unjust, that the Chief Court extended the time under S. 5 of the Lim. Act. AIR (Vol 7) 1920 Lah 450: 2 Lah LJ 734 (DB).

——S. 115 and O. 21, R. 2 — Revision — Conversion into appeal.

In a fit case the High Court may convert a revision petition into an appeal. AIR (Vol 6) 1919 Mad 358: 9 LW 596: 50 Ind Cas 931.

——S. 115 — Revision — Converted into appeal.

When a revision petition is by order of Court altered into a second appeal, the second appeal will be in time if at the date of the filing of the revision, the time for second appeal had not expired. AIR (Vol 4) 1917 Upp Bur 9: (1916) 11 UBR 106: 10 Bur LT 10: 34 Ind Cas 264.

——S. 115 — Revision — Conversion into appeal.

The High Court may treat an application for revision as a memorandum of appeal. The High Court has ample powers to set matters right when the Court below disposed of the question of apportionment without affording an opportunity to the petitioner to establish his allegations. (1910) 12 CLJ 545: 7 Ind Cas 481 (DB).

——S. 115 — Conversion of revision into appeal.

If a person files a revision petition, instead of appealing, he can ask the Court to treat it as an appeal paying the stamp duty necessary. (1901) 24 M 658 (659) (DB).

(f) Small cause suits.

——S. 115 — Suit of small cause nature wrongly decreed by trial Court — On appeal by defendant suit dismissed — Second appeal and revision application in alternative filed by plaintiff — Second appeal, held could be treated as revision — Essentials to be proved by plaintiff to succeed in revision indicated.

The plaintiff's suit which was of a small cause nature was wrongly decreed by the trial Court but was dismissed by the District Judge on appeal by the defendant. The plaintiff filed a second appeal to the High Court and in the alternative, a revision under S. 115 on the ground that the appeal to the District Judge was incompetent by reason of S. 32, Provincial Small Cause Courts Act:

Held, that as the second appeal was incompetent, it could be treated as revision.

Held further, that in order to succeed in revision it was not enough for the plaintiff applicant to show that the lower Appellate Court had no jurisdiction to entertain the appeal; if it was found that the defendant, had he not appealed, would have obtained relief under S. 25, Provincial Small Cause Courts Act, the High Court would not in exercise of the powers under S. 115, Civil P. C., restore the wrong decision of the trial Court. AIR (Vol 33) 1946 Cal 63: 49 CWN 711.

——S. 115 — Trying of Small Cause suit as ordinary suit — Dismissal of first appeal — Conversion of second appeal into revisional application under S. 115 — Validity.

A suit which ought to have been tried as a Small Cause Court suit was tried as an ordinary suit by a Judge who did not have Small Cause Court powers. The suit was partly decreed and the plaintiff filed an appeal. The first appeal was dismissed by the Appellate Court. In second appeal, it was discovered that no second appeal lay as the suit was a Small Cause Court suit:

Held, that the suit having been tried as an ordinary suit, an appeal did lie to the lower Appellate Court and, therefore, the only way the High Court could entertain the appeal which was filed as a second appeal would be by converting it into a revisional application under S. 115, Civil P. C. But that procedure would prejudice the appellant because if the suit had been tried by a Judge having Small Cause Court powers, the appellant would have had the right to come to High Court under S. 25, Provincial Small Cause Courts Act and the provisions of S. 25, Provincial Small Cause Courts Act are much wider than the provisions of S. 115, Civil P. C. and by the suit not having been tried by a Judge having the powers of a Small Cause Court, the appellant was deprived of the right of filing a revisional application to the High Court under S. 25, Provincial Small Cause Courts Act. Under the circumstances, the suit should be remanded to the trial Court to be tried by a Judge with Small Cause Court powers. AIR (Vol 32) 1945 Bom 197: 47 Bom LR 38: ILR (1945) Bom 382: 220 Ind Cas 202 (FB).

——S. 115 — Where from the suit of a small cause nature, a second appeal is filed, the appeal cannot be treated as revision. AIR (Vol 23) 1936 Lah 293: 165 Ind Cas 137.

——S. 115 —Suit for damages for breach of contract valued at less than Rs. 500 — Suit cognizable by Small Cause Court but tried by Munsif as regular suit — No second appeal lies but it can be treated as revision application under S. 115, Civil P. C. AIR (Vol 23) 1936 Oudh 129: 1935 OWN (CC) 1244: 165 Ind Cas 251.

7. Court.

See also Note 36.

——S. 115 — Commissioner under Payment of Wages Act (1936) is not Court subordinate to High Court.

A Commissioner appointed under the provisions of the Payment of Wages Act (1936) is not a Court subordinate to the High Court within the meaning of Section 115. Hence a revision application does not lie to the High Court from an order passed by the Commissioner that a certain person was not eligible to apply for a decision under Section 15 (3) of the Act. AIR (Vol 33) 1946 All 276: 1946 All LJ 23: 1946 OWN (HC) 49: 222 Ind Cas 423.

——S. 115 — No revision lies from orders of Debt Adjustment Board.

The Debt Adjustment Board set up under the Bombay Agricultural Debtors' Relief Act, 1939, is not a Court subordinate to the High Court in order to attract the application of Section 115. Hence, no revisional application lies from order of the Debt Adjustment Board. AIR (Vol 33) 1946 Bom 200: 47 Bom LR 852.

——S. 115 — No revision lies against order of Judge acting under S. 15, Bombay Municipal Boroughs Act, (1925).

A Judge acting under Section 15, Bombay Municipal Boroughs Act, is not a Court but a persona designata, and the High Court has, therefore, no jurisdiction to revise his order under Section 115, Civil P. C., or to correct any mistake committed by him whether he exercises jurisdiction not vested in him or fails to exercise jurisdiction vested in him or acts with material irregularity in the exercise of his jurisdiction. AIR (Vol 33) 1946 Bom 64: 47 Bom LR 851.

——S. 115 — Subordinate Court — Collector making or refusing to make reference under Section 18, Land Acquisition Act — Assuming that he acts as Court, he is not subordinate to High Court so as to make his order revisable—Civil P. C. (1908), S. 3.

Section 115 only speaks of a Court subordinate to the High Court and not of a 'civil Court' so subordinate. The object of Section 3 of the Code is not to define or enumerate Courts which are subordinate to the High Court, but simply to declare the order of subordination, for the

purpose of the Code, as respects the ordinary hierarchy of Courts established under the Civil Courts Act. Hence, in order to make out subordination of the Collector, it is not necessary to establish that he is a civil Court, as contemplated in Section 3 of the Code. There is nothing to show that apart from his functions under Section 18, Land Acquisition Act, the Collector is in any way subordinate to the High Court and that being so, subordination must be found, if at all, qua Section 18 itself. But no subordination of the Collector to the High Court can be established through the Land Acquisition Judge to whom the Collector has to make a reference under Section 18, as in its relation to the Collector the District Court is a Court of original jurisdiction and no appeal lies from the Court of the Collector to the District Judge and further considering the nature of the award made by the Judge and of the proceedings relating thereto between the Collector and the High Court, there is no link but a gap. Therefore, assuming that in dealing with an application under Section 18, the Collector acts as a Court, he does not do so as a Court subordinate to the High Court, so as to make his order revisable under Section 115 of the Code. (12 CWN 241 Overruled.) AIR (Vol 33) 1946 Cal 508.

——**S. 115 — 'Authority' appointed under Section 15 of Payment of Wages Act (1936) is Civil Court and is subject to revisional jurisdiction of High Court under S. 115, Civil P. C., and S. 44 of Punjab Courts Act.**

One of the fundamental tests whether a certain Tribunal is a Court or is not so is whether it exercises jurisdiction by reason of the sanction of the law or whether jurisdiction is given to it by the voluntary submission of the parties to a dispute. Another important test whether a certain Tribunal is or is not a Court is whether it can take cognizance of a lis and whether in exercising its functions it proceeds in a judicial manner.

The provisions of the Payment of Wages Act, 1936, and the Rules make it perfectly obvious that the 'Authority' appointed under Section 15 of Payment of Wages Act (1936), performs the delegated judicial functions of the State and in exercising its functions, it proceeds in a judicial manner. The fact that the amounts awarded by the 'Authority' are described as directions rather than decrees and that the 'Authority' as such cannot execute its own decrees cannot be regarded as determining factors. Hence the 'Authority' appointed under Section 15 of the Payment of Wages Act (1936), must be regarded as a Civil Court and it is a Court subordinate to the High Court within the purview of Section 115, Civil P. C., and Section 44 of the Punjab Courts Act. AIR (Vol 33) 1946 Lah 316 (FB).

——**S. 115 — Tribunal under S. 59, U. P. Town Improvement Act.**

Per Harries, C. J. and Abdul Rashid, J., Abdul Rahman, J. contra. — The Tribunal set up under Section 59, U. P. Town Improvement Act as extended to Delhi is not a 'Court'. AIR (Vol 32) 1945 Lah 313: 47 PLR 284: 222 Ind Cas 363 (FB).

——**S. 115 — What constitutes.**

To be a Court, the person or persons who constitute it must be entrusted with judicial functions i. e., of deciding litigated questions according to law. However, by agreement between parties, arbitrators may be called upon to exercise judicial functions and to decide a dispute according to law. But that would not make the arbitrators a Court. Before a person or persons can be said to constitute a Court, it must be held that they derive their powers from the State and are exercising the judicial powers of the State. AIR (Vol 32) 1945 Lah 313: 47 PLR 284: 222 Ind Cas 363 (FB).

——**S. 115 — How, constituted.**

It is only a legislative enactment or a rule having statutory authority that can constitute a Court or invest a Judge with authority to determine matters outside his ordinary jurisdiction. Hence a Judge nominated to hear appeals under an order made by the Governor or executive officer, is not a Court.

Obiter.— When a statute provides that a particular matter shall be determined by "a Court" and not by an individual Judge, the officer presiding over the Court must be deemed to exercise his jurisdiction as 'Court' and not as persona designata. AIR (Vol 30) 1943 Cal 247: 47 CWN 460: 77 CLJ 317: ILR (1943) 2 Cal 272: 208 Ind Cas 108 (DB).

——**S. 115 — "District Judge" referred to in S. 36, Bengal Municipal Act.**

The 'District Judge' referred to and contemplated by Section 36, Bengal Municipal Act, is not a persona designata but is the Court of the District Judge and the High Court has power of superintendence under Section 107 of the Government of India Act over it. The High Court can, therefore, under those powers, order the District Judge to hear a petition which he has on an erroneous view of law, refused to hear. (1936) 163 Ind Cas 735: 39 CWN 671: 63 Cal 136 (DB).

——**S. 115 — High Court — Powers of — Order refusing to refer under S. 18, Land Acquisition Act to Civil Court is not revisable by High Court (case-law discussed).**

High Court has no powers under Section 115, C. P. Code, or under Section 107 of the Government of India Act to revise the order of a Collector acting under the provisions of the Land Acquisition Act refusing to refer to the Court, an application under Section 18 of the same Act by a person interested, requiring him to refer the matter for the determination of the Court. When Collector acts under part 3 of which Section 18 forms part, he is acting in a different capacity because he has there to decide certain things but no revision petition lies to High Court because he is not a Court at all. AIR (Vol 11) 1924 Mad 442: 46 MLJ 209: 84 Ind Cas 616: 47 Mad 357: 19 MLW 445: 35 MLT 18: 1924 MWN 224 (FB).

——**S. 115 (S. 622 Old Code) — "Court" — District Registrar.**

A District Registrar is not a Court within the meaning of Section 622, C. P. C. The word "Court" in the section means a place where justice is judicially administered. (1905) 17 MLJ 313: 30 M 326 (327): 2 MLT 267: also (1901) 28 C 680 (684): 6 CWN 114.

——**S. 115 — Presidency Small Cause Courts Act, S. 9, — C. P. C., S. 622 — Revision — Rules of High Court framed under — Jurisdiction of Registrar to entertain application to set aside an ex parte decree passed by him — Rules 63, 70. 92, 94:**

The Court and not the Registrar of the Presidency Small Cause Court has jurisdiction to entertain an application to set aside an ex parte decree passed by him. (1903) 30 C 588 (592): 7 CWN 547.

8. Court-fees.

(a) Additional fees.
(b) Adverse to plaintiff.
(c) Deficiency in.
(d) Favourable to plaintiff.
(e) Jurisdiction involved.
(f) General rulings as to.
(g) Other remedies open.
(h) Power to value.
(i) Time allowed to pay

(a) Additional fees.

——S. 115 — Court-Fees — Order requiring additional court-fee — Revision.

An order demanding additional court-fee is revisable under Section 115, C. P. Code, as in such cases there is a refusal to exercise jurisdiction in the matter and trying the case on the merits unless the additional court-fee demanded is paid. AIR (Vol 38) 1951 Simla 238: 52 PLR 336.

——S. 115 — Court-fee — Order as to — Revision — Court-fees Act, S. 12.

An order demanding additional court-fees is revisable. 29 NLR 125 and 1946 NLJ 110, not followed. AIR (Vol 36) 1949 Nag 211: 1949 NLJ 33: ILR (1949) Nag 66.

——S. 115 — Court-fees — Decision as to — Revision.

An order demanding additional court-fee is revisable. AIR (Vol 36) 1949 Nag 37: 1948 NLJ 121: ILR (1948) Nag 210.

——S. 115 — Order demanding higher court-fee — High Court can interfere in revision.

An order demanding court-fees in excess of what the plaintiff has paid is virtually a refusal to exercise jurisdiction, and as such, if it is erroneous, the High Court will interfere with it in revision. AIR (Vol 32) 1945 Bom 336 (DB).

——S. 115 — An order directing the plaintiff to pay additional court-fee can be the subject of interference under Section 115. AIR (Vol 29) 1942 Mad 585: 55 MLW 293: (1942) 1 MLJ 569: 1942 MWN 352: 203 Ind Cas 457.

——S. 115 — Interlocutory order to pay additional court-fee — Revision is incompetent — Proper course is to appeal, if and when the plaint is rejected on the refusal to pay the court-fee. (1934) 147 Ind Cas 347 (1) (Lah).

——S. 115 — Determination of question of payment of additional court-fee.

The determination of the question whether an additional court-fee should be paid or not marks the termination of a definite stage of the suit and settles the controversy between the parties on the particular point. The order so passed is an order deciding a case and it is open to the High Court to interfere in revision when the order amounts to a failure to exercise a jurisdiction vested in the Court. AIR 20) 1933 All 350: (1933) ALJ 311: 55 All 274: 148 Ind Cas 152 (DB).

——S. 115 — Where the Court ordered payment of additional court-fee and returned the plaint and plaintiff relinquished the excess portion of the claim and represented the amended plaint with same court-fee:

Held, that plaintiff had the right to do so and the suit could not be dismissed on the ground that the plaintiff had not complied with the order of the Court. AIR (Vol 18) 1931 Mad 716: (1931) MWN 677: 34 MLW 252: 134 Ind Cas 816.

——S. 115 — Although the High Court might be competent to interfere with an erroneous decision of a subordinate Court directing the plaintiff to pay additional Court-fee such an order will be revised by High Court only in exceptional cases particularly when there is no other remedy available to the injured party and when the order complained against is such as calculated to cause irreparable loss to such a party or amounts to denial of jurisdiction. Each case has to be considered on its own circumstances. AIR (Vol 16) 1929 Pat 427: 119 Ind Cas 78: 10 PLT 464.

——S. 115 — Revision will lie against an order demanding additional Court-fees. AIR (Vol 14) 1927 Nag 256: 103 Ind Cas 268: 10 NLJ 106.

——S. 115 — No revision will lie from an interlocutory order directing the payment of an additional Court-fee. AIR (Vol 13) 1926 Mad 768: 50 MLJ 497: 95 Ind Cas 424: 23 MLW 752: 1926 MWN 444.

——S. 115 — Court-fee — Erroneous demand.

Revision lies to the High Court from an erroneous order for payment of additional court-fee and the plaintiff need not wait for the dismissal of the suit by disobeying the order and then move the High Court in appeal or revision. AIR (Vol 4) 1917 Mad 134: 36 Ind Cas 831.

(b) Adverse to plaintiff.

——S. 115 — Court-fees — Decision as to — Revision.

It is well-settled that a decision upon court-fee which is adverse to the plaintiff amounts to a decision of the Court, refusing to exercise its jurisdiction to try the issues as between the plaintiff and the defendant, and in such a case the decision of the Subordinate Court is subject to the revisional jurisdiction of the High Court under Section 115, C. P. Code. AIR (Vol 37) 1950 Pat 470 (DB).

——S. 115 — Decision in matter of court-fee adverse to plaintiff.

Where a lower Court has jurisdiction to decide questions of law and fact as between the parties, the superior Court will not exercise revisional jurisdiction against the decision whether it be right or wrong; but the superior Court will interfere in revision where the jurisdiction is derived from statute (e. g., Court Fees Act) and the matter is one of the construction of the statute e. g., the category in which the suit falls and the court-fee payable on it.

The Court is doing nothing wrong in hearing the contentions of the common informer, but in deciding the question of court-fee, he is deciding an issue not as between the plaintiff and the defendant wherein his decision both on law and fact is not subject to revision, but is deciding an issue as between the Crown and the plaintiff: and should his decision be adverse to the plaintiff, it amounts to a decision to refuse to exercise his jurisdiction to try the issues as between the plaintiff and the defendant. His decision in such a case is subject to the revisional jurisdiction of the High Court. Where, however, the decision is in favour of the plaintiff, it is not open to the defendant to apply to the Court for revision. The High Court can interfere with an erroneous decision of the trial Court adverse to the plaintiff in the matter of the court-fee and not leave him to file an appeal after rejection of his plaint for non-payment of court-fee. AIR (Vol 22) 1935 Pat

186: 16 PLT 158: 1 BR 471: 7 RP 601: 155 Ind Cas 617 Overrules. AIR (Vol 25) 1938 Pat 22: 18 PLT 977: 4 BR 178: 16 Pat 766: (1938) PWN 989: 172 Ind Cas 840 (FB).

——S. 115 — Although Civil Revision Petition lies when the decision of the lower Court with regard to Court-fee payable is unfavourable to the plaintiff, it does not lie when such decision is in plaintiff's favour as such decision, though to the detriment of the revenue, is not against defendant, and as the mistake can be corrected by appellate Court under S. 12 of the Court-fees Act. AIR (Vol 16) 1929 Mad 191: 114 Ind Cas 842: 29 MLW 42: 56 MLJ 302.

(c) Deficiency in.

——S. 115 — Order as to adequacy of court-fee by plaintiff.

A revision petition lies when a Court subordinate to the High Court has held that the plaintiff has inadequately stamped his plaint but a petition for revision does not lie when a defendant has unsuccessfully challenged the adequacy of the stamp affixed by the plaintiff, unless a further question of jurisdiction is involved. AIR (Vol 26) 1930 Mad 380. Overruling. AIR (Vol 31) 1944 Mad 315: 57 MLW 247: 1944 MWN 243: (1944) 1 MLJ 328: ILR (1944) Mad 626: 217 Ind Cas 5 (FB).

——S. 115 — Execution sale set aside on ground of insufficiency of stamp — No appeal by decree-holder but application to Court to vacate its order under S. 151 — Refusal by Court — High Court will not interfere in revision. AIR (Vol 28) 1941 Pat 408: 7 BR 685: 22 PLT 818: 194 Ind Cas 21 (DB).

——S. 115 — Rejection of plaint for want of court-fee.

Court calling upon plaintiff to make good deficiency in court-fee — Non-compliance — Plaint rejected — Remedy is by way of appeal and no revision lies — Order cannot be interfered with under S. 224, Govt. of India Act, 1935 — High Court cannot interfere in the exercise of its administrative functions with judicial orders under S. 224. AIR (Vol 25) 1938 Lah 80: ILR (1938) Lah 377: 40 PLR 1039: 176 Ind Cas 764.

——S. 115 — Order rejecting memo of appeal for want of sufficient stamp — Appeal, if lies — Revision, competency of.

An order rejecting a memorandum of appeal because it is insufficiently stamped is not appealable. It does not fall within the definition of a decree given in S. 2 (2), Civil P. C., and has not been made appealable as an order under O. 43. But an order demanding additional court-fees on a memorandum of appeal is always revisable but one accepting the court-fees paid is not revisable because then there is no refusal to proceed with the appeal and because jurisdiction is not then affected nor is the other side damnified. AIR (Vol 25) 1938 Nag 122: ILR (1938) Nag 106: (1938) NLJ 1: 173 Ind Cas 329 (FB).

——S. 115 — Where the plaintiff is directed to make up the deficiency in court-fee, the order is an interlocutory one and no revision is competent against it to the High Court. (1937) 172 Ind Cas 497: ILR (1937) Lah 430: 39 PLR 819.

——S. 115, O. 7, R. 11 (b) (c) — Dismissal of suit for failure to pay proper court-fees — Revision from appellate order.

Dismissal of a suit on the ground that proper court-fee is not paid within time allowed, amounts to rejection of the plaint under O. 7, R. 11, cls. (b) and (c). An appeal and a second appeal lie from that order but no revision lies from the order of the Appellate Court dismissing the appeal. AIR (Vol 22) 1935 Cal 157 (1): 38 CWN 1063: 60 CLJ 197: 154 Ind Cas 820 (DB).

——S. 115 — Lower Court holding on report of office, that the stamp paid by plaintiff was insufficient and ordering the deficiency to be made up — Court, whether refusing jurisdiction to try suit.

Where, on a report made by the office that the court-fee paid by the plaintiff was insufficient, the Court having heard the plaintiff's Counsel, held that the amount of the court-fee paid was insufficient and ordered that the plaintiff should make good the deficiency and the plaintiff went in revision:

Held, that a mere decision as to the amount of the court-fees payable did not amount to a "case decided" within S. 115, Civil P. C., nor was it necessarily an irregularity in procedure or illegality or a refusal to exercise jurisdiction and hence revision did not lie.

Per Mukerji, J.: —The decision that the court-fee paid was insufficient did not terminate the proceedings before the Court and therefore, it could not be said that any "case" was decided. The crder passed was only one of the orders necessary and preliminary to the hearing of the suit, and it could not be said that it was a complete and independent matter. AIR (Vol 21) 1934 All 620: (1934) ALJ 381: 57 All 17: 3 AWR (HC) 677: 149 Ind Cas 1183 (FB).

——Ss. 115, 149 — Insufficiently stamped plaint — Granting of time to make good deficiency — Interference in revision.

Where a suit is filed with insufficient stamp and the Court, instead of rejecting the plaint, gives the plaintiff time to make good the deficiency in court-fee, the decision by the Court is in exercise of its discretion and the High Court is not justified in revision in holding that the discretion had been wrongly exercised or had not been exercised at all, and that the plaint was barred by the provisions of the Court Fees and Limitation Acts for that reason. AIR (Vol 21) 1934 All 160: (1934) ALJ 533: 4 AWR (HC) 538: 147 Ind Cas 342.

——S. 115 — Order to make good deficiency in court-fee.

An order requiring the plaintiff to make good certain deficiency in court-fee fully decides the matter in controversy as regards court-fee and constitutes a complete adjudication of the controversy at that particular stage of the suit. Such an order is an order deciding a case and can be the subject of an application in revision. AIR (Vol 21) 1934 Oudh 212 (2): 11 OWN (CC) 617: 148 Ind Cas 908 (1).

——S. 115 — High Court taking different view on points of law.

Where a Court has come to a reasonable decision on the points of law involved and holds that a court-fee is insufficient, the High Court cannot interfere in revision on the ground that it takes a different view on such points of law. It cannot be said that a Court has exercised jurisdiction not vested in it by law or has failed to exercise jurisdiction so vested when its action is the proper consequence of an erroneous finding of law or fact reached with proper care and due exercise of jurisdiction.

Interference would be improper when the action of the Court is the result of a finding reached with due care regarding the sufficiency of court-fees; for the Legislature would have pro-

vided an appeal against such a finding if it had been intended that the finding should be reviewed by a superior Court. AIR (Vol 20) 1933 Nag 107: 16 NLJ 29: 29 Nag LR 125: 143 Ind Cas 84 (FB).

—S. 115— An order directing that the Court-fee paid by the plaintiff on a plaint is sufficient is open neither to appeal nor to revision. AIR (Vol 12) 1925 Pat 703: 85 Ind Cas 538 (DB).

——S. 115 — Court-fee — Order as to.

The chief Court would not interfere in revision with an order calling on plff. to make up court-fee on his plaint. 120 PR 1919: 53 Ind Cas 427: AIR (Vol 6) 1919 Lah 11.

——S. 115, 114 (Ss. 622, 623, 626, 629 old Code) — Review of judgment — Application for review rejected — Revision — Small Cause Court suit.

An application for review of judgment in a Small Cause Court suit was rejected, wrongly, on the ground of a supposed deficiency in the Court Fee paid upon the application. Held, that this order was open to revision. S. 626, C. P. C., refers to a consideration of the application on the merits. (1907) 1907 AWN 132: 4 ALJ 439: 29 A 468 (470).

(d) Favourable to plaintiff.

——S. 115 — Court-fee — Decision as to — Revision.

Where the question of Court-fees has been decided by the lower Court in favour of the plaintiff, the High Court in revision would ordinarily decline to interfere. AIR (Vol 36) 1949 Assam 64.

——S. 115 — Revision — Court-fee.

The order of the lower Court holding that the court-fee paid is correct is not revisable. AIR (Vol 18) 1931 Mad 8 : 32 MLW 694 : 59 MLJ 953.

——S. 115 — Order relating to question of Court-fee cannot be interfered with in revision if it is favourable to the plaintiff and is the only ground of revision. AIR (Vol 16) 1929 Mad 396 : 56 MLJ 394 : 119 Ind Cas 35 : 29 MLW 584 : 1929 MWN 286 (DB).

(e) Jurisdiction involved.

——S. 115 — Revision — Competency — Failure to exercise jurisdiction. See AIR (Vol 36) 1949 Mad 855 : (1949) 1 MLJ 233.

——S. 115 — Court-fees — Decision as to — Revision.

When the matter involves a question of jurisdiction of the lower Court also & is not one affecting court-fee alone, a revision lies to the High Court. AIR (Vol 36) 1949 Mad 415 : (1948) 2 M. LJ 523 : 61 LW 789 : 1948 MWN 832.

——S. 115 — Court-fee — Decision as to — Revision.

A question of court-fees, not involving also a question of jurisdiction, can well be left over to be determined in an appeal from the decree. But if it also involves a question of jurisdiction, it is expedient to entertain a revision petition under S. 115, C. P. Code. AIR (Vol 35) 1948 Nag 219 : ILR (1947) Nag 902.

——S. 115 — Court erroneously refusing to proceed with case until proper court-fee is paid — Revision, held maintainable.

Where a Judge on an erroneous view of the court-fee payable refuses to proceed with the case until the proper court-fee is paid, he fails to exercise jurisdiction as a party is entitled to have his case tried if he has paid the court-fee. AIR (Vol 29) 1942 Sind 76 : ILR (1942) Kar 61 : 200 Ind Cas 545 (DB).

——S. 115 — Court has no inherent jurisdiction to consolidate Civil Revision Petitions in cases which have been disposed of by a single judgment of the lower Court so as to enable the party to file one vakalat in the petitions and pay one process fee for the common respondents. AIR (Vol 17) 1930 Mad 381 : 58 MLJ 521 : 123 Ind Cas 606 : 53 Mad 262 : 31 MLW 294 (DB).

——S. 115 — Where a Judge, on an erroneous view of the Court-fee payable refuses to proceed with the suit until the proper Court-fee is paid, he fails to exercise jurisdiction, as a party is entitled to have his case tried if he has paid the Court-fee. In such cases the order is revisable. Case-law considered. AIR (Vol 15) 1928 Mad 416: 55 MLJ 345: 108 Ind Cas 539: 51 Mad 664: 27 MLW 286 (DB).

——S. 115 — Court-fee — Revision.

The High Court can interfere under S. 115 with interlocutory orders where they appear to be a denial of jurisdiction. To hold that a member of a public bringing a declaratory suit under S. 92, C. P. Code, cannot bring such a suit without valuing his plaint at the value of the property involved is shutting him out of the right of suit and it would be useless to defer the matter until the plaintiff had by neglecting to take further steps in the matter incurred the rejection of his plaint. (1910) 14 CWN 932 : 12 CLJ 211 : 7 Ind Cas 92 (DB).

(f) General rulings as to.

——S. 115 — Court-fee — Wrong decision as to jurisdiction of High Court to interfere. AIR (V 34) 1947 Bom 259 : 49 Bom LR 72.

——S. 115 — Obiter. — Where an order relating to court-fee is passed in a suit, so far as the question of court-fee is concerned, a case has been decided within the meaning of S. 115, Civil P. C. AIR (V 28) 1941 All 298 : 1941 OWN (HC) 704 : (1941) ALJ 376 : 1941 RD 394 : 1941 AWR (HC) 188 : ILR (1941) All 558 : 195 Ind Cas 758 (DB).

——S. 115 — Concurrent findings on question of court-fee.

When lower Courts have concurrently found on question of court-fee, High Court will not interfere in revision. AIR (V 23) 1936 Pesh 213 : 166 Ind Cas 178 (1).

——S. 115 — High Court holding decree to be declaratory — Refund of court-fee under S. 151 — Application to be treated as review application — Revision.

In a suit for arrears of maintenance a compromise decree was passed and the lower Court held that a court-fee of Rs. 715/- should be paid. On appeal in execution, the High Court held that the decree was a mere declaratory decree. The plaintiff then applied for refund of court-fee but the lower Court thought that it had no power to refund:

Held, that the application of the plaintiff should have been treated as an application under O. 47, R. 1 for review of his order by the Judge of the lower Court, the new and important matter discovered being that the High Court had held that the decree was a declaratory decree; and that as under the circumstances the lower Court had failed to exercise a jurisdiction which the lower Court possessed, a revision lay to the High Court. AIR (V 22) 1935 All 455 : (1935) ALJ 376 : 1935 AWR (HC) 368 : 1935 ALR 213 : 154 Ind Cas 520.

——S. 115 — Question as to whether fee is excessive or unreasonable.

The question whether the fee levied by a bye-law of the Municipality is excessive is a mixed

question of fact and law and cannot be raised for the first time in revision. AIR (V 21) 1934 All 39 : (1934) ALJ 80 : 35 Cr LJ 704 : 3 AWR 181 : 56 All 241 : 148 Ind Cas 603 (DB).

——**S. 115 — Government of India Act, 1919 (9 & 10 Geo. V, Ch. 101), S. 107 — Order relating to court-fee — Order favourable to plaintiff.**

Where an order in regard to court-fee has been passed in favour of the plaintiff, the High Court has no power of revision either under S. 115 or under S. 107 of the Government of India Act. AIR (V 20) 1933 Mad 506 : (1933) MWN 737 : 65 MLJ 25 : 38 MLW 80 : 56 Mad 744 : 144 Ind Cas 516 (DB).

——S. 115 — When it is a question of a principle to be applied to the levying of court-fees, the High Court has frequently interfered in revision. AIR (V 20) 1933 Mad 367 (1) : (1933) MWN 1128 : 142 Ind Cas 195 (1).

——S. 115 — An order deciding that the court-fee paid on the plaint is correct is not revisable by the High Court under S. 115 where it does not affect the jurisdiction of the Court. AIR (V 18) 1931 Mad 8 : 32 MLW 694 : 59 MLJ 953 : 129 Ind Cas 254.

——S. 115 — The High Court should not interfere under S. 115 in respect of an order passed by the Court below on a question of court-fees. AIR (V 14) 1927 Mad 1162 : 102 Ind Cas 877.

——S. 115 — High Court will interfere in revision with the orders of the lower Courts deciding what Court-fee is payable. AIR (V 13) 1926 Mad 678 : 51 MLJ 67 : 96 Ind Cas 129 : 23 MLW 581.

——S. 115 — Where the question is as to whether a suit falls under Court-Fees Act, S. 7 Cl. 4 (c) or Second Schedule, Art. 17-A (1) and the lower Court in the course of the suit has decided the matter in one way, the High Court can interfere in revision and set aside the decision. AIR (V 12) 1925 Mad 713 : 48 MLJ 688 : 87 Ind Cas 660 : 21 MLW 649 : 1925 MWN 276.

——S. 115 — Wrong order regarding Court-fees leading plaintiff to seek permission to continue to sue 'in forma pauperis' is revisable. AIR (V 11) 1924 Nag 105 : 81 Ind Cas 643 : 7 NLJ 91.

——**S. 115 — Court-fee — Revision.**

The High Court has power to interfere in revision with interlocutory orders of lower Courts, e.g., a direction to pay court-fee. AIR (V 9) 1922 Pat 359 : 4 Pat LJ 195 : 50 Ind Cas 470 (DB).

(g) Other remedies open.

——**S. 115 — Court-fees — Decision not final and open to appeal.**

Where the decision on a question of court-fee is not final and is, therefore, open to appeal, the High Court would not interfere with the order in revision. AIR (V 28) 1941 Cal 518 : 73 CLJ 240 : 196 Ind Cas 762 (DB).

——**S. 115 — Lower Court ordering plaintiff to pay ad valorem court-fees under Court-Fees Act (VII of 1870), S. 7 (iv) (c) — Another remedy by appeal — Interference under S. 115.**

Quaere — Whether interference in revision is at all permissible in cases where the Subordinate Judge requires the plaintiff to pay court-fees under S. 7 (iv) (c) of the Court-Fees Act, ad valorem on the value of the suit under S. 8, Suits Valuation Act, and whether if it is, it is restricted to cases which relate to category only and not merely to quantum of court-fee.

Interference under S. 115, Civil P. C., is proper only where there is no other remedy available to the plaintiff and where irreparable loss would be caused if the High Court did not intervene at that stage. Even if the application for revision falls within the category of cases with which S. 115 is concerned, and if there is certainly another remedy, that is to say, by appeal if the suit is dismissed and there is nothing to show that irreparable loss will be caused to the plaintiff if the order to pay court-fee under S. 7 (iv) (c) is not set aside, interference is not proper. AIR (V 23) 1936 Pat 190 : 16 PLT 889 : 2 BR 230 : 160 Ind Cas 608.

——**S. 115 — Another remedy.**

The High Court will not interfere in revision with an interlocutory order deciding an issue as to court-fees and demanding additional court-fee from the plaintiff as he has another remedy open to him by way of appeal against the subsequent order rejecting his claim. AIR (V 19) 1932 Pat 319 : 13 PLT 590 : 140 Ind Cas 817.

——S. 115 — When there is another course open and no irremediable harm can be suffered by the interlocutory order directing additional Court-fee to be paid, High Court will not interfere with it. AIR (V 8) 1921 Pat 180 : 1921 PHCC 166 (DB).

——**S. 115 — Court-fee — Interlocutory order — Other remedy open.**

Where the lower Court decided an issue about court-fees and called upon plaintiff to pay deficit court-fee calculating it ad valorem, the High Court will not interfere under S. 115 as there was another course open by way of appeal and no irremediable harm was suffered by the interlocutory order. There was a right of appeal against the order rejecting the plaint. AIR (V 7) 1920 Pat 789 : 1 Pat LT 5 : 55 Ind Cas 786 (DB).

——**Ss. 115 and 149 — Court-fee — Order for payment of additional Court-fee — Revision.**

An order under S. 149 of the C. P. Code requiring the plaintiff to pay additional court-fee is not open to revision under S. 115 of the C. P. Code. There is another remedy to the plaintiff in case of dismissal of his suit for non-payment of the additional court-fee, by way of appeal. AIR (V 6) 1919 Cal 840 : 51 Ind Cas 581 (DB).

(h) Power to value.

——**S. 115 — Court-fees — Decision as to valuation and ordering payment of proper court-fee — Revision.**

Where on a dispute as to the valuation and the court-fee payable, the Court determines the valuation and directs the party concerned to pay the additional court-fee, the order of the Court is not open to revision under S. 115, C. P. Code. AIR (V 39) 1952 All 644 : 1949 ALJ 250 : 1949 AWR 338 (DB).

——**S. 115 — Court-fees — Decision regarding valuation — Revision — Court-Fees Act, S. 12.**

If in coming to a decision as to the value for purposes of jurisdiction and court-fee the lower Court commits an irregularity which comes within S. 115, C. P. Code, the High Court will be justified in interfering at that stage. If the lower Court has no material before it on which to come to the finding at which it has arrived, a case is made out for revision of its order. AIR (V 36) 1949 EP 372.

——**S. 115 — Order in appeal — Proper court-fee arising from trial Court's decree not paid.**

The Court of the Judicial Commissioner of Sind should not hear a revision application against an order in an appeal from a decree, on which the proper court-fee arising from the decree of the trial Court has not been paid by the applicant. There is no question of a notional valuation when the result of the trial of the suit is that by a final decree, the rights and liabilities of the parties

have been fixed in specific sums. AIR (V 29) 1942 Sind 76 : ILR (1942) Kar 61 : 200 Ind Cas 545 (DB).

——S. 115 — It is open to the trial Court to revise under S. 8-C, Court-Fees Act (VII of 1870), the valuation of a relief under S. 7 (iv) (c) of the Act and its valuation cannot be interfered with in revision unless it is shown that the Court applied a wrong principle or a wrong objective standard. AIR (V 28) 1941 Cal 509 : 197 Ind Cas 128 (DB).

——S. 115 — Orders about court-fees adverse to an applicant can be the subject of revision. AIR (V 27) 1940 Nag 65.

——S. 115 — Trial Court accepting valuation in plaint under S. 8 (c), Court-Fees Act (VII of 1870) — Decision affecting jurisdiction.

Where the trial Judge has not actually fixed the valuation upon the claim in suit, but has based his decision upon the argument that the exact money-value of the claim cannot be ascertained and S. 8 (c), Court-Fees (Ben. Amendment) Act, cannot help, the decision can be assailed under S. 115, Civil P. C., as the trial Court will exercise jurisdiction wrongly if its decision is wrong. AIR (V 25) 1938 Cal 161 : 42 CWN 192 : 177 Ind Cas 893.

——S. 115, O. 20, R. 12 — Court-Fees Act (VII of 1870), Ss. 12, 13 — Decree allowing mesne profits — Appeal — Valuation — Such appeal not described as title appeal — Valuation given not proper — Appeal admitted and decree set aside and case remanded — Decree signed and sealed — Successor-in-office of Appellate Court, if can revise order and stay proceedings until proper court-fee is paid — Power of High Court under S. 12, Court-Fees Act.

Where a decree allowing mesne profits is appealed from, the proper value of the appeal is the amount of the decree and it is not open to the Appellate Court to entertain it until ad valorem court-fee is paid.

Such appeal was described as miscellaneous appeal instead of title appeal. The valuation given was Rs. 201 instead of Rs. 1,493 and odd and the court-fee paid was Re. 1 and not Rs. 135. The Appellate Court set aside the decree and remanded the case. The decree was signed and sealed. On an application of the decree-holder for an order staying further proceedings until the judgment-debtor had paid court-fee, the successor-in-office of the Appellate Court held that he had no jurisdiction to revise the order passed by his predecessor-in-office:

Held, that the order that the lower Appellate Court had no power to revise the order, was correct and that in view of the matter, the High Court could not exercise its powers under S. 12, Court-Fees Act.

Held, also, that it was doubtful had the judgment-debtor paid proper court-fee, whether he would have been entitled to claim refund in view of S. 13 of the Court-Fees Act. (1937) 172 Ind Cas 212 : 18 PLT 864 : 4 BR 153.

——S. 115 — Order as to quantum of court-fee — Revision, if lies — Order deciding that suit falls in a particular category — Order, if revisable.

In a case of a mere matter of valuation, where the Judge or other authority applies his mind to the question of valuation and ultimately comes to a decision he having exercised his jurisdiction, no appeal will lie against the quantum of stamp duty which he directs shall be payable. But in a case in which the question is as to the particular category into which the suit falls, that is to say, whether the duty is payable upon the suit as belonging to a particular class or whether another duty is payable as belonging to another class, the officer will give a decision upon this matter quite irrespective of the question of the quantum of the duty payable in the particular case and, if he decides that the case falls into a class other than that contended for by the applicant and therefore, is liable to payment of an amount which is larger than that which the plaintiff contends for, and refuses to entertain the suit until the higher duty is paid, it amounts to a refusal to exercise jurisdiction upon legal grounds and therefore, it is a matter properly to be reviewed in revisional proceedings. AIR (Vol 21) 1934 Pat 641 : 1 BR 192 : 16 PLT 69 : 14 Pat 220 : 152 Ind Cas 1003 (DB).

——S. 115 — Where plaintiff valued his suit for injunction at Rs. 150, the value of the property involved being Rs. 300, and lower appellate Court held that under S. 7, sub-s. (4), cl. (c) of the Court-Fees Act the valuation was reasonable,

Held, that the lower appellate Court had jurisdiction to decide the matter and High Court will not interfere. AIR (Vol 13) 1926 Pat 334 : 94 Ind Cas 103 : 1926 PHCC 102.

——S. 115 — The Court is empowered under the law to revise the valuation put by the plaintiff and if on such revision, it is of opinion that the valuation is insufficient or arbitrarily low, it has jurisdiction to fix the proper value. But where a Court determines the valuation according to its judgment or holds that plaintiff's valuation is correct it does not commit such an error of law as to entitle the High Court to interfere under S. 115, C. P. Code. AIR (V 12) 1925 Cal 814 : 86 Ind Cas 853 : 29 CWN 627 (DB).

——S. 115 — An order directing a party to pay ad valorem fees on the amount at stake in his miscellaneous appeal, instead of the fixed fee of eight annas, which he had actually paid is a "case decided" within the meaning of S. 115.

Held also, that an order directing the dismissal of such appeal if the Court-fee is not paid is a refusal to exercise jurisdiction and is therefore revisable. AIR (V 10) 1923 Mad 270 : 71 Ind Cas 173 : 1922 MWN 831 : 17 MLW 623.

——S. 115 — No revision lies against a decision of a Subordinate Court on a question of valuation determining the amount of Court-fee inasmuch as no case has been decided by the Court below within the meaning of S. 115. An error of law is a good ground for second appeal but not a ground for revision. AIR (V 9) 1922 Nag 128 : 65 Ind Cas 327.

——S. 115 — Court-fee — Revision.

The High Court will not revise an interlocutory order demanding ad valorem Court-fee on a plaint, as the order of rejection of the plaint is appealable. The general practice of the High Court is not to interfere under S. 115 of the C. P. C. when another remedy is available to the petitioner. AIR (V 8) 1921 Pat 180 : 5 Pat LJ 400 : 1 Pat LT 268 : 56 Ind Cas 649 (DB).

——S. 115 — Court-fees — Valuation — Prejudice — Revision.

Where the Court below has arrived at a conclusion though wrongly, either on the facts or on proper judicial consideration of the matters placed before it, the Court would not interfere in revision. But where the Court below failed to grasp the point which really had to be determined, viz., whether, under the provisions of the Court-Fees Act and the Suits Valuation Act, the valuation of the suit given by the plaintiff was correct the High Court should interfere, even though there is no prejudice to parties, if it is satisfied that the decision of the Court below was wrong. No ques-

tion of prejudice to parties arises in the case. (1913) 17 CWN 160 : 15 Ind Cas 46 (DB).

(i) Time allowed to pay.

——Ss. 115, 149 — Court passing final and peremptory order for non-payment of court-fee when amount is big and time allowed is short — Propriety.

Where the sum to be paid as court-fee was a large one, almost Rs. 400, and the time allowed for payment was only one fortnight, a peremptory and final order dismissing the suit, leaving no possibility for any extension of time is perhaps unnecessarily stringent and it would be better if time is simply allowed with a direction that the case be put up on the expiry of that time for final orders. AIR (V 29) 1942 Pat 234 : 8 BR 204 : 197 Ind Cas 433 (DB).

——S. 115 — Order stating that suit shall stand dismissed if court-fee is not paid within certain date — Time cannot be further extended and the High Court will not interfere in revision. AIR (V 29) 1942 Pat 234 : 8 BR 204 : 197 Ind Cas 433 (DB).

——S. 115 — Court-fee — Extension of time for payment — High Court can extend time.

Held, that High Court can extend time for payment of court-fee on an application for revision against order rejecting petitioner's application to appeal as pauper, even where time fixed by the lower Apellate Court for payment of the requisite court-fee has expired and the appeal dismissed. AIR (V 23) 1936 Lah 909 : 38 PLR 374 : 166 Ind Cas 83 (1).

——S. 115 — Lower Court ordering to pay deficiency of court-fees within certain time.

A mere decision as to the amount of the court-fee payable, does not amount to "a case decided" nor is it a refusal to exercise jurisdiction. Consequently, no revision lies to the High Court from an order of the Court below calling upon the plaintiff to make good the deficiency of the amount of court-fees within certain time. AIR (V 23) 1936 Oudh 22 : 1935 OWN (CC) 1158 : 11 Luck 529 : 158 Ind Cas 949 (FB).

——S. 115, O. 7, R. 11 — Dismissal for non-payment of deficiency of court-fee within time allowed.

Where the appellant is not aware at any time before his appeal is dismissed, that he has been asked to make good any deficiency in court-fee, the Court is not justified in rejecting his appeal for non-payment of Court-fee within the time allowed by it. Where the Court summarily rejects the appeal for non-payment of court-fee without giving any real opportunity to the appellant to make good the deficiency, it acts illegally and with material irregularity in the exercise of its jurisdiction and the High Court will entertain an aplication in revision under S. 115, Civil P. C. AIR (V 22) 1935 Oudh 119 : 11 OWN 1555 : 10 Luck 476 : 153 Ind Cas 503 (DB).

——S. 115 — Appellate Court — Case remanded on condition of party depositing additional court-fees and costs within a fixed period — Order extending time — Legality — Civil Procedure Code (Act V of 1908), Ss. 148, 149, O. 41, R. 23.

Where the Appellate Court allowed an amendment on condition of the party paying the necessary court-fee and the costs of the opposite party within two months after arrival of the record in the Court below and ordered that if the costs be not so paid or deposited the suit will stand dismissed with costs throughout, and the party failed to carry out the terms within the two months:

Held, that the successor-in-office of the Judge who passed the order had jurisdiction to extend the time for paying court-fees but not for depositing the costs.

Their Lordships, however, refused to interfere in revision with an order enlarging the time for depositing costs as the order was one which met the ends of justice, though strictly, not in accordance with law. AIR (V 20) 1933 Cal 20 : 36 CWN 869 : 140 Ind Cas 373 (DB).

——S. 115 — An order of the lower Court assessing the Court-fee payable upon a petition and allowing the petitioners certain time within which to pay it does not decide a "case" within S. 115 and is not revisable. A different set of considerations might arise if the court on failure to make the payment dismissed the petition. AIR (V 14) 1927 Mad 1021 : 53 MLJ 452 : 104 Ind Cas 145 : 39 MLT 220.

9. Criminal prosecution.

(a) Scope of.
(b) When involves jurisdiction.
(c) When revisable.

(a) Scope of.

——S. 115 — The sum and substance of S. 476, Criminal P. C., is that before a prosecution can be launched either the first or the Appellate Court must be of opinion both that an offence appears to have been committed and that it is expedient to prosecute. If they take up those questions or either of them and deal with them judicially and reach a conclusion, then High Court has no jurisdiction whatever to interfere in revision under S. 115, Civil P. C., however wrong or erroneous High Court may consider that conclusion to be. AIR (V 28) 1941 Nag 155 : 1941 NLJ 91 : ILR (1942) Nag 388 : 194 Ind Cas 583.

——S. 115 — Appeal under S. 476-B, Criminal Procedure Code — Complaint for prosecution under S. 193, Penal Code — Revision under S. 115.

Where, in an appeal filed before him, under S. 476-B, Criminal P. C., the District Judge considers the evidence and directs a complaint to be made against the applicant for his prosecution under S. 193, I. P. C., the High Court can entertain the application in revision under S. 115, Civil P. C., against that order. (1937) ALJ 10 : 1936 AWR (HC) 1272 : (1937) 170 Ind Cas 125.

——S. 115 — The parties are apt to say in their pleadings things not strictly true but by such statements they do not render themselves liable for prosecution for perjury. Where the Judge so misconceives the operation and function of a written statement as to imagine that because something is put in in a written statement which is in a sense not true and something is omitted from the written statement, that of itself constitutes offence under S. 193, Penal Code, the High Court is not only justified in exercising but is bound to exercise its power in revision to set aside the order. AIR (V 17) 1930 Cal 639 (DB).

——S. 115 — The High Court can only interfere with the order of District Judge revoking the order of the Munsif granting sanction for the prosecution of a party for perjury either under S. 115, C. P. Code or under S. 107 of the Government of India Act. But the fact that the Judge had considered the matter from a wrong point of view is not by itself a sufficient ground for interference. AIR (V 11) 1924 Cal 641 : 71 Ind Cas 595 : 24 Cr LJ 179 (DB).

——S. 115 — In an appeal against an order of sanction to prosecute the applicant for giving false evidence, the only judgment passed was "The application is rejected."

Held, that an order like this passed in a sanction for prosecution case, amounts to refusal to consider the question and would amount to a material irregularity. AIR (V 8) 1921 All 86 : 60 Ind Cas 800: 19 ALJ 291.

——**S. 115 — Criminal prosecution — Sanction by Officer exercising Small Cause powers — S. 182, I. P. C. — Civil matter — Revision.**

A Cantonment Magistrate exercising the powers of a Smal Cause Court ordered the prosecution of a decree-holder for an offence under S. 182, I. P. C. committed in the execution proceedings.

Held, that the matter was of a civil nature and should not be brought up on the criminal side. Treating it as a civil matter it was impossible under S. 115 of the C. P. C. to interfere. AIR (V 5) 1918 All 68 : 16 ALJ 921 : 20 Cr LJ 19 : 48 Ind Cas 499.

——**S. 115 — Criminal prosecution — Cr. P. C., S. 476 — Perjury — Action taken before suit ended — Revision — Charter Act, S. 15.**

Where in the course of trial of a suit the Court ordered the prosecution of plaintiff for perjury on the basis of a statement which he made during negotiations for compromise and which he contradicted in the witness box later on.

Held per Abdur Rahim, J. (Ayling, J.) contra. — Not only were the proceedings of the District Munsif highly irregular, bringing the case within S. 115, but also amounted to an abuse of the powers which the law vested in him justifying an interference under S. 15 of the Charter Act. AIR (V 2) 1915 Mad 1193 : 18 MLT 591 : 17 Cr. LJ 42 : 32 Ind Cas 330 (DB).

——S. 115 (S. 622, old Code) — Revision of orders of Civil Courts under S. 195, Cr. P. C. (1906) 1906 AWN 103 : 1 MLT 219 : 3 ALJ 394 : 28 A 554 (563) (FB).

(b) When involves jurisdiction

——S. 115 — Criminal P. C., S. 476 — Order by Munsif that party in civil suit should be prosecuted — Appeal — Judge finding that materials on record do not justify prosecution and setting aside order — Judge acts in exercise of jurisdiction — No revision lies. AIR (V 21) 1934 All 1065 : (1934) ALJ 870 : 4 AWR (HC) 342 : 57 All 351 : 152 Ind Cas 34.

——S. 115 — Where a Munsif, under S. 476, refused to direct a complaint to be made on the view that he had no jurisdiction in the matter, and an appeal was taken to the District Judge under S. 476-B, who, without deciding the question whether the Munsif had jurisdiction or not, purported to act under the section.

Held, that the District Judge erred in holding this view. It was also an error with respect to procedure. It is a material irregularity and the High Court should interfere in such a matter under S. 115. AIR (V 15) 1928 Cal 237 : 109 Ind Cas 211 : 55 Cal 836 : 47 CLJ 277 : 10 AI Cr R 167 : 29 Cr LJ 483 (DB).

——S. 115 — An order passed in exercise of jurisdiction under S. 476, Cr. P. Code, by a civil Court cannot be revised under S. 115, C. P. Code. AIR (V 13) 1926 Sind 215 : 95 Ind Cas 316 : 20 SLR 90 : 27 Cr. LJ 780 (DB).

——S. 115 — Where there has been no excess of jurisdiction nor failure to exercise jurisdiction in refusing sanction under S. 195, Cr. P. Code, on the facts it is difficult to say that the case can be brought within the last clause of S. 115, C. P. Code.

Per Cuming, J. — Section 115, C. P. Code, obviously refers to civil matters and civil matters only. It is found in C. P. Code, and can have no application in criminal matters. AIR (V 10) 1923 Cal 45 : 69 Ind Cas 153 : 36 CLJ 265 : 26 CWN 1016 : 23 Cr LJ 665 (DB).

——**S. 115 — District Judge illegally revoking sanction under S. 195, Cr. P. C., and ordering prosecution under S. 476.**

It is at least clear that S. 115, C. P. C., cannot be limited to the case of a subordinate Court acting altogether without jurisdiction, and the High Court interfered where a District Judge wrongly considered himself bound to revoke a sanction under S. 195, Cr. P. C., and erroneously ordered a prosecution under S. 476, Cr. P. C. The High Court restored the original sanction under S. 195, Cr. P. C. (1909) 13 CWN 1038 (1045) : 37 C 13 : 4 Ind Cas 6 (DB).

——**S. 115 — Cr. P. C., Ss. 195, 439 — Legal Practitioners Act, S. 14 — Jurisdiction.**

A litigant made a complaint to a Subordinate Judge against a pleader. The Sub-Judge merely lodged it. A similar complaint was made to the District Judge and the latter on inquiry into its authenticity referred it to the Sub-Judge for inquiry and report. The Sub-Judge gave sanction against one of the witnesses that appeared in the inquiry and it was confirmed by the District Judge.

Held, that the first letter followed by the communication from the District Judge amounted to a "charging of the pleader in the Court of the Subordinate Judge" within the meaning of S. 14 of the Legal Practitioners Act, and that the Subordinate Judge had jurisdiction to hold the inquiry and grant the sanction. That the High Court cannot revise it either under S. 622, C. P. C., or under Ss. 195 and 439, Cr. P. C. (1908) AWN 273 : 5 ALJ 749 : 31 A 38 (40, 41) : 1 Ind Cas 569 (DB).

(c) When revisable.

——**S. 115 — Applicability — Appellate order by District Judge under S. 476-B, Cr. P. Code — Procedure — Cr. P. Code, Ss. 435 and 439 — Application of.**

An application in revision against an appellate order of a District Judge under S. 476-B, Cr. P. Code, is governed not by Ss. 435 and 439 Cr. P. Code, but by S. 115, C. P. Code. AIR (Vol 35) 1948 Pat 225: 27 Pat 52: 49 Cr LJ 246 (FB).

——S. 115 — Where an order has been passed by a Civil Court under S. 476, Criminal P. C., S. 439, Criminal P. C. has no application — The High Court can only exercise the revisional powers under S. 115, Civil P. C. AIR (Vol 27) 1940 Mad 465: 51 MLW 542 (2): (1940) 1 MLJ 719: (1940) MWN 472 (2): 41 Cr LJ 769: ILR (1940) Mad 762: 189 Ind Cas 630 (FB).

——S. 115 — Applications in revision from an order under S. 476-B, Criminal P. C. by a Civil Court to the High Court should be heard and decided in accordance with the provisions of S. 439 Criminal P. C. Provisions of S. 115, Civil P. C. do not apply to such a case. AIR (Vol 25) 1938 Bom 225 (227): 40 Bom LR 297: 39 Cr LJ 495: ILR (1938) Bom 331: 174 Ind Cas 780 (FB).

——**S. 115 — Munsif making complaint after deciding case — Applicability of S. 439, Criminal Procedure Code.**

Where a Munsiff makes a complaint after deciding the case, revision from an order in such proceedings lies under S. 115, and not under S. 439, Criminal P. C. AIR (Vol 22) 1935 All 696: (1935) ALJ 943: 1935 AWR (HC) 792: 58 All 85: 161 Ind Cas 322 (DB).

——**S. 115 — High Court's powers in revision in Civil, Criminal and Revenue matters.**

Where a Civil or Revenue Court has initiated proceedings under S. 476 of the Criminal P. C., the High Court can in revision interfere with an order of the Appellate Court in such proceedings only under S. 115 and where a Criminal Court takes proceedings under S. 476 of the Criminal P. C., the appellate order of the Sessions Judge can only be revised by the High Court under the provisions of S. 439 of the Criminal P. C. AIR (Vol 22) 1935 Oudh 59: 11 OWN (CC) 1469: 36 Cr LJ 254: 10 Luck 335: 153 Ind Cas 104 (DB).

——S. 115 — Proceedings before a Subordinate Judge in an appeal under S. 476-B, Cr. P. Code transferred to him by a District Judge from an order of a Munsif under S. 476, Cr. P. Code, can be declared to be null and void under S. 115, C. P. Code, though, not under S. 439, Cr. P. C. the Court of a Subordinate Judge not being a Criminal Court. AIR (Vol 15) 1928 Oudh 494: 114 Ind Cas 812: 4 Luck 155: 30 Cr LJ 382: 5 OWN 882 (DB).

——S. 115 — Where a Civil Court refused to make a complaint under Cr. P. Code, S. 476, but the appellate Court directs the complaint to be filed, the order of the appellate Court is revisable only when it is brought within C. P. Code S. 115. AIR (Vol 14) 1927 All 334: 100 Ind Cas 376: 28 Cr LJ 296: 25 ALJ 569: 49 All 536.

——S. 115 — An appellate order by a Civil Court confirming refusal to lodge a complaint by its subordinate Court is not open to revision by High Court under S. 439, Cr. P. Code, as the order is not of a Criminal Court. It is also not revisable under S. 115 if conditions of S. 115 are not fulfilled. AIR (Vol 14) 1927 Oudh 14: 99 Ind Cas 48: 3 OWN 905: 28 Cr LJ 16: 7 AI Cr R 240: 7 AI Cr R 47.

——S. 115 — Where the Sub-Deputy Collector, after enquiry, refused the application of the opposite party for prosecution of petitioner under Penal Code, S. 471, but on appeal the Collector set aside the order of the Sub-Deputy Collector and made a formal complaint under S. 200, Cr. P. Code, for the prosecution of the petitioner.

Held, that the Collector was clearly acting as a Revenue Court and he was exercising judicial powers in setting aside the order of the Sub-Deputy Collector and in making a complaint under S. 200 and was therefore subject to the superintendence of the High Court and his order is revisable under S. 115, C. P. Code, as also under S. 107 of the Government of India Act. AIR (Vol 13) 1926 Pat 25: 90 Ind Cas 445: 7 PLT 199: 26 Cr LJ 1565.

——S. 115 — Criminal prosecution — Cr. P. C., S. 476 — Order by Civil Court — Revision.

An order passed by a Civil Court under S. 476, Cr. P. C. can be revised only under S. 115, C. P. C. and not under S. 439, Cr. P. C. AIR (Vol 7) 1920 Nag 146: 16 NLR 23: 21 Cr LJ 270: 55 Ind Cas 286 (DB).

[Contra 33 Ind Cas 824 : (AIR (V 4) 1917 Mad 158.]

——S. 115 — Criminal prosecution — Charges to be specific and not general.

The High Court can revise an order under S. 476 Cr. P. C. passed by a Civil Court if it fails to specify the charges. AIR (Vol 4) 1917 All 425: 38 All 695: 14 ALJ 814: 18 Cr LJ 4: 36 Ind Cas 836.

——S. 115 — Criminal prosecution — Collector's order under S. 476, Cr. P. C.

Prosecution order of Collector under S. 476, Cr. P. C. while acting under S. 70 C. P. C., cannot be revised by High Court. AIR (Vol 4) 1917 All 59: 14 ALJ 1077: 18 Cr LJ 307: 38 Ind Cas 419.

——S. 115 — Cr. P. Code, S. 195 or S. 476 — Order by Civil Court — Revision.

Where an order is passed by a Civil Court under S. 195 or 476, Cr. P. C. the High Court can revise under S. 115, C. P. C. or S. 15 of the High Courts Act and the Criminal Bench cannot revise the order. AIR (Vol 4) 1917 Cal 527: 21 CWN 654: 18 Cr LJ 793: 41 Ind Cas 313: 25 CLJ 401.

——S. 115 — Criminal prosecution — Order under S. 476, Cr. P. Code — Civil Court — Revision — High Court.

When action is taken by a Civil or a Revenue Court under S. 476, Cr. P. C., its proceedings may be revised by the High Court under S. 115, C. P. C. on any of the grounds mentioned therein, or may be examined under S. 15 of the High Courts Act. (1913) 40 Cal 477: 17 CLJ 245: 14 Cr LJ 197: 17 CWN 647: 19 Ind Cas 197 (FB).

[Contra AIR (Vol 4) 1917 Mad 158 : 33 Ind Cas 824.]

——S. 115 — Criminal prosecution — Sanction —Revision of proceedings of a Civil Court under S. 195 Cr. P. C.

A petition to revise proceedings under S. 195, Cr. P. C. of a Civil Court should not be under S. 115 of C. P. C. but under S. 439, Cr. P. C. AIR (Vol 4) 1917 Mad 158: 7 Cr LJ 184: 33 Ind Cas 824 (DB).

[Contra (1913) 40 Cal 477 : 19 Ind Cas 197.]

——S. 115 — Criminal prosecution — Sanction — Refusal by Civil Court — Revision — Delay.

An order of a Dt. Munsif or a Dt. Judge refusing to grant an application for sanction to prosecute cannot be revised by the High Court under S. 439 but under S. 115, C. P. C. or S. 15 of the Charter Act. When a prosecution is undertaken at the instance of the Government, mere delay in applying for sanction cannot be taken as suggesting mala fides. AIR. (Vol 2) 1915 Cal 457: 19 CWN 447: 21 CLJ 198: 16 Cr LJ 286: 28 Ind Cas 334 (DB).

——S. 115 — Criminal prosecution — Sanction — Dismissal — Interference.

A Court cannot dismiss for default and non-payment of process fees, an application made under S. 195 of the Cr. P. C.; when a Court therefore restores to its file, an application so dismissed the High Court will not interfere as its effect will be to perpetuate a wrong order. AIR (Vol 1) 1914 Mad 159: 15 Cr LJ 71: 22 Ind Cas 423.

——S. 115 — Criminal prosecution — Cr. P. C. S. 195.

If the judge of Small Cause Court at Calcutta refuses sanction to prosecute under S. 195, Cr. P. C. an application for revision lies to the Original side of the High Court and not to the Appellate side. (1910) 37 Cal 714: 14 CWN 806: 11 Cr LJ 357: 6 Ind Cas 473.

——S. 115 — Bench sitting on civil side — Inconvenience in converting civil revision into criminal revision.

Their Lordships sitting in a Bench exercising civil jurisdiction felt it difficult to accede to the request of counsel to convert a civil revision petition into a criminal revision. (1908) 35 C 909 (912) (DB).

10. Delay.

See also Notes 4 and 22.

——S. 115 — Delay in applying — Practice.

When applications in revision are very belated ones and are not intended to be pressed, the High Court would not interfere with the order of the lower Court sought to be revised even though the order itself might be an improper one. AIR (Vol 37) 1950 A 248: 1950 AWR 137: 1950 ALJ 80.

——S. 115 — **Delay in applying — If ground for refusal to interfere — Interference on payment of costs to opposite party.**

The fact that an applicant for revision of an order under S. 115, C. P. Code, has applied after a great delay would not be a ground for the High Court refusing to exercise its revisional powers in a fit case, when for such delay, the opposite party can be sufficiently compensated for in costs. AIR (Vol 37) 1950 Pat 470 (DB).

——S. 115 — Ordinarily, the High Court does not entertain applications for revision made after undue delay. AIR (Vol 25) 1938 All 98: (1937) ALJ 1181: (1937) AWR (HC) 1116: ILR (1938) All 148: 173 Ind Cas 729 (DB).

——S. 115 — **Petition filed after considerable delay admitted.**

Considerable delay in filing a petition is not in itself a sufficient ground for rejecting the petition where once it has been admitted to hearing. AIR (Vol 22) 1935 Lah 120.

——S. 115 — **Petition filed after great delay — No reasonable explanation.**

It is not the usual practice of the High Court to interfere in revision when the petition is presented a long time after the passing of the order sought to be revised, especially when no reasonable explanation of the delay is offered. AIR (Vol 20) 1933 Lah 175: 33 PLR 1070: 142 Ind Cas 687.

——S. 115 — An application for revision should not be entertained when filed after considerable delay unless good cause is shown for delay in filing it. AIR (Vol 16) 1929 Oudh 383: 10 LRA Rev. 204.

——S. 115 — Mere lapse of time is no ground for rejecting revision petition where the petitioner could not be imputed with laches or negligence. AIR (Vol 15) 1928 Mad 528: 110 Ind Cas 63: 51 Mad 672: 28 MLW 297: 55 MLJ 274 (DB).

——S. 115 — Delay of nearly seven months in filing the application would in itself be a sufficient ground for declining to accept it. AIR (Vol 13) 1926 Al 228: 92 Ind Cas 993.

——S. 115 — A Revision which is filed after a long delay of more than three years cannot be entertained unless some good reason is shown for the delay. AIR (Vol 12) 1925 Oudh 608: 86 Ind Cas 329.

——S. 115 — An application for revision made more than a year after the order complained of was passed will not be accepted unless some good reason can be shown for the delay. AIR (Vol 10) 1923 Oudh 272: 10 OLJ 205: 77 Ind Cas 115.

——S. 115 — Though the High Court as a rule does not entertain revision petitions after three months, in proper cases the discretion of the Court could very well be exercised in excusing the delay. AIR (Vol 9) 1922 Mad 63: 65 Ind Cas 732: 16 MLW 760: 1922 MWN 130.

——S. 115 — A High Court may and frequently will refuse to interfere in revision where there has been undue delay in bringing the matter before it. AIR (Vol 8) 1921 Oudh 141: 64 Ind Cas 303: 24 OC 282.

——S. 115 — **Delay — No interference.**

Where a plaint was returned for presentation to the proper court and plff. applied for revision of the trial Court's order long after the dismissal of his appeal by the Lower Appellate Court, the High Court refused to interfere in revision on account of the plff's laches. AIR (Vol 5) 1918 Oudh 116: 4 CLJ 551: 43 Ind Cas 470.

——S. 115 — **Delay — Fatal.**

Revision is a privilege and not a right and it corresponds to the remedies in England known as 'Certiorari' and 'Mandamus.' The invariable rule in these cases is that a party aggrieved must come to the High Court for relief at the earliest possible moment and also must come with no ulterior purpose. AIR (Vol 4) 1917 All 215 (1): 39 Ind Cas 570 (DB).

——S. 115 — **Delay — Power of High Court to interfere with orders passed years back.**

The High Court should not interfere in revision with an order passed a long time back, unless it feels that its interference is necessary in the interests of justice to all parties. AIR (Vol 2) 1915 Cal 290: 19 CLJ 9: 22 Ind Cas 801 (DB).

——S. 115 — **Delay — No interference.**

Where an order was sought to be set aside by a petition presented more than 8 months from the date of the order and after 5 months of inexcusable delay, held there was no reason to excuse the delay. AIR (Vol 1) 1914 Mad 299: 24 Ind Cas 56.

——S. 115 — **Delay — Dismissal of petition.**

A railway company relying on a technical defect to defeat just claim of the public, filed a revision petition after a long delay. The High Court did not interfere and rejected it. (1911) 10 MLT 382: 21 MLJ 1061: 12 Ind Cas 169.

——S. 115 — **Delay.**

A revision cannot be entertained after delay of five and half months. (1910) 8 Ind Cas 529 (All).

——S. 115 — **Revision — Delay in application good ground for, no interference.**

See (1905) 1905 AWN 65 (65): 2 ALJ 128: 27 All 480.

11. Discretion.

See also Notes 4, 33 and 37.

(a) **Abatement of suit.**
(b) **Amendments.**
(c) **Arbitration.**
(d) **Costs.**
(e) **Evidence.**
(f) **Inherent powers**
(g) **Interference justified.**
(h) **Issue of commission.**
(i) **Limitation.**
(j) **Miscellaneous illustrations.**
(k) **Principle of interference.**
(l) **Review.**
(m) **Security.**
(n) **Time.**

(a) Abatement of suit.

——S. 115 — Abatement of suit — Application for substitution — It may be treated as one for setting aside abatement — Discretion of lower Court exercised within jurisdiction — Interference by High Court in revision is not proper. AIR (Vol 20) 1933 Nag 85: 29 NLR 118: 144 Ind Cas 368.

——S. 115 — **Court's discretion under O. 22, R. 9.**

High Court will not interfere with the discretion of the Court setting aside abatement under O. 22, R. 9. AIR (Vol 20) 1933 Pat 27: 13 PLT 692: 140 Ind Cas 837.

——S. 115 — Where there is no reason for suggesting that the District Judge has in any way exceeded the wide powers conferred on him under S. 88, an application for revision of his order to the High Court is unwarranted. AIR (Vol 19) 1932 Cal 727: 36 CWN 641: 55 CLJ 563: 140 Ind Cas 267.

(b) Amendments.

——S. 115 — Amendment of pleadings — Interference by High Court.

Where a party has omitted to raise certain relevant pleas at the beginning of the proceedings without any excuse and the Court has refused amendment of the pleadings subsequently, there is no good ground for the High Court to interfere with the lower Court's discretion. AIR (Vol 27) 1940 Nag 8: 1939 NLJ 525: 188 Ind Cas 23 (DB).

——S. 115 — Amendment of plaint.

Application under S. 152 for amendment of plaint allowed — Order does not fall under S. 104 (4) or O. 43, R. 1 — No appeal lies from such order — Revision, however, is maintainable. AIR (Vol 21) 1934 All 100 (2): 1934 ALR 228: 147 Ind Cas 633 (DB).

——S. 115 — Amendment of.

The Court has discretion to amend or alter the issues at any time before passing the decree under O. 14, R. 5. No revision lies against such an amendment. Where a Court avails itself of a discretion which the Code permits, however injudicious the exercise of that discretion may have been, no infraction of law or procedure is entailed and therefore no revision under S. 115 would lie. (1929) 113 Ind Cas 313: 1928 MWN 836.

——S. 115 — An amendment of the plaint is within the discretion of the Court and the High Court will not interfere in revision against an order allowing an amendment of the plaint where the amendment does not change the character of the suit or involve any material injustice to the defendant. AIR (Vol 9) 1922 Mad 321: 68 Ind Cas 167: 15 MLW 667: 1922 MWN 521.

——S. 115 — The question of amendment is a question of discretion with the Court and unless High Court is satisfied that the discretion was exercised on entirely wrong lines or in fact the lower Court refused a jurisdiction vested in it, High Court will not be justified in interfering under S. 115. AIR (Vol 13) 1926 Cal 1112: 30 CWN 928: 98 Ind Cas 751 (DB).

(c) Arbitration.

——S. 115 — Reference to arbitration without jurisdiction — Decree in accordance with award — Revision — Interference.

A reference to arbitration is without jurisdiction if all the parties interested in the dispute have not joined it. But the High Court will not interfere in revision with a decree passed in accordance with award in case of such reference at the instance of a party who joined the reference, took part in it and having lost it was trying to back out of it. AIR (Vol 32) 1945 Cal 156.

——S. 115 — It cannot be laid down as a principle that the Judge must refuse to stay the suit under S. 19, Arbitration Act, if any difficult question of law arises. If any such principle has been enunciated, S. 115 applies. AIR (Vol 29) 1942 Sind 57: ILR (1941) Kar 587: 199 Ind Cas 707 (DB).

(d) Costs.

——S. 115 — Though an order requiring security for costs is entirely a matter of discretion with which the High Court would not interfere in revision, the High Court can interfere where the lower Court has acted with material irregularity in exercising its jurisdiction. AIR (Vol 22) 1935 Mad 230: 41 MLW 135: (1935) MWN 513: 69 MLJ 38: 155 Ind Cas 317.

——S. 115 — Discretion — Adjournment costs — Excessive and unreasonable.

The High Court will not interfere in revision with an order for payment of adjournment costs not complying with a provision of law, when the amount awarded is neither excessive nor unreasonable. AIR (Vol 7) 1920 Nag 149: 57 Ind Cas 506.

(e) Evidence.

——S. 115 — Discretion — Evidence — Late production of documents — Reception of evidence — Interference.

Under O. 13, R. 2, the Court has a discretion to receive evidence at any stage of the evidence on good cause shown for not having produced it earlier. Where in the exercise of the discretion, the lower Court has admitted certain documents though at a late stage of the suit, the High Court cannot interfere in revision. AIR (Vol 17) 1930 Pat 603.

——S. 115 — Exercise of revisionary power is discretionary.

Whether the Court will exercise its powers of revision is a matter to be determined in its discretion according to the circumstances of the case under review. Where, in recording evidence in the Lower Court, the provisions of O. 18, Rr. 5, 8 and 14 were not complied with, but it was not shown that the evidence was not fairly and accurately recorded, the High Court will not interfere in revision to set aside the order on the ground that there was no legal evidence. AIR (Vol 16) 1929 Cal 78: 113 Ind Cas 833: 55 Cal 1084.

——S. 115 — Trial Court rejected application to allow further evidence without exercising judicial discretion. Appellate Court failed to consider ground of appeal.

Held, the trial Court's judgment should be set aside. AIR (Vol 11) 1924 Rang 318: 3 Bur LJ 125.

——S. 115 — Where an appellate Court in the exercise of the discretion vested in it by O. 41, R. 27 of the C. P. Code refused to admit additional evidence offered three days after the argument was closed, the High Court would not interfere with its order in revision. (1922) 67 Ind Cas 252 (Cal) (DB).

(f) Inherent powers.

——S. 115 — Discretionary order — Revision — Order refusing stay, under S. 151, of civil suit for rent, pending commutation proceedings under Tenancy Act before Revenue Officer — Interference — Grounds for. See AIR (Vol 37) 1950 Pat 363.

——S. 115 — Discretion — Inherent power.

Exercise of powers under S. 151, C. P. Code is purely discretionary with a Court and if the lower appellate Court has refused to exercise these powers, High Court will not interfere in revision unless the order is perverse or illegal. AIR (Vol 10) 1923 Lah 506: 75 Ind Cas 487.

——Ss. 115 and 151 — Discretion — Inherent power — Refusal to exercise — Revision.

Where the lower court with all the facts before it refuses to exercise its discretionary power under S. 151, the Chief Court would not interfere in revision. AIR (Vol 1) 1914 Lah 9: 10 PR 1914: 273 PLR 1913: 217 PWR 1913: 25 PWR 1914: 20 Ind Cas 203 (DB).

(g) Interference justified.

——S. 115, O. 23, R. 1 — Order under O. 23, R. 1, without exercising discretion judicially.

Where the trial Court has made an order under O. 23, R. 1, without exercising its discretion judicially, that is, without applying its mind to the

matter before it with due reference to the provisions of the Order, the High Court can interfere in revision. AIR (Vol 22) 1935 All 381: (1935) ALJ 330: 1935 AWR (HC) 267: 159 Ind Cas 147.

——S. 115 — When there is a mistake purely of an arithmetical nature, Court cannot refuse to correct it. The matter is not one of discretion and the High Court will, therefore, correct the same in revision. AIR (Vol 17) 1930 Mad 421: 114 Ind Cas 635.

——S. 115 — Discretion — Subordinate Court — Interference — When justified.

A High Court ought not to interfere with every exercise of discretion by the Court below, even if no appeal is allowed, but must do so only where there has been a wanton abuse of process. The issue or a refusal to issue by a subordinate Court, a commission to examine certain witnesses is not an abuse of process warranting an interference by the High Court. AIR (Vol 1) 1914 Mad 203: 15 MLT 339: 23 Ind Cas 522.

——S. 115 — Discretion — Interference when justifiable.

Where a Judge uses his discretion to grant or refuse leave to institute a suit he does not act illegally nor with material irregularity nor is any question of jurisdiction involved. (1912) 12 MLT 359: 17 Ind Cas 400.

(h) Issue of commission.

——S. 115 — Application to issue commission — Court has discretion under O. 26, R. 4 — Refusal to issue commission does not amount to exercise of jurisdiction illegally or with material irregularity. AIR (Vol 29) 1942 Oudh 344: 1942 OWN (CC) 307: 1942 AWR (CC) 203: 199 Ind Cas 831 (DB).

——S. 115 — It is not open to the High Court to revise the order refusing to issue a commission to examine a witness under R. 57, Mad. Civil Rules of Practice on the ground of its having been made too late. (1933) 1933 MWN 648.

(i) Limitation.

——S. 115 — Under S. 5 of Lim. Act it is a matter for the Court's discretion to decide whether it should excuse the period of delay or not and when it has decided that no sufficient grounds existed for excusing delay, it is not within the High Court's powers of revision under S. 115 to interfere with that decision. AIR (Vol 29) 1942 Mad 604: 55 MLW 426: (1942) 2 MLJ 104: 1942 MWN 503: ILR (1942) Mad 868: 203 Ind Cas 5.

——S. 115 — Application filed late — Discretion.

Interference in revision being discretionary, the practice of the Oudh Chief Court has been to refuse to entertain applications for revision if they are made too late and to demand an explanation from the applicant for the delay in case the application is made more than ninety days after the passing of the order. Where applicant for revision was not a party to any of the orders which he sought to revise and they were all passed behind his back and without notice to him, the delay is excusable and should be condoned. AIR (Vol 23) 1936 Oudh 185: 1936 OWN (CC) 262: 12 Luck 52: 160 Ind Cas 814 (DB).

——S. 115 — Lower Court's discretion under S. 5, Lim. Act, whether can be interfered with.

Where the Judge has purported to exercise a discretion vested in him by S. 5, Lim. Act, the High Court will not interfere with his order. AIR (V 23) 1936 Pesh 97: 162 Ind Cas 416.

——S. 115 — Discretion of High Court to extend period provided by rules of Court.

The period of ninety days provided by the rule of the Sind Judicial Commissioner's Court for revision applications is subject to the Court's discretion and when the mistake on the part of the Advocate in not having got the vakalatnama stamped is satisfactorily explained, the period will be extended by a short time. AIR (Vol 23) 1936 Sind 172: 30 SLR 271: 166 Ind Cas 365 (DB).

(j) Miscellaneous illustrations.

——S. 115 — Discretion — Illegal order setting aside prior illegal order — Interference in revision.

The exercise by the High Court of its powers of revision under S. 115, C. P. Code, is discretionary, and the section imposes no obligation on the High Court to interfere in each case of illegal exercise of jurisdiction by a subordinate Court. Where the effect of an illegal order passed by the lower Court has been to set aside another illegal order, and thus to restore the parties to their original position, the High Court will not be disposed to interfere and set aside the second only of the two illegal orders which would have the result of restoring the first illegal order. AIR (Vol 34) 1947 All 343: ILR (1947) All 389: 229 Ind Cas 26.

——S. 115 — S. 115 and O. 9, R. 9 — Suit dismissed for default — Order restoring suit passed though no sufficient cause for non-appearance was shown by plaintiff — Case taking dilatory course due to numerous adjournments — Order of dismissal coming as a surprise — Held, order of restoration was justified by circumstances of case — High Court refused to interfere in revision.

An application under O. 9, R. 9 was made by a Receiver plaintiff for restoration of his suit dismissed for default. The Court found that no sufficient cause for non-appearance was shown by the plaintiff but nevertheless it ordered the suit to be restored merely because it thought that the estate which the Receiver represented could not equitably be penalised for the Receiver's negligence and justice would be better done by restoring the suit & compensating the defendants in costs. From the record of the case it was evident that numerous adjournments were given to the parties for one reason or the other and the case had not proceeded to an advanced stage during the course of one year. On the date of the last hearing, the plaintiff's Counsel wanted time but the application was rejected and he was ordered to proceed with the case at once. The Counsel stated that he had no further instructions upon which the case was dismissed for default. On revision from the order of restoration:

Held, that the practice of giving adjournments was productive of slackness on the part of the litigants and, therefore, it was a sufficient reason for the plaintiff not being ready on the date of hearing. The order of dismissal was sprung as a matter of surprise to the plaintiff when he was lulled into security that the case would not be taken on the date of hearing. In the circumstances, the order of restoration was proper and just.

Held further, that interference in revision being discretionary, the High Court would not interfere with the order which was justified in the circumstances of the case though it was not supported by the finding of the Court below. AIR (Vol 33) 1946 Pat 165: 222 Ind Cas 353.

——S. 115 — Exercise of discretion — Appeal wrongly entertained.

Where the execution application was time-barred but the executing Court entertain it all the same but the same was thrown out in appeal:

Held, that assuming there was no right of appeal it was not a fit case for interference in revision. AIR (Vol 18) 1931 Cal 425: 35 CWN 31.

——**S. 115 — Appointment of trustee.**

Where the District Judge did not think it desirable on the merits to appoint the applicant as a trustee in place of his deceased father and refused to appoint him as such:

Held, that there was no case for interference in revision. AIR (Vol 18) 1931 Oudh 408: 8 OWN 999: 134 Ind Cas 1090 (DB).

——S. 115 — Where the District Judge held that in his discretion, in view of the delay which had occurred in applying, the case was not a suitable or advisable one for even appointing a curator, much less for putting the applicant in possession.

Held, that whether or not the discretion was wisely exercised, it is not the function of the High Court to determine. AIR (Vol 14) 1927 Nag 253: 102 Ind Cas 622.

——S. 115 — Omission to give reasons by a Court for granting instalments is after all an irregularity and the discretion exercised by the Court below in that respect ought not lightly to be interfered with. Where the question is one of discretion the ground why it was refused in one case is not relevant in other cases. AIR (Vol 12) 1925 All 218: 5 LRA Civ 784: 83 Ind Cas 133.

——S. 115 — No revision lies against an order requiring the plaintiff to pay certain damages on condition of getting an adjournment, with an order that the case will not be taken up unless the amount is paid. AIR (Vol 8) 1921 Oudh 23: 24 OC 215: 64 Ind Cas 211.

——**S. 115 and O. 21, R. 2 — Material irregularity — Application for entering up satisfaction — Withdrawal of.**

Where there is an application for entering up satisfaction put in by the decree-holder the Court in allowing the application to be withdrawn acts with material irregularity, especially when the judgment-debtor pleads discharge. The permission to withdraw in such a case is a grave irregularity warranting the interference of the High Court in revision. Where injustice is done in the exercise of jurisdiction, the High Court should interfere. AIR (Vol 6) 1919 Mad 198: 35 MLJ 252: 51 Ind Cas 411.

——S. 115 — Discretion wrongly exercised through oversight — Remedy — See (1902) 4 Bom LR 816 (816, 817).

——**S. 115 — Exercise by legal authority of — Unchangeable rules to guide such authority, validity of.**

Where a discretion is vested in any legal authority, such authority must be free to exercise it in each case, and rules which are unchangeable and which compel such authority to exercise its discretion in any particular manner are invalid. (1902) 4 Bom LR 768 (772): 27 Bom 307.

(k) Principle of interference.

——**S. 115 — Discretion of lower Court as to specific performance — Interference.**

The relief of specific performance is no doubt discretionary and the revisional Court will not ordinarily interfere with the exercise of the lower Court's discretion. Where a particular aspect of the case has not been considered at all by the lower Courts, there is no exercise of discretion at all and it is open to the Court in revision to exercise its discretion on the facts found. AIR (Vol 37) 1950 Kutch 86.

——**S. 115 and O. 22 — Applicability of O. 22 to revision applications — Principles to be applied in regard to revisions generally.**

There is no provision of law laying down the procedure or law applicable for substitution of legal representative in revision applications. But as the remedy by way of revision is only discretionary, if the party does not apply for substitution in time, the proceedings will cease unless there are good grounds for the failure to apply in time. AIR (Vol 35) 1948 Oudh 84: 1947 OWN 221: 1947 OA (CC) 150: 1947 AWR (CC) 150: 22 Luck 373 (DB).

——**S. 115 — Power of interference under.**

Per Meredith J.—The power of interference in revision is a discretionary power. It is entirely for the High Court to decide whether or not to interfere in any particular case, and it is the practice of the High Court not to interfere in any case, unless it deems it necessary to do so in the interests of justice. It will not lightly interfere with an order which it believes upon the merits to be right. AIR (Vol 31) 1944 Pat 147: 22 Pat 577: 10 BR 614: 214 Ind Cas 59 (DB).

——S. 115 — The High Court is reluctant to interfere with orders passed by the Court below in exercise of its discretionary powers but as such powers must be exercised judicially, a Court should be careful to indicate in its order the reasons for it so that the High Court may be satisfied that the discretion has been exercised judicially. AIR (Vol 29) 1942 Pat 451: 23 PLT 194: 8 BR 792: 201 Ind Cas 484.

——S. 115 — A wrong exercise of discretion cannot amount to a material irregularity in the exercise of jurisdiction. AIR (Vol 25) 1938 Lah 548: 40 PLR 69: ILR (1938) Lah 289: 177 Ind Cas 778 (DB).

——S. 115 — Although the jurisdiction to decree specific performance is discretionary, the jurisdiction of the Court is not to be arbitrarily exercised but guided by judicial principles. When the discretion has been exercised by the lower Court, before a Court of appeal thinks of interfering with that discretion, it should come to the conclusion that the discretion was exercised by the Court below arbitrarily. AIR (Vol 24) 1937 All 161: 1936 AWR (HC) 1290: 167 Ind Cas 657.

——S. 115 — In a matter of discretion, unless there are very special circumstances, the High Court will be reluctant to interfere with the orders of the Court below. AIR (Vol 23) 1936 Lah 140: 161 Ind Cas 518 (1).

——S. 115 — Where the Court below exercises its discretion in the matter and there is no illegality or material irregularity, no revision lies against its decision under S. 115. whether that discretion is used rightly or wrongly. AIR (Vol 23) 1936 Oudh 129: 1935 OWN 1244: 165 Ind Cas 151.

——**S. 115 — Discretionary nature.**

The jurisdiction vested in the High Court by S. 115 is only discretionary but to say that S. 115 does not apply to cases in which a decree has been passed in terms of an award is to take away that discretion altogether in such cases, a conclusion which is not warranted by the terms S. 115 or by any other provision of the Code. AIR (Vol 23) 1936 Oudh 1: 1935 OWN (CC) 1036: 11 Luck 441: 158 Ind Cas 11 (DB).

——**Ss. 115, 151 — Court refusing to exercise discretion under S. 151.**

Section 115, Civil P. C., cannot be applied to a case where the lower Court has considered the matter judicially and has refused to exercise its discretion under S. 151, so that no question of jurisdiction arises at all. AIR (Vol 22) 1935 All 49: 4 AWR (HC) 607: 154 Ind Cas 1028.

——S. 115 — Civil Procedure Code and S. 107, Government of India Act.

Ordinarily, the discretion of a judicial officer will not be reviewed by the High Court in revision. But it is impossible to lay down a hard and fast rule, that in no instances will the discretion exercised by the judicial officer be reviewed either under S. 115 or S. 107, Govt. of India Act, or under the combined operation of the two sections. Under S. 107, Govt. of India Act (S. 15 of the Charter), the High Court can interfere where irreparable injury will be done to one of the litigants or where there will be a failure of justice if the matter is not set right. AIR (Vol 22) 1935 Cal 102: 60 CLJ 91: 38 CWN 1146: 155 Ind Cas 1109 (DB).

——S. 115 — There is nothing to prevent one Court from notifying to another a particular complicated situation and to suggest to it the advisability of staying proceedings before it. The Court so addressed must attach due weight to such communication and give reasons for refusing to comply with the request. But the Court has a discretion in the matter and such discretion shall not be interfered with lightly unless there is some flagrant miscarriage of justice. AIR (Vol 22) 1935 Pesh 182: 160 Ind Cas 82.

——S. 115 — When an order is made in the exercise of the discretion of the lower Court, ordinarily the discretion will not be reviewed by the High Court in revision. But it is impossible to lay down a hard and fast rule that in no circumstances will the discretion exercised by a judicial officer be reviewed either under S. 115, Civil P. C. or under S. 107, Government of India Act, or under the combined operation of the two sections. Each case must depend upon its own facts; and, subject to any question of costs, applications of this nature that is to say, applications for amendment of plaints where trial has began have got to be considered very carefully. They have to be considered very carefully because it is essential that the rights of either party should not be prejudiced. AIR (Vol 21) 1934 Cal 102: 37 CWN 1093: 149 Ind Cas 923 (DB).

——S. 115 — It is not open to the High Court to question the discretion exercised by the District Judge in a petition for revision unless it is apparent on the face of the record that the direction has been erroneously and arbitrarily exercised. AIR (Vol 21) 1934 Lah 807 (1): 36 PLR 5: 150 Ind Cas 305.

——S. 115 — The powers under S. 115 are intended to be exercised with a view to subserve and not to defeat the ends of justice. The High Court will not exercise its discretion in favour of persons coming forward with revision application against the rejection of their 'mala fide' application. AIR (Vol 20) 1933 All 154: 144 Ind Cas 904.

——S. 115 — Temporary injunction.

Per Niamatullah, J. — If a Court grants or refuses to grant a temporary injunction on the ground of balance of convenience, it is not correct to say that the discretion has been exercised otherwise than judicially only because the Court of Revision thinks that it would have passed a different order in the circumstances of the case. AIR (Vol 20) 1933 All 86: (1932) ALJ 803: 143 Ind Cas 98 (DB).

——S. 115 — Interference in revision is discretionary and when the interference is likely to work, not in the interests of justice but rather against it, such a course should not be taken. AIR (Vol 17) 1930 Lah 417.

——S. 115 — An application in revision is matter of discretion for the High Court and the Court will not interfere with an order though made without jurisdiction if to interfere with such order amounts to doing grave injustice. AIR (Vol 17) 1930 Pat 279.

——S. 115 — Under S. 115 of the C. P. Code, the High Court is not bound to intervene but may refuse to exercise its discretion if the circumstances require that such discretion should not be exercised. AIR (Vol 12) 1925 All 264: 85 Ind Cas 660: 6 LRA Civ 63 (DB).

——S. 115 — There is no obligation on the High Court to interfere on an application made under S. 115, even if facts are proved which bring the application within the section. It is purely a matter of discretion, and no rules can be laid down how that discretion is to be exercised. Whether the Court will interfere or not is entirely for the Court, which hears the application, to decide on the particular circumstances of the case before it. AIR (Vol 12) 1925 Bom 341: 87 Ind Cas 910: 49 Bom 535: 27 Bom LR 423 (DB).

——S. 115 — Material irregularity — Discretion.

An improper exercise of discretion by the lower court is not a ground for revision. AIR (Vol 16) 1919 Cal 323: 29 CLJ 362: 51 Ind Cas 233 (DB).

——S. 115 and O. 22, R. 9 — Discretion — No interference.

The High Court will not interfere in revision with an order of the lower court refusing to extend time for setting aside an abatement under O. 22, R. 9 or for an application for review. AIR (V 6) 1919 Mad 479: 25 MLT 116: (1918) MWN 888: 9 LW 166: 49 Ind Cas 268 (DB).

——S. 115 — Ordinarily the exercise of discretion by a Lower Court in awarding compensation in breaches of contracts of service should not be questioned in revision. AIR (Vol 4) 1917 Low Bur 31: 39 Ind Cas 121.

——S. 115 — Discretion — High Court's interference.

The High Court's interference with the discretion of a court is confined only to an ignorant or perverse exercise of it. AIR (Vol 3) 1916 Pat 75: 20 CWN 1080: 1 Pat LJ 465: 3 Pat LW 55: 37 Ind Cas 129 (DB).

——S. 115 — Discretion — Interference by High Court — Principle of.

Where discretion is to be exercised by a subordinate Court, a High Court will not ordinarily interfere, if there are other remedies open; but where want of jurisdiction in the subordinate Court is established, no question of discretion arises. AIR (Vol 1) 1914 Mad 301: 26 MLJ 467: (1914) MWN 368: 23 Ind Cas 572.

(1) Review.

——S. 115 — Failure to exercise the discretion of admitting the application for review after time, upon an insufficient ground falls under S. 115. AIR (Vol 14) 1927 All 386: 100 Ind Cas 727.

——S. 115 — Validity of.

The Court has got discretion to decide whether the sale of a holding is voidable or not under S. 173(3) of the Bengal Tenancy Act and its decision is not revisable unless serious prejudice has been caused. AIR (Vol 12) 1925 Cal 293: 80 Ind Cas 708 (DB).

——S. 115 — An order refusing to grant a review is not open to revision. The granting of a review is a matter peculiarly within the discretion of the Judge who passed the decree. No other Judge can hear such an application and if the Judge who tried the case refuses to grant a review, his order is by rule 7 of Order 47 expressly declared not to

be appealable and hence no revision should be permitted. AIR (Vol 10) 1923 Oudh 153: 74 Ind Cas 351: 9 OLJ 623.

——S. 115 — The High Court in revision under S. S. 115 cannot interfere with the discretion of a judge as to whether he should or should not have reviewed his judgment. AIR (Vol 5) 1918 Cal 701: 40 Ind Cas 463 (DB).

——S. 115 — When a Court sets right a wrong order passed by it, on review, the High Court will not interfere in revision. (1910) 5 MLT 221: 4 Ind Cas 1130.

(m) Security.

——S. 115 — Order rejecting appeal under O. 41 R. 10 due to failure to furnish security is not appealable. The appeal cannot also be treated as revision. The Court has absolute discretion in the matter of security and the order which it makes is not without jurisdiction. AIR (Vol 23) 1936 Rang 109: 161 Ind Cas 233 (DB).

——S. 115 — Judge of lower Court not perusing security bond he is asked to assign — Whether amounts to material irregularity.

Where the Judge of the lower Court has judicially considered the matter in controversy between the parties, the High Court will have no jurisdiction to interfere with the exercise of his discretion, howmuchsoever the High Court may disapprove of the manner in which such discretion was exercised. But where he has not perused the security bond which he was asked to assign and the recitals in which were of cardinal importance in the case, the omission to consider the terms of the bond is tantamount to a refusal by the Judge to consider the application before him judicially. It is a material irregularity in the exercise of his jurisdiction by the Judge to refuse to look into the bond he is asked to assign and this irregular exercise of jurisdiction vests the High Court with the discretion to revise his order and when the discretion has been exercised capriciously the High Court will reverse the order. AIR (Vol 22) 1935 All 705: 1935 AWR (HC) 361: 154 Ind Cas 816 (DB).

——S. 115 — Security for the full amount of the decree under O. 21 R. 29, being within the discretion of the Court, High Court will not interfere in revision, unless the discretion was improperly used. AIR (Vol 16) 1929 110: 116 Ind Cas 101 (DB).

(n) Time.

——S. 115 — Discretion — Extension of time.

An order extending time for performance fixed in a decree for specific performance is not revisable unless discretion is wrongly exercised. AIR (Vol 14) 1927 Rang 311: 5 Rang 615: 6 Bur LJ 216: 105 Ind Cas 467 (DB).

——S. 115 — Under S. 149 the Court has discretion to grant time for payment of deficient Court-fee and the propriety of the exercise of that discretion cannot be challenged in revision. AIR (Vol 13) 1926 Nag 156: 89 Ind Cas 419.

——S. 115 — Where under a compromise decree, time is fixed for payment of the decretal amount, the Court can extend the time for payment if in its discretion, it thinks that time is not of the essence of the contract, and such an order extending the time is not subject to revision. AIR (Vol 11) 1924 Pat 387: 82 Ind Cas 505: 2 Pat 906: 1924 PHCC 122: 5 Pat LT 401 (DB).

12. Error of Law.

See also Notes 15 and 23.

(a) Admission of evidence.
(b) Award.
(c) Burden of proof.
(d) Discretion.
(e) Evidence.
(f) Extension of time.
(g) Facts.
(h) Judgment.
(i) Jurisdiction.
(j) Limitation — Miscellaneous illustrations.
(k) Misapplication of law.
(l) Misconstruction.
(m) No ground — Miscellaneous rulings.
(n) Omission to apply law.
(o) Substantial justice.

See also Note 14.

(a) Admission of evidence.

——S. 115 — Relevant evidence adduced by consent — Prayer for re-hearing on the ground that evidence was inadmissible — Estoppel.

It is not open to a plaintiff who is bound to adduce evidence to prove his claim to demand a re-hearing on the ground that the evidence he had placed before the Court was inadmissible. AIR (V 21) 1934 Mad 610 : 40 MLW 356 : 67 MLJ 358 : (1934) MWN 1015 : 151 Ind Cas 621.

——S. 115 — A wrong admission of the deed of adoption in evidence without its being properly and duly stamped does not enable the petitioner to move the High Court in revision. (1934) 35 PLR 683.

——S. 115 — Where a Court erroneously holds that certain documents are admissible but arrives at its findings independently of such documents, its finding cannot be said to be vitiated by such admission. AIR (V 13) 1926 Pat 29 : 90 Ind Cas 329.

——S. 115 and O. 41, R. 27 — Error of Law — Admission of additional evidence.

The High Court could not revise an order of the lower appellate court taking additional evidence under O. 41, R. 27 of the C. P. C., there being no defect of jurisdiction but merely an error of law. AIR (V 7) 1920 Pat 266 : 1 Pat LT 701 : 5 Pat LJ 263 : 56 Ind Cas 983 (DB).

(b) Award.

——S. 115 — Lower Court taking mistaken view as to what constitutes misconduct on part of arbitrator. There is no ground for revision. AIR (Vol 27) 1940 Nag 386: 1940 NLJ 393: ILR (1940) Nag 659: 192 Ind Cas 371.

——S. 115 — The question, whether or not the award was valid, is one especially reserved for the decision of the court passing such decree, and even if it has erred on a question of law in coming to a decision on that point, that in itself is not a ground for revision. AIR (Vol 14) 1927 All 573: 100 Ind Cas 76.

——S. 115 — Where an application to set aside an award was dismissed as barred by limitation without considering the provision of the Limitation Act, Section 12 (4) as to deduction of time required for obtaining a copy of the award:

Held, there was no question of jurisdiction and revision was not competent. AIR (Vol 14) 1927 Mad 660: 26 MLW 15: 101 Ind Cas 514.

——S. 115 — Where an objection as to the legality of the award on the ground of absence of the sanction of Court for the reference to arbitration on behalf of minors is taken, and the Court holds the reference and the award to be valid, is decision, even if erroneous, is on a point of law and not open to revision for Section 115 is not directed against conclusions of law or facts in which the question of jurisdiction is not involved. AIR (Vol 9) 1922 Sind 1: 15 SLR 165: 65 Ind Cas 50 (DB).

——S. 115 — Error of law — No ground.

The High Court cannot interfere in revision merely because a Court has taken in the exer-

cise of its jurisdiction a mistaken view as to what does or does not constitute misconduct in an arbitrator. AIR (Vol 6) 1919 Sind 104: 13 SLR 98: 52 Ind Cas 864 (DB).

——**S. 115 — Error — Misconduct of arbitrator.**

A mistaken view by the Lower Court as to what amounted to misconduct of arbitrators is no ground for revision. AIR (Vol 3) 1916 Lah 89: 117 PR 1916: 107 PWR 1916: 70 PLR 1917: 34 Ind Cas 192 (DB).

——**S. 115 — Error of law — Rejection of Award.** —An error of law is not a material irregularity and is no ground for revision. Rejection of private award in toto where part of award is valid and is separable is at the most an error of law. AIR (Vol 2) 1915 Lah 105: 66 PR 1915: 146 PWR 1915: 31 Ind Cas 80 (DB).

(c) Burden of proof.

——S. 115 — The mistake as to onus gives rise to a revision petition. AIR (Vol 26) 1939 Lah 562: 41 PLR 513: 185 Ind Cas 613.

——**S. 115 — Lower Court wrongly deciding question as to burden of proof.**

It is the duty of the High Court to interfere in revision to correct lower Courts when they act perversely; it can never be said that it should interfere with them in revision merely because they have decided wrongly. It is not any part of the legitimate duties of this Court to help lower Courts to frame issues. They alone have jurisdiction to frame the issues in the suits which come before them for trial, and they have jurisdiction to decide wrongly as well as rightly. The wrong decision on question which way the burden of proof is to be thrown, is not a ground for interference in revision. AIR (Vol 26) 1939 Mad 733: (1939) MWN 608: (1939) 2 MLJ 44: 50 MLW 459: 186 Ind Cas 120.

——**S. 115 — Lower Court wrongly placing burden of proof and wrongly deciding issue on presumption.**

When the parties lead evidence on both sides the question of burden of proof loses much of its importance. But in a case where the plaintiff's evidence does not satisfy the Court and the Court proceeds to decide the issue on presumption raised against the defendant because of non-production of certain documents, it is the duty of the High Court to interfere in revision. AIR (Vol 25) 1938 All 520: (1938) ALJ 686: 1938 AWR (HC) 458: 177 Ind Cas 663.

——**S. 115 — Miscarriage of justice.**

Where the burden of proof has been wrongly placed by the lower Court and there has been a miscarriage of justice, the High Court should interfere in revision. AIR (Vol 22) 1935 Rang 131: 159 Ind Cas 70 (1).

——S. 115 — The fact that the burden of proof as to certain issues was not correctly placed is no ground for interference in revision. (1934) 151 Ind Cas 5481: 35 PLR 334.

——S. 115 — Where the lower Court passed an erroneous order the effect of which was to lay upon the applicants the burden of proving that certain payments by an insolvent were bona fide whereas it was incumbent on the Receiver to show that they were fraudulent:

Held, that the High Court had jurisdiction to revise the order. AIR (Vol 18) 1931 Rang 136: 9 Rang 71: 134 Ind Cas 744.

——S. 115 — A revision is competent where the Courts below deal with the case under an entire misapprehension as to the law on the subject. Where, in a suit on the basis of a bond, the Courts below, though at one stage fully conscious of the fact that it is for the defendant to prove want of consideration, proceed on the assumption, when actually deciding the case, that it is for the plaintiff to prove affirmatively that the consideration in respect of the bond had been paid by him, the burden of proof being wrongly placed, the decree should be set aside. AIR (Vol 17) 1930 Lah 572: 31 PLR 284.

——S. 115 — The giving of an erroneous decision on a point of law is not an irregularity or illegality and so is not a ground for revision; a decision on a question of onus cannot be attacked in revision. (1926) 92 Ind Cas 46: 26 PLR 783.

——S. 115 — Revision will lie where the Appellate Court takes a different view as to burden of proof but does not give the party on whom it places the burden, opportunity to produce evidence. AIR (Vol 10) 1923 Pat 295: 72 Ind Cas 157: 4 PLT 245: 1923 PHCC 269.

(d) Discretion.

——S. 115 — An order under O. 1, R. 10 can be revised. When the Court fails to exercise a discretion vested in it and when its failure is due to error. AIR (Vol 24) 1937 Mad 338: (1937) MWN 375: 171 Ind Cas 798.

——S. 115 — An alleged wrong view of law regarding the correct provision of the Court Fees Act applicable to the suit, the appellate Court having full discretion, is not a ground for interference in revision. AIR (Vol 9) 1922 Nag 264: 71 Ind Cas 31.

(e) Evidence.

——**S. 115 — Evidence recorded in two cases, when can be taken together.**

Where the Court treats the evidence in two cases together although the parties had apparently never agreed to the evidence in one case being treated as evidence in the other and the suits had not been consolidated, the Court commits an error. AIR (Vol 26) 1939 Lah 53: 40 PLR 990: ILR (1939) Lah 266: 181 Ind Cas 436.

——**S. 115 — Order made bona fide upon material on the record.**

Where a Judge or Magistrate makes an order to the effect that an Advocate could not with propriety appear by reason of the fact of his having been interested on behalf of the other side in matters which were collateral to the suit in question and there was upon the record proof of ample material before him upon which he could make such an order and there is no suggestion that whether he was right or wrong, he did not do so bona fide, then it is not a case for the High Court to intervene in revision.

Per Mosely, J. — The order is admittedly a judgment as defined in Section 2 (9) of the Code, that is to say, a statement given by the Judge of the grounds of a decree or order, and therefore, the powers of the Court are restricted as laid down in Section 85, Govt. of Burma Act. and the question cannot be agitated in addition as one of general sperintendence over the Courts as provided in Section 85 (1) of that Act. AIR (Vol 26) 1939 Rang 183: 1939 Rang LR 514: 182 Ind Cas 77 (SB).

——**S. 115 — Error in drawing presumption.**

Even when the lower Appellate Court has committed an error of law in drawing certain presumptions and in arriving at certain conclusion, it would not afford any ground for revision. AIR (Vol 25) 1938 Lah 357: 180 Ind Cas 555 (DB).

——S. 115 — **Lower Court refusing to allow certain question to be put to witness — High Court's power of interference — Government of India Act, 1915 (5 and 6 Geo. V, C. 61), Section 107.**

The High Court is not competent in the exercise of its authority to interfere and set right the orders of a subordinate Court refusing to allow certain questions to be put to the witness on the ground that the order of the subordinate Court has proceeded on an error of fact. AIR (Vol 22) 1935 All 599: (1935) ALJ 549: 1935 AWR (HC) 654: 57 All 977: 156 Ind Cas 805 (FB).

——S. 115 — The fact that the handwriting expert did not give sworn testimony is a mere error not involving any question of jurisdiction and does not justify interference in revision. AIR (Vol 21) 1934 Lah 230: 35 PLR 109: 150 Ind Cas 357.

——S. 115 — **Error of law — Exclusion of evidence.**

Where by an error of law the Court excludes certain evidence from consideration, the evidence being the main evidence in the case, then there is such material irregularity in the exercise of jurisdiction as may lay the judgment open to revision. AIR (Vol 17) 1930 Lah 177: 119 Ind Cas 417.

——S. 115 — Under section 115 mere error of law in excluding evidence does not give the Court jurisdiction to interfere. AIR (Vol 10) 1923 Cal 322: 65 Ind Cas 696.

——S. 115 — **Error of law — No revision.**

Though the law enunciated by the Judge was wrong and the evidence adduced was inadmissible and misunderstood these are not errors involving any question of jurisdiction and the High Court will not interfere in revision. AIR (Vol 5) 1918 Pat 607: (1918) Pat HCC 347: 48 Ind Cas 930 (DB).

——S. 115 — **Error of law — Appreciation of evidence.**

The fact that undue weight is given to one item of evidence or that it is misappreciated is not a sufficient ground for interference in revision. (1910) 6 NLR 49: 6 Ind Cas 429.

——S. 115 — Consideration — Proof of payment — Burden of proof — Revision — Civil Cases — Material irregularity — The plaintiff sued on a hundi. The defendant pleaded want of consideration. The plaintiff produced a hundi in lieu of which he alleged the hundi in suit was executed. The Court decreed the claim. On appeal the District judge dismissed the suit wrongly holding that the burden of proving the passing of consideration lay on the plaintiff and he had not discharged it. The plaintiff applied for revision. Held that the onus of proving want of consideration lies on the drawer of a negotiable instrument; thus, it was wrongly held that the onus was on the plaintiff which amounted to material irregularity and hence revision was allowable under Section 115, Civil P. C. (1910) 1910 PLR No 24 P 58 (60): 1910 PWR 25: 5 Ind Cas 891.

——S. 115 (S. 622 old Code) — **Revision — Appellate Court acting in contravention of Section 578 — Ss. 59, 62, 63 — Court of first instance allowing document on which suit based to be produced at a later stage — Appellate Court if may reject, and on what ground — Dealing with cases as if there was no evidence when in fact there was — High Court's power to interfere in revision.**

Where a document upon which a suit was based was not produced along with the plaint but the Court allowed it to be produced at a later stage, and relying on it, gave the plaintiff a decree, but on appeal the appellate Court rejected the document merely because it was not produced along with the plaint, and dismissed the suit:

Held: That having regard to the provisions of Section 578 of C. P. C., the appellate Court acted illegally and with irregularity in the exercise of its jurisdiction and the High Court could interfere. The policy underlying Sections 68 & 69 of C. P. C., 1882, is to exclude evidence as to the existence of which at the date of the suit there may be reasonable doubt and as to the genuineness of which suspicion might rightly arise because it was produced at a late stage. The appellate Court in the above circumstances should have considered whether leave for the reception of the document was properly granted and whether the trial was prejudiced thereby; also whether by reason of the delay in the production of the document there was a well founded ground of suspicion that the document was not genuine.

The appellate Court dealt with the case on the footing that besides the excluded document there was no other evidence to support the plaintiff's case, when as a matter of fact, there was other evidence on the record. Held, that there was no proper trial and it was incumbent on the High Court to interfere. (1909) 13 CWN 797: 10 CLJ 33 (37, 38): 2 Ind Cas 946 (DB).

(f) Extension of time.

——S. 115 — **Court wrongly holding that time for confirmation cannot be extended.**

Even if the Court below is considered to be wrong in holding that time for confirmation of sale could not be extended without consent of parties, it cannot be held that the Court was acting illegally in the exercise of its jurisdiction or with material irregularity. Consequently the High Court cannot exercise its power under Section 115, Civil P. C. AIR (Vol 23) 1936 Oudh 172: 1936 OWN 137: 160 Ind Cas 468 (DB).

——S. 115 — **Mistake of petitioner due to accident or inadvertence.**

Where the mistake by the petitioner was due to mere accident or inadvertence and on the merits it was a fit case in which extension should have been granted and the lower Court did not apply its mind to this aspect of the case and all that it held was that legally there was no power to extend the time and this view was found erroneous:

Held, that it was open to the High Court in revision to extend the time for payment. AIR (Vol 21) 1934 Lah 537: 35 PLR 459: 149 Ind Cas 96 (2).

——S. 115 — **Court-fee.**

Decree in favour of plaintiff with proviso that if deficient court-fee was not paid within certain time, suit to stand dismissed. Court cannot subsequently extend time, when decree was not amended — Order extending time is open to revision. AIR (Vol 18) 1931 All 318: 129 Ind Cas 732.

——S. 115 — Where the lower Court granted an extension of time in a manner not known to law:

Held, that the High Court can interfere in revision with the order. AIR (Vol 18) 1931 Cal 319: 52 CLJ 23.

——S. 115 — No revision lies against an order refusing extension of time under Section 5 of

the Limitation Act where it ought to be extended as at the best it amounts to an error of law. AIR (Vol 14) 1927 Lah 43: 98 Ind Cas 892.

——**Ss. 115 and 148.— Error of law — Powers of High Court to extend time allowed by lower Court.**

In exercising the special powers given by Section 115 of the C. P. Code it is not for the High Court to enter into the question whether upon the facts, a particular order is right or wrong.

Quaere — Where the High Court, as a Court of revision, has the power to extend the time fixed by the Lower Court for the doing of an act by one of the parties? AIR (Vol 6) 1919 Cal 312: 30 CLJ 64: 52 Ind Cas 4 (FB).

(g) Facts.

——**S. 115 — Error of law — Appellate Court failing to determine basic question of fact — Interference in revision.**

When the decisions of the appellate Court are based on facts proved by the testimony of witnesses and the decision is not contrary to law, they will be binding on the highest Court. But where the only fact that goes to the root of the case is whether any right of way could be claimed on basis of long user, it is a question of law, and the appellate Court failing to determine the basic question of fact, commits a serious error of law calling for interference in revision. AIR (Vol 36) 1949 HP 4.

——**S. 115 — Facts and law duly considered.**

If the facts and the law applicable to the case have been duly considered by the lower Court, then although its decision may be erroneous, the error cannot be corrected on revision. If, on the other hand, the lower Court has failed to consider the law or the facts, it has acted illegally and its decision may be revised. AIR (Vol 27) 1940 Rang 75: 187 Ind Cas 350.

——**S. 115 — Even though a Judge has decided** a question of fact or law erroneously, it gives the High Court no jurisdiction to disturb his judgment or order. But when the High Court finds that the order made by the Judge is one which is entirely and absolutely unjustifiable and is almost perverse, it has jurisdiction to revise the order. AIR (Vol 26) 1939 Pat 430: 5 BR 922: 183 Ind Cas 371.

——**S. 115 — Court having jurisdiction deciding wrongly — Revision, if lies.**

Where the Courts have decided certain questions of law and of fact and even though it be true that they have decided them wrongly, if they had jurisdiction to decide them and they have not committed any illegality or material irregularity in the exercise of their jurisdiction, no revision lies. AIR (Vol 24) 1937 Rang 61: 167 Ind Cas 479 (2).

——**S. 115 — Error on question of fact or mixed question of fact and law — High Court's jurisdiction to interfere in revision.**

Error on a question of fact or a mixed question of fact and law cannot in any way give the High Court jurisdiction to interfere in revision. AIR (Vol 22) 1935 Pat 448: 1 BR 757 (1): 157 Ind Cas 474 (1).

——S. 115 — Where the question is a mixed one of law and fact, and from one point of view, the lower Court has decided erroneously, this fact does not give the High Court jurisdiction to interfere in revision. AIR (Vol 22) 1935 Pat 267: 1 BR 444: 155 Ind Cas 419.

——**S. 115 — Error in deciding question of fact.**

The mere fact that the lower Court errs in applying the proper test to decide a question of fact would not make the point a question of law or a ground of revision; at best this could only be held to be an error of law. AIR (Vol 15) 1928 Lah 102: 106 Ind Cas 829.

——**S. 115 — Error of law — Material irregularity or illegality — Interference with Pres. Sm. C. Court.**

Mere decisions in matters of law and fact are not within the scope of Section 115 of the C. P. Code. Clauses (a) and (b) of that section deal with the question of jurisdiction and Cl. (c) refers to illegal processual acts. 41 Cal 323 ref. The trial of an issue in the form in which it was raised amounted to an error in law and not to an illegality or material irregularity in the procedure. Under the circumstances of the case, the mere fact that the onus was wrongly placed on defendant, did not entitle the Court to interfere under Section 115. Inasmuch as there was some evidence on which the Court acted, there could not be any interference under the section. AIR (Vol 6) 1919 Cal 266: 23 CWN 759: 52 Ind Cas 767 (DB).

(h) Judgment.

——**S. 115 — Failure of Judge to refer to a document in judgment — No revision lies.**

A Judge has jurisdiction to decide wrong as well as right and merely because he makes an error of law, that is no ground for revision. Where an Appellate Court omits to refer to a particular document in the judgment, it does not necessarily follow that it has failed to consider the document. The failure of the Judge to refer to a document in his judgment is no ground for interference in revision. AIR (Vol 33) 1946 Nag 165: ILR (1946) Nag 26: 1946 NLJ 14: 223 Ind Cas 491.

——**S. 115 (c) — Rent suit decreed by Small Cause Court Judge — Absence of express finding.**

Where a rent suit has been decreed by the Small Cause Court Judge and his judgment read as a whole does imply a finding that the relationship of landlord and tenant exists between the plaintiff and the defendant, the absence of the express finding matters little. In any case, the absence of such an express finding is not a matter which would attract the interference of the High Court under Section 115, Civil P. C. AIR (Vol 29) 1942 Cal 530: 46 CWN 838: 203 Ind Cas 368.

——**S. 115 (c) — Small Cause Court Judge in reasons for his decision not mentioning certain documents.**

It is not necessary for a Judge of the Court of the Small Causes to give the reasons for his decision on the points which arose for determination. All that he need do is to set out the points for determination, and his decision thereon. The fact that in the reasons for his decision he has not mentioned certain documents does not show that he has ignored these documents. Even if he ignored these documents, such omission would not come within the mischief of Section 115 (c). AIR (Vol 29) 1942 Cal 530: 46 CWN 838: 203 Ind Cas 368.

——S. 115 — Under O. 20, R. 4, Civil P. C., a Judge in a Small Cause Court suit need not write lengthy judgments. He can reduce his remarks to a minimum but that minimum must be intelligible thus enabling the High Court in review to satisfy itself whether the decree or order passed by the Judge was according to law. AIR (Vol 25) 1938 Oudh 225: 1938 OWN 805: 14 Luck 211: 177 Ind Cas 59.

——S. 115 — That the District Judge has given a wrong decision is no ground for interference in revision. AIR (Vol 22) 1935 Lah 602: 16 Lah 1090: 38 PLR 115: 161 Ind Cas 197 (DB).

——S. 115 — Even if the lower Court had committed an error of judgment or of law the High Court cannot interfere under S. 115, C. P. Code. (1922) 65 Ind Cas 512 (Cal).

(i) Jurisdiction.

(i) Assumption of.
(ii) Failure to exercise.
(iii) Not involved — Miscellaneous rulings.
(iv) Scope — Miscellaneous illustrations.

(i) Assumption of.

——S. 115 — Error of law — When ground for revision — Order of Court dismissing pauper application under O. 33, R. 5 (d) erroneously interpreting that rule.

Once a Court rightly assumes jurisdiction to decide a dispute between the parties, it does not exercise its jurisdiction illegally or with material irregularity simply because it decides either a question of law or a question of fact erroneously and in such a case, High Court has no power of revision against a decision of the lower Court. But if a question of jurisdiction is involved in its conclusion of law or fact, then High Court can interfere in the event of such conclusion being erroneous, because that would amount to illegal assumption or exercise of jurisdiction. Under O. 33, R. 5 (d), C. P. Code, the Court's jurisdiction to reject an application for leave to sue in 'forma pauperis' is derived from or is based upon the decision of the question whether the applicant's allegations do not show a cause of action. If it decides that question on an erroneous interpretation of R. 5 (d), it will not be acting within the ambit of its jurisdiction, and its order dismissing the application is, therefore, revisable. AIR (Vol 33) 1946 Pat 316: 25 Pat 58 : 12 BR 398: 223 Ind Cas 336.

——S. 115 — Appellate Court ordering subordinate Court to try suit not triable by it.

An appellate Court has no jurisdiction to order a subordinate Court which is legally not competent to try a suit, to hear it and dispose of it, and if it does actually order the Subordinate Court to dispose of the case, it acts without jurisdiction and acts illegally in the exercise of its jurisdiction. If, therefore, an order of this kind is passed, it is open to be revised both under cl. (a) and cl. (c) of S. 115, Civil P. C. AIR (Vol 30) 1943 All 300: 1943 RD 328: 1943 AWR (HC) 133 and Rev 12: (1943) ALJ 395: ILR (1943) All 661: 209 Ind Cas 101.

——S. 115 — Notice under S. 80 necessary but not given — Court wrongly deciding question.

If in fact notice had to be given as required by S. 80 of the Civil P. C. and if notice was not given in accordance with the provisions of that section, the Court has no jurisdiction to entertain the suit as against the Provincial Govt. The question does not cease to be a question of jurisdiction merely because the lower Court has decided wrongly questions which, if decided rightly, would have left it without jurisdiction to entertain the suits. AIR (Vol 30) 1943 Mad 284: (1943) 1 MLJ 53: 56 MLW 50: 1943 MWN 56: 210 Ind Cas 418.

——S. 115, O. 43, R. 1 (a) — Appellate Court's order under O. 43, R. 1 (a), whether immune from operation of S. 115.

The attributes of jurisdiction are external to the tribunal and independent of its decision. The Appellate Court's order under O. 43, R. (1) (a), Civil P. C., is not immune from the operation of S. 115 of the Civil P. C. If the Appellate Court were to assume or abdicate jurisdiction by its own wrong decision, the High Court would have jurisdiction to rectify the error in revision. Hence where the Appellate Court by its wrong decision makes a Court subordinate to it, assume or abdicate jurisdiction or lends support to it, in doing so, its decision cannot but be pronounced as illegal or at any rate illegal exercise of jurisdiction and hence would fall under S. 115 (c). Moreover, in such a case, the decision of the Appellate Court amounts to the exercise of jurisdiction not vested in it by law and, therefore, its decision would fall under S. 115(a) inasmuch as the Appellate Court can neither confer on the sub-Court a jurisdiction which it has not under the law nor take away from the sub-Court a jurisdiction vested in it by law. AIR (Vol 28) 1941 Nag 278: ILR (1941) Nag 543: 1941 Nag LJ 245: 198 Ind Cas 34 (DB).

——S. 115 — Erroneous interpretation of Proviso 2 to O. 21, R. 90 — Objection to sale not entertained.

Where a Judge has refused to consider the objection to sale in the erroneous belief that it was not entertainable in view of Proviso 2 to O. 21, R. 90, the error of law in such a case affects the jurisdiction of the Court and in the circumstances, the petition for revision is competent. AIR (Vol 26) 1939 Lah 222: 41 Pun LR 553.

——S. 115 — Court following ruling of the other High Court to which it is not subordinate, in absence of ruling of its own High Court.

When a Court has jurisdiction to decide a question and has decided it whether rightly or wrongly, there can be no revision under S. 115, as even if the Court has decided the question wrongly, it has not exercised its jurisdiction illegally or with material irregularity.

Where a Court disallows an application of an Official Receiver in charge of an insolvent's estate, to sue as a pauper and has exercised its jurisdiction following a ruling of a High Court to which it is not subordinate, in the absence of a ruling of the High Court to which it is subordinate, the Court cannot be said to have exercised its discretion illegally or irregularly and no revision lies against such order. AIR (Vol 26) 1939 Oudh 129: 1939 OWN (CC) 193: 14 Luck 442: 179 Ind Cas 1001 (DB).

——S. 115 — Judge's error one of law and due to fact of rules not having been published.

When the error committed by the Judge was merely one of law and due to the fact that the rules had not been published by the time the order came to be made, it cannot be said that the Judge has acted with any material irregularity or has exercised a jurisdiction not vested in him when he committed an error of law in interpreting a section of the Act, and hence the High Court will not interfere in revision. AIR (Vol 23) 1936 All 449: (1936) ALJ 501: 1936 RD 214 (2): 1936 AWR (HC) 428 (1): 163 Ind Cas 828.

——S. 115 — Facts ousting jurisdiction must be patent on the face of the record.

Facts ousting jurisdiction must be patent on the face of the record before it can be predicted of a Court that it has exercised a jurisdiction not vested in it by law in terms of cl. (a), S. 115. An error of law does not justify interference by the High Court in its revisional jurisdiction :

Held, on the facts of the case that the order was not so patent. AIR (Vol 20) 1933 Sind 229: 27 SLR 261: 150 Ind Cas 461 (DB).

——S. 115 — Though an erroneous decision on a question of law or fact after jurisdiction has once been legally assumed would not be a ground for interference under S. 115, yet, if it is the very basis and foundation of jurisdiction in its limited

sense, as distinguished from powers, it at once comes within the purview of S. 115. AIR (Vol 17) 1930 Pat 528: 11 Pat LT 384: 122 Ind Cas 153.

——S. 115 — An error of law which amounts to a usurpation of authority in the act of rejection of a petition for review of order confirming auction sale calls for interference under S. 115. AIR (Vol 16) 1929 Nag 305: 116 Ind Cas 65.

——S. 115 — Error of law — Order beyond jurisdiction.

The High Court will interfere when a Subordinate Court issues an order which is erroneous in law and as a result of that error the court acts beyond or in derogation of its jurisdiction. AIR (Vol 3) 1916 Cal 371: 21 CLJ 614: 30 Ind Cas 38 (DB).

(ii) Failure to exercise.

——S. 115 — Failure to exercise jurisdiction due to wrong interpretation of law.

It depends upon the facts of each particular case whether or not the High Court will interfere in revision on the ground that the lower Court has failed to exercise its jurisdiction owing to wrong interpretation of law. AIR (Vol 26) 1939 Pat 263: (1939) PWN 50: 5 BR 304: 179 Ind Cas 845.

——S. 115 — Where an error of law results in failure to exercise jurisdiction, High Court can interfere in revision. AIR (Vol 18) 1931 All 756: 53 All 959: (1932) ALJ 13: 133 Ind Cas 407 (DB).

(iii) Not involved — Miscellaneous rulings.

——S. 115 — Error of law — Interference in revision.

Under Section 115 (c), C. P. Code, the High Court can interfere only in those cases where in the exercise of jurisdiction the lower Court acts illegally or with material irregularity. A mere error of law not involving the jurisdiction of the Court is not enough. AIR (Vol 37) 1950 Cal 87: 54 CWN 355 (DB).

——S. 115 — Error of law — Interference.

In a case under Section 115, C. P. Code, errors in law are not in themselves a ground for interference in revision. There must at the lowest be some material irrgularity which touches the question of jurisdiction. AIR (Vol 35) 1948 Pat 48.

——S. 115 — Error of law — When and when not a proper ground for interference.

If the error of law complained of has resulted in giving the Court concerned a jurisdiction which it did not in fact possess, or if it has resulted in that Court refusing jurisdiction which it did in fact possess, then the question is one which is clearly within the scope of S. 115, Cl. (a) or (b), C. P. Code. If, however, the error committed does not touch the question of jurisdiction, Section 115 has no application unless the case comes within the purview of cl. (c) of the section. AIR (Vol 34) 1947 Oudh 228: 22 Luck 403: 1947 OWN 362: 1947 OA (CC) 140: 1947 AWR (CC) 140.

——S. 115 — Wrong decision — Whether ground for revision.

Where the lower Court had jurisdiction to decide a plea even if it decided it wrongly, it cannot be said to have exercised its jurisdiction illegally or with material irregularity and it is not a ground for interference in revision. AIR (Vol 30) 1943 Oudh 300: 1943 OWN (CC) 169: 208 Ind Cas 45.

——S. 115, O. 21, R. 52 — Custody Court deciding question of priority — Revision, competency of.

Where the custody Court decides that a certain person is not entitled to any priority, no revision can be entertained by the High Court under Section 115, simply because the judgment of the custody Court is erroneous on a question of law. The custody Court has jurisdiction to decide the question of priority, and whether the decision is right or wrong, it cannot be said that it had acted with material irregularity in the exercise of jurisdiction. AIR (Vol 23) 1936 Lah 521: 38 PLR 800: 163 Ind Cas 584 (DB).

——S. 115 — Where a Court has jurisdiction to determine a question and it determines that question, it cannot be said that it has acted in the exercise of its jurisdiction illegally or with material irregularity because it has come to an erroneous decision, whether that decision be on a question of fact or even on a point of law. AIR (Vol 22) 1935 Rang 158: 156 Ind Cas 615 (1).

——S. 115 — Court having jurisdiction.

Whether the decision arrived at by the lower Court is wrong or right, if the Court had jurisdiction to decide the matter and it did decide it, even if it was decided wrongly, the lower Court cannot be said on that ground to have exercised its jurisdiction either wrongly, illegally or with material irregularity and no application for revision lies against the decision. (1935) 156 Ind Cas 1098 (Rang).

——S. 115; O. 9, R. 13 — Notice of hearing not issued to one defendant — Ex parte decree — Erroneous decision on question of law — Material irregularity — Jurisdiction not lost due to erroneous decision on a question of law.

Where the Court passed an order that the absent defendants be summoned for a date and that the parties should appear before a certain Judge on that date, and defendant No. 1 not appearing on that day, the case was ordered to be proceeded with ex parte against him and it appeared that no notice was sent to him of the hearing of the date fixed:

Held, that the decision was at the most an erroneous decision on a question of law and that it could not be said that in arriving at this decision the trial Court exercised a jurisdiction not vested in it by law or acted illegally or with material irregularity in the exercise of its jurisdiction. The trial Court had the jurisdiction to decide whether any irregularities were committed and, if so, whether those irregularities amounted to an error apparent on the face of the record. Even if this point has been wrongly decided, it cannot be said that the lower Court has assumed jurisdiction which it did not possess. The jurisdiction of the Court to adjudicate upon the alleged irregularities had been complete throughout, and it cannot be said to have been lost on account of an erroneous decision on a question of law. AIR (Vol 21) 1934 Lah 825: 35 PLR 670: 152 Ind Cas 620.

——S. 115 — Court having jurisdiction.

Where a Court has jurisdiction to determine a question, it cannot be said that it has acted illegally or with material irregularity because it has come to an erroneous decision on a question of fact or even of law. AIR (Vol 21) 1934 Rang 233: 153 Ind Cas 996.

——S. 115 — Wrong decision by Court having jurisdiction.

Where a Court has jurisdiction to decide a question before it and, in fact, decides the question, it cannot be regarded as acting in the exercise of its jurisdiction illegally or with material irregularity merely because its decision is

erroneous. AIR (Vol 21) 1934 Rang 230: 151 Ind Cas 668.

——S. 115 — A Court has jurisdiction to decide rightly or wrongly and when a question of res judicata is decided wrongly, the High Court has no jurisdiction to interfere in revision under Section 115, Civil P. C. AIR (Vol 20) 1933 Mad 231 (1): 145 Ind Cas 380.

——S. 115 — Where the lower Court had jurisdiction to hear a case and exercised its jurisdiction and did not act illegally or with material irregularity in the exercise of its jurisdiction, the High Court is not entitled to interfere with its order in revision, even if it is satisfied that the point of law upon which the lower Court passed its order is absolutely wrong. AIR (Vol 20) 1933 Oudh 240: 10 OWN (CC) 259: 142 Ind Cas 616.

——S. 115 — A mere error of law, however gross, would not in itself be sufficient for interference in revision. That error of law must result either in failure to exercise jurisdiction or wrong exercise of jurisdiction or any irregularity in the exercise of jurisdiction before the High Court can interfere under S. 115. AIR (Vol 18) 1931 All 667: (1931) ALJ 995: 133 Ind Cas 404 (DB).

——S. 115 does not contemplate a case where there has been an error of law in deciding a matter the decision of which was for the Court in the regular exercise of jurisdiction. (1929) 118 Ind Cas 141 (Pat).

——S. 115, applies to jurisdiction alone, the irregular exercise of it or the illegal assumption of it. It is not directed against conclusions of law or fact in which the question of jurisdiction is not involved, however gross and palpable the errors of law may be. (1929) 113 Ind Cas 539: 30 PLR 230.

——S. 115, applies to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved and therefore the High Court cannot interfere in such a case. AIR (Vol 14) 1927 Cal 965: 46 CLJ 527 (DB).

——S. 115 should be confined and strictly confined to cases in which there has been material irregularity so far as jurisdiction is concerned and either a failure to exercise a jurisdiction vested in the Court or a wrong exercise of such jurisdiction. It is wrong to utilize the section to correct errors of law and not merely errors of procedure. AIR (Vol 13) 1926 Cal 1112: 30 CWN 928: 98 Ind Cas 751 (DB).

——S. 115 — Where the lower Court has not exercised its jurisdiction illegally or with material irregularity, the High Court cannot interfer under Section 115 in spite of the decision of lower Court being erroneous on a point of law. AIR (Vol 13) 1926 Nag 472: 96 Ind Cas 251.

——S. 115 — The High Court will not ordinarily interfere with a finding of fact in revision. Erroneous decision on a question of law which the lower appellate Court has jurisdiction to try, is no ground for interference in revision. AIR (Vol 13) 1926 Oudh 80: 90 Ind Cas 373.

——S.115 — It is well settled that where a Court has jurisdiction to determine a question and it has determined that it cannot be said to have acted illegally or with material irreguarity simply because it has come to an erroneous decision. The High Court will not interfere under Section 115, C. P. Code, merely because the lower Court had wrongly decided that a suit was barred by limitation or that it was barred as res judicata or because the lower Court had proceeded upon an erroneous construction of the sections of an act, or had misunderstood the effect of a document in evidence or had excluded evidence which it ought to have admitted. Section 115 applies to jurisdiction alone, the irregular exercise of it or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved. Jurisdiction according to the exact conception of it formed by the Roman lawyers consists in taking cognizance of a case involving the determination of some jural relations, in ascertaining the essential points of it and in pronouncing upon them. An enquiry into whether the jurisdiction exists is not an exercise of jurisdiction over the case itself, but an investigation of another question altogether, that of whether the considerations of cognizance are satisfied. AIR (Vol 11) 1924 Cal 493: 80 Ind Cas 205: 28 CWN 292.

——S. 115 — Error of Law — No ground for — Revision.

To give an erroneous decision on a question of law is not necessarily to act illegally or with material irregularity in the exercise of jurisdiction. AIR (Vol 1) 1914 Sind 141: 8 SLR 190: 27 Ind Cas 371.

(iv) Scope — Miscellaneous illustrations.

——S. 115 — Error of law — When a ground for interference in revision.

If a Court assumes jurisdiction, or declines to exercise jurisdiction upon an erroneous view of the law its order can be revised. But if the decision of a question of law has no effect upon the jurisdiction of the Court, it cannot be interfered with in revision under Section 115, C. P. Code. AIR (Vol 37) 1950 A 144: 1949 ALJ 439: 1949 AWR 521.

——S. 115 — Error of law — Erroneous decision on question of notice under S. 77 of Railways Act — Interference in revision.

Where the Court below has passed a decree in favour of the plaintiff in a suit against the Railway Administration wrongly holding that a notice under Section 77 of the Railways Act is not necessary, the High Court in revision under Section 115, C. P. Code, is not entitled to reverse that decree, as the error of the Court is not on a point touching jurisdiction but a mere error of law. Section 77 of the Railways Act does not provide that no suit shall be entertained in the absence of notice. It provides only that it cannot be decreed. The Court has always got the jurisdiction to entertain the suit, and has then to decide upon the necessity of notice. With regard to the necessity of notice, it has jurisdiction to decide rightly or wrongly. AIR (Vol 36) 1949 Pat 410: 28 Pat 552: 30 PLT 280 (FB).

——S. 115 — Jurisdiction.

An erroneous decision on a question of fact or law not involving question of jurisdiction is not open to revision. AIR (Vol 32) 1945 Oudh 79: 1944 AWR (CC) 277: 1944 OWN (CC) 440 (DB).

——S. 115 (c) — Scope and applicability.

Section 115 (c) applies to errors committed in connection with the exercise of jurisdiction or errors committed in respect of procedure. It does not apply to every error of law committed by a Judge. AIR (Vol 29) 1942 Cal 530: 46 CWN 838: 203 Ind Cas 368.

——S. 115 — Issue decided wrongly but with jurisdiction — Effect of.

If a Court has jurisdiction, it does not at all follow that if it has decided an issue wrongly

that it has acted illegally or with material irregularity in the exercise of its jurisdiction. If it did not, no revision application lies against an order passed by it. AIR (Vol 26) 1939 Pat 564: (1939) PWN 341: 5 BR 645: 181 Ind Cas 644 (DB).

——S. 115 — A mere error of law on a question which the Court has jurisdiction to decide will not in itself be a ground for interference in revision. AIR (Vol 26) 1939 Rang 448: 1939 Rang LR 591: 185 Ind Cas 574 (DB).

——S. 115 — Court having jurisdiction.

Where a Court has jurisdiction to decide points arising in a suit, whether its decision is right or wrong in law, that would not be a ground for interference in revision. AIR (Vol 25) 1938 Lah 827: 179 Ind Cas 706.

——S. 115 — Where the question involved is one of law and there is no question of jurisdiction, there is no ground for revision, even if there is an error of law. (1938) 40 PLR 461.

——S. 115 — Decision on point of law — Question of jurisdiction arising.

A decision on a point of law may be interfered with in revision if in fact the question of jurisdiction does arise. AIR (Vol 24) 1937 Pat 647: 18 PLT 826: 4 BR 137: 16 Pat 729: 172 Ind Cas 225 (DB).

——S. 115 — A mere error of law in deciding a case by a Court having jurisdiction cannot be said to be an illegal or irregular exercise of jurisdiction possessed by that Court. But where the Court below does not judicially consider what it ought to have considered, and decides something that it was not called upon to decide, there is illegal or irregular exercise of jurisdiction. AIR (Vol 22) 1935 All 310: (1935) ALJ 527: 1935 AWR (HC) 559: 57 All 810: 156 Ind Cas 1088 (DB).

——S. 115 — A mere error on a point of law is not sufficient for purposes of revision under section 115 unless it raises a question as to jurisdiction. AIR (Vol 22) 1935 Lah 972: 159 Ind Cas 988.

——S. 115 — Court taking one view of points of law while another was possible — No question of jurisdiction.

Where there was no question of jurisdiction involved, the only grievance against the order of the District Judge being that he decided the points of law involved in the case erroneously against the petitioner and it was possible to take a different view of the points of law involved in the case:

Held, that in view of the clear exposition of Section 115, the High Court was precluded from interfering in revision with the order of the District Judge. AIR (Vol 22) 1935 Lah 951: 162 Ind Cas 124.

——S. 115 — Court having jurisdiction.

A wrong decision on a point of law is not a decision which is either illegal or with material irregularity. AIR (Vol 22) 1935 Pat 191: 1 BR 644: 156 Ind Cas 777.

——S. 115 — Punjab Courts Act (VI of 1918), S. 44.

A mere error of law which does not raise any question affecting jurisdiction is no good ground for interference in revision. AIR (Vol 21) 1934 Lah 1019 (1): 36 PLR 283: 155 Ind Cas 533.

——S. 115 (a) (c) — Orders passed by Election Commissioner — Power of High Court to interfere.

The High Court will not interfere by a writ of certiorari with orders passed by an Election Commissioner unless he has acted without jurisdiction or in excess of it. Where the Commissioner has jurisdiction but is guilty of an error of law or fact, the High Court will not interfere. AIR (Vol 21) 1934 Mad 269: 66 MLJ 367: 39 MLW 465: 57 Mad 571: 148 Ind Cas 668 (DB).

——S. 115 — Court applying its mind to case.

Courts have jurisdiction to decide questions wrongly as well as rightly, and where a lower Court has applied its mind to the case before it and duly considered the facts and the law applicable, then, although its decision may be erroneous, that error cannot be corrected on revision. AIR (Vol 21) 1934 Rang 306: 150 Ind Cas 1055.

——S. 115 — Revision petition cannot be entertained on wrong conclusions of law in which no question of jurisdiction is involved. (1934) 26 PLR 177.

——S. 115 applies to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved. A mere error in law is not an "illegality" within the meaning of Section 115. AIR (Vol 20) 1933 Oudh 534: 10 OWN (CC) 1145: 148 Ind Cas 809 (DB).

——S. 115 — An application in revision will not be entertained on the ground of error on a question of law in which the question of jurisdiction is not involved. AIR (Vol 20) 1933 Sind 329: 27 SLR 190: 149 Ind Cas 700 (DB).

——S. 115 is not intended to be directed against conclusions of law or fact in which jurisdiction is not involved. AIR (Vol 19) 1932 All 140: 134 Ind Cas 463 (DB).

——S. 115 — The fact that a decision is incorrect is no ground for revision under Section 115, where no question of jurisdiction is involved. (1932) 136 Ind Cas 251: 8 OWN (CC) 1235: 16 RD 9.

——S. 115 — There is no right of revision against a mistake of law apart from a question of jurisdiction. AIR (Vol 16) 1929 Lah 26: 116 Ind Cas 221.

——S. 115 — Erroneous decisions by the lower Courts on points of law or fact cannot be revised under Section 115 of the C. P. Code if no question of jurisdiction is involved. (1929) 116 Ind Cas 660 (Nag).

——S. 115 — Where a Court which had jurisdiction to hear an appeal hears it, and while disposing of the appeal in the exercise of his jurisdiction he comes to a wrong conclusion on point of law, it does not amount to acting in the exercise of jurisdiction "illegally or with material irregularity". AIR (Vol 16) 1929 Pat 633.

——S. 115 — Where the question of law involved is a question of jurisdiction, the High Court has power to interfere under Section 115 even when the lower Court has committed only a mistake of law. AIR (Vol 15) 1928 Bom 548: 30 Bom LR 1391: 112 Ind Cas 734 (DB).

——S. 115 — Erroneous decision on a question of law is no ground for revision. Decision of

the lower appellate Court on appeal from an order of trial Court directing presentation of the plaint to the proper Court is not open to revision though erroneous as it is a question of law and it had jurisdiction to try it. AIR (Vol 13) 1926 Oudh 31: 90 Ind Cas 430.

——S. 115 — An error of law in coming to a decision is no ground for revision where the decision is come to in exercising jurisdiction vested by law. (1926) 95 Ind Cas 838 (Cal).

——S. 115 — A mere error of law is not necessarily an illegality and is not an exercise by a Court of jurisdiction not vested in it by law so as to entitle the person aggrieved to apply for revision. (1925) 91 Ind Cas 379 (Oudh).

——S. 115 — The High Court should not interfere in revision on the ground that there has been a serious error in law in coming to a finding in a matter in which the Court had jurisdiction. AIR (Vol 10) 1923 Cal 280: 68 Ind Cas 430 (DB).

——S. 115 — Error of law — No ground for revision.

If there is no question of jurisdiction or of the court having acted illegally and without jurisdiction, an application for revision is not maintainable though the court below had committed an error of law. AIR (Vol 7) 1920 All 142: 18 ALJ 373: 2 UPLR (All) 86: 58 Ind Cas 182 (All).

——S. 115 and O. 21, R. 89 — Error of law — Not a ground for interference.

An erroneous decision on a question of law or fact after jurisdiction has once been legally assumed is not a ground for interference but if the decision is the very basis and foundation of jurisdiction in its limited sense as distinguished from powers, it at once comes within the purview of that section. AIR (Vol 6) 1919 Pat 501: 4 Pat LJ 340: 51 Ind Cas 873 (DB).

——S. 115 — Error of law — No ground.

The High Court would not interfere under Section 115 if the Lower Appellate Court has not exceeded its jurisdiction in the case. AIR (Vol 4) 1917 Mad 404: 4 LW 411: 35 Ind Cas 74.

——S. 115 — Error of law — When open to revision.

An erroneous view of the law unless it involves a want or refusal of jurisdiction or any illegality or material irregularity of procedure is not revisable by the High Court. AIR (Vol 3) 1916 Nag 86: 13 NLR 116: 41 Ind Cas 883.

——S. 115 — Error of law — No ground.

Taking an erroneous review of the law does not amount to the exercise of jurisdiction not vested by law or the exercise of jurisdiction illegally or with material irregularity. (1913) 19 Ind Cas 594 (Cal) (DB).

——S. 115 (S. 622 old Code) — When no interference? — Revision — Erroneous decision on a question of law.

Held that the possible erroneous decision by a subordinate Court on a question of law which that Court had jurisdiction to decide, can form no ground for the exercise of the High Court's revisional jurisdiction under Section 622 C. P. C. (1903) 1903 AWN 12 (12, 13).

(j) Limitation — Misellaneous Illustrations.

——S. 115 — Erroneous decision — Question of limitation.

Where the lower Court exercises a jurisdiction not vested in it by law under a misconception of the law of limitation, its order is liable to be set aside in revision. 54 CWN 451 : AIR (Vol 37) 1950 Cal 411 (DB).

——S. 115 — Error of law — Wrong decision on limitation — Revision — Interference.

An erroneous decision on a question of limitation will not justify the High Court in interfering with that decision in revision under S. 115, C. P. Code. (1947) 13 Cut LT 63 (DB).

——S. 115 — S. 115, O. 21, R. 95 — Application under O. 21, R. 95 rejected as time-barred — Order is not open to revision.

An order rejecting an application under O. 21, R. 95, Civil P. C., on the ground that it was barred by limitation is not open to revision. A finding on a question of limitation, whether right or wrong, is generally speaking, a finding on a point of law which does not bring the case within the ambit of S.115, Civil P. C., because it cannot be said that the Court has exercised a jurisdiction not vested in it by law or failed to exercise a jurisdiction vested in it or to have acted in the exercise of its jurisdiction illegally or with material irregularity. The point is one which the Court has jurisdiction to decide, and whether the decision is right or wrong, the decision is final, unless it is subject to appeal. AIR (Vol 28) 1941 Bom 271 : 43 Bom LR 480 : 195 Ind Cas 601 (DB).

——Ss. 115, 60, O. 21, A. 89 — Dismissal of application under O. 21, R. 89, as time-barred — Appellate Court holding that sale must be set aside irrespective of limitation, land being not saleable under S. 60.

An application under O. 21, R. 89, Civil P. C., to set aside the sale was made in execution proceedings but was dismissed as time-barred. On an appeal, therefore, the Appellate Court held that the land sold being State land, was not saleable under S. 60, Civil P. C., and the sale must, therefore, be set aside irrespective of the time when the deposit was made.

Held that no revision lay. The Appellate Court had jurisdiction to decide whether the land was saleable property and the Court did not extend limitation but merely pointed out that period of limitation did not apply to such cases. Even if the Court might have decided the question wrongly, it did not amount to exercising jurisdiction illegally or with material irregularity. AIR (Vol 24) 1937 Rang 537: 174 Ind Cas 691.

——S. 115 — Court deciding question of limitation wrongly.

If the question of limitation has been wrongly decided by the lower Appellate Court, it has considered and wrongly decided it. Section 115 of the Civil P. C., would not, in such cases, give the High Court, the authority to interfere in revision. (1936) 164 Ind Cas 442: 39 CWN 534: 62 CLJ 277.

——S. 115 — It is one thing to misconstrue the Limitation Act or a certain document in such a way as to hold that either limitation has not expired or that a new period of limitation has begun to run and quite another thing to extend the period of limitation in a manner which the law does not contemplate. (Court extending period of limitation for restoration application and restoring suit under O. 9, R. 9: Held, that the order should be set aside under S. 115). AIR (Vol 18) 1931 Cal 319 : 52 CLJ 23 : 129 Ind Cas 778.

——S. 115 — Entertaining time-barred suits — Where the lower Court hears a suit barred by time, treating it as not barred, it acts "illegally" in the exercise of its jurisdiction and its order can be set aside in revision. AIR (Vol 18) 1931 Nag 17 : 27 NLR 251 : 130 Ind Cas 145.

——S. 115 — **Limitation.**

An error of law such as on a question of limitation is not sufficient for purposes of revision under S. 115 unless it affects the jurisdiction of the Court. (1931) 133 Ind Cas 439 : 32 PLR 410.

——S. 115 — Even if a case is not decided on a question of fact, the decision as to limitation does not open the way to a revision, where the Courts below have not acted with material irregularity in the exercise of the jurisdiction vested in them. 123 Ind Cas 571 : AIR (Vol 17) 1930 Lah 112.

——S. 115 — A mistake of law even as regards limitation does not entitle the aggrieved party to the remedy of revision. A revision does not lie on the ground that burden of proving that an application was within time was placed on the wrong party. 120 Ind Cas 414 : AIR (Vol 17) 1930 Nag 88.

——S. 115 — An erroneous view of law on the question of limitation is not by itself a ground for revision. 32 CWN 98 : 106 Ind Cas 561 : AIR (Vol 15) 1928 Cal 202 (DB).

——S. 115 — An error on a question of limitation is not necessarily such an error as would bring the case within the purview of S. 115. 47 CLJ 62 : 107 Ind Cas 733 : AIR (Vol 15) 1928 Cal 189.

——S. 115 — An erroneous decision of a point of law, not connected with the exercise of jurisdiction will not give a right to apply in revision. Therefore a Court wrongly allowing a time-barred application cannot be said to be acting either without, or in illegal or irregular exercise of its jurisdiction. 100 Ind Cas 638 : 49 All 454 : 25 ALJ 399 : AIR (Vol 14) 1927 All 358.

——S. 115 — An erroneous decision of the lower Court on the question of limitation is not a sufficient ground for interference in revision. 103 Ind Cas 113 : AIR (Vol 14) 1927 Nag 389.

——S. 115 — Where the trial Judge, in a carefully reasoned judgment, decided, after considering the various authorities, the suit is to be time barred, the fact that the Judge had arrived at incorrect interpretation of the authorities is no ground for interference by the High Court. 4 OWN 1123 : 107 Ind Cas 191 : AIR (Vol 14) 1927 Oudh 615.

——S. 115 — Where a Court, in dealing with an application to set aside an abatement, fails to take into consideration the period of limitation fixed by law for applying to set aside the order, the order setting aside the abatement is bad & will be set aside in revision. 87 Ind Cas 173: AIR (Vol 13) 1926 Cal 444 (DB).

——S. 115 — A High Court cannot interfere under S. 115 merely because the lower Court wrongly decided that the suit was barred by limitation or on the principle of res judicata. 93 Ind Cas 855: AIR (Vol 13) 1926 Lah 355.

——S. 115 — Judgment of a Subordinate Court may be upset on a question of limitation in revision. AIR (Vol 12) 1925 Oudh 34: 79 Ind Cas 848: 11 OLJ 513 (DB).

——S. 115 — Where the lower Court granted the application to set aside the ex parte decree, which was on the face of it barred by limitation.

Held, that the order was erroneous in law, but it is not open to the High Court to interfere in the exercise of its revisional jurisdiction under S. 115. 76 Ind Cas 14 : AIR (Vol 11) 1924 Lah 666.

——S. 115 — Where the Court held that the applicants were not entitled to get the sale set aside because they had failed to serve the auction-purchaser with a notice under O. 21, R. 92 within one month of the sale.

Held, that this was a wholly erroneous view of the law of limitation, but all the same it was a decision arrived at with jurisdiction and it cannot be revised under S. 115. 75 Ind Cas 430 : 2 Pat 800 : 4 PLT 491 : 1 Pat LR 361 : AIR (Vol 11) 1924 Pat 37 (DB).

——S. 115 — Where there is no mistake in computing the period of notice but error in holding that 15 days inclusive of the first were sufficient, it is an error of law and there is no sufficient ground for review. AIR (Vol 9) 1922 Pat 308.

——S. 115 — **Error of law — Limitation — Not a ground.**

The High Court will not interfere in revision on the ground that the court below has wrongly decided a question of limitation. 2 UPLR (All) 72 : 55 Ind Cas 871 : AIR (Vol 7) 1920 All 181.

——S. 115 — **Error of law — Limitation — Revision.**

The question whether a petition for the restoration of a suit is or is not barred by limitation, is within the province of the court to decide and an error in this, whether of law or fact, would not entitle a party to move the High Court in revision. 3 Pat LJ 376 : 46 Ind Cas 176 : AIR (Vol 5) 1918 Pat 390 (DB).

——S. 115 — **Error of law — Limitation.**

When a question of limitation is wrongly decided by Lower Court, interference of the High Court is not justified. The High Court can rightly interfere when the Lower Court has no jurisdiction in deciding the case. 32 Ind Cas 982 : AIR (Vol 4) 1917 Cal 572 (DB).

——S. 115 — **Error of law — Limitation — Full Bench of Prs. Sm. C. Court.**

The High Court cannot under S. 115, revise the decision of the Full Bench of the Pres. Small Cause Court on the question of limitation merely because it is alleged to be erroneous unless there is a question of jurisdiction. 21 MLJ 1020; 31 Ind Cas 536; 28 IC 189, Diss. 19 MLT 24 : 3 LW 36 : 32 Ind Cas 3 : AIR (Vol 4) 1917 Mad 76 (DB).

[**Affirming AIR (Vol 2) 1915 Mad 48 : 16 MLT 438 : 1 LW 855 : 25 Ind Cas 647.**]

——S. 115 — **Error of law — Limitation — No revision.**

Where an appeal lies to the Dt. Judge from an order passed under O. 21, R. 72 (3), C. P. C., the High Court will not interfere in revision with the order merely because the Lower Appellate Court decided a question of limitation wrongly. 13 ALJ 351: 28 Ind Cas 270: AIR (Vol 2) 1915 All 54 (DB).

——S. 115 — **Error of law — Objection that proceedings have been erroneous.**

In a revision before a High Court an objection cannot be taken that the proceedings in the lower court have been throughout erroneous. Error of law as to limitation is no ground for revision. AIR (Vol 2) 1915 Mad 907 : 2 MLW 609 : 30 Ind Cas 264.

——S. 115 — **Error of law — Limitation — Refusal to entertain appeal.**

An order refusing to excuse delay in presentation of an appeal is not open to revision even for showing that the appeal was in time. 24 Ind Cas 872 : AIR (Vol 1) 1914 Mad 149.

——S. 115 — **Error of law — Limitation.**

A wrong decision on a question of limitation does not furnish any ground for revision under S. 115, C. P. C. (1912) 14 Ind Cas 52 (All) (DB).

——S. 115 — Error of law — Limitation.

An error in applying the law of limitation is not a ground of revision for in doing it the court has not failed to exercise jurisdiction vested in it by law or acted illegally or with material irregularity in the exercise of its jurisdiction. (1912) 16 Cal WN 1015 : 15 Ind Cas 679 (DB).

——S. 115 — Error of law — Limitation.

Mere erroneous decision on a limitation point by a Lower Court does not justify High Court's interference in revision under S. 115. (1912) 39 Cal 473 : 15 Ind Cas 547.

(k) Misapplication of Law.

——S. 115 — Wrong interpretation of law.

A wrong interpretation of law in certain cases may amount to a material irregularity justifying interference in revision. AIR (Vol 32) 1945 All 388: ILR (1945) All 637: 1945 AWR (HC) 189: 1945 OWN (HC) 167.

——S. 115 — Decision merely erroneous in a point of law cannot be interfered with unless it arises from misconception of the nature of proceedings. Thus where an application which does not fall under Art. 178, Lim. Act, is held time-barred under that Article, the decision is liable to be reversed. AIR (Vol 31) 1944 Lah 398: 46 PLR 232.

——S. 115 — Decision wrong, not only on law point but due to wrong method used — Decision is vitiated by material irregularity.

Where the wrong view of the law at which the lower Court has arrived is not merely a wrong decision of the law point which he was entitled to decide, but is vitiated by a material irregularity of method, it opens the door to revision under S. 115. AIR (Vol 31) 1944 Nag 295: 1944 NLJ 347: ILR (1944) Nag 806 (DB).

——S. 115 — Judge enunciating principle that suit must not be stayed under S. 19, Arbitration Act, if difficult point of law arises.

It cannot be laid down as a principle that merely because a difficult point of law is raised, a Judge must necessarily exercise his discretion in a particular manner, and that he must refuse to stay the suit under Arbitration Act, S. 19. If any such principle has been laid down by a Judge, S. 115, Civil P. C., would apply. AIR (Vol 29) 1942 Sind 57: ILR (1941) Kar 587: 199 Ind Cas 707 (DB).

——S. 115 — Incorrect view of law — High Court will interfere only when law is well-known.

It is the practice of the Nagpur High Court to interfere in revision against an incorrect view of the law only when the law is well-known. AIR (Vol 26) 1939 Nag 64: 1938 NLJ 457: 181 Ind Cas 123.

——S. 115 — Transferee of judgment-debtor, instead of depositing the amount into the Court, stating that payment was made to decree-holder outside Court — Landlord assenting — Sale set aside :

Held, that the sale was set aside on a wrong view of the law and the revision lay. AIR (Vol 24) 1937 Pat 537: 18 PLT 409: (1937) PWN 497: 4 BR 129: 172 Ind Cas 8.

——S. 115 — High Court satisfied that lower Court proceeded on clear misapprehension of S. 63 — Interference in revision when another remedy open.

Where the High Court is satisfied that in making an order under S. 63, the lower Court has proceeded on a clear misapprehension of that section, it will be justified in setting aside that order in revision even though another remedy by way of separate suit may also be open to the aggrieved party. AIR (Vol 23) 1936 Mad 91: (1935) MWN 1300: 69 MLJ 908: 43 MLW 40: 59 Mad 303: 161 Ind Cas 93 (DB).

——S. 115 (a) (c) — Wrong interpretation of Statute by lower Court.

If a Court by a misinterpretation of the provisions of a statute assumes a jurisdiction in respect of a matter over which it would not have had jurisdiction if the statute had been rightly interpreted, the order made is one which is liable to be revised if not under cl. (a) to S. 115, at least under cl. (e) of the said section. (1936) 164 Ind Cas 73: 39 Cal WN 915.

——S. 115 — Execution sale — Sale of property subject to mortgage — Commission to auctioneer to be paid only on the bid and not on the mortgage amount — Order granting commission on both can be set aside in revision. AIR (Vol 21) 1934 Pesh 29 (1): 149 Ind Cas 1126.

——S. 115 — Wrong application of section of Act.

Where the lower Court having jurisdiction to decide a case, wrongly applied the section of an Act to the case having entirely misunderstood its object and scope and in disposing of the case perpetrated injustice :

Held, that the case was one in which the High Court would exercise its revisional powers. AIR (Vol 20) 1933 Lah 335: 34 PLR 440: 148 Ind Cas 1097.

——S. 115 — Raiyat or under raiyat holding homestead not as part of his holding — Landlord has no right of pre-emption — An order for pre-emption in such a case made by the lower Court can be set aside by the High Court. AIR (Vol 19) 1932 Cal 857: 36 CWN 788: 139 Ind Cas 765.

——S. 115 — Limitation Act (IX of 1908), S. 19.

A wrong application of S. 19, Limitation Act, to the contents of a document is only an error of law, and such an error by itself would not furnish a ground for revision by the High Court. (1932) 137 Ind Cas 513 (1): 33 PLR 330 (DB).

——S. 115 — Appeal erroneously entertained.

Where a District Munsif passes an erroneous order from which no appeal lies but an appeal is erroneously entertained by the District Judge and the order is rectified, the High Court can in revision while setting aside the appellate order, revise the order of the District Munsif. AIR (Vol 19) 1932 Mad 714: 36 MLW 646: (1932) MWN 1244: 139 Ind Cas 167.

——S. 115 — Necessary party — Non-joinder of.

The order of the District Judge who decides the case without joining a necessary party on an erroneous view of the law is open to revision. AIR (Vol 15) 1928 Lah 414: 10 Lah LJ 161: 108 Ind Cas 391.

——S. 115 — Where the lower Court has misapplied the law by treating a case of compensation for deficiency of the land sold as one of mistake of fact and on that footing rescinded the contract, the order can be revised. AIR (Vol 14) 1927 Rang 90: 5 Bur LJ 206: 100 Ind Cas 327.

——S. 115 — If a Court, upon an erroneous view of the scope of a section of the Civil Procedure Code applies it to a case to which it has no application, such a Court would act without jurisdiction, and High Court would, in the circumstances, be prepared to interfere. AIR 1922 Nag 115, Not Foll. AIR (Vol 13) 1926 Nag 257: 92 Ind Cas 40.

——S. 115 — Ex parte decree — Refusal to set aside.

Where a District Judge on appeal against an order refusing to set aside an ex parte decree, has misunderstood and misapplied the law, he has committed a material irregularity in the exercise of his jurisdiction, and his order is open to revision by the High Court. AIR (Vol 11) 1924 Lah 603: 75 Ind Cas 1020.

——S. 115 — In a suit by one partner against another, the validity of service is governed by the provisions of O. 5, R. 25 and not by O. 30, R. 3. or O. 5, R. 13. But even if the lower Court has misapplied the provision of law applicable to such a case, it is at best a matter of law which the Court had jurisdiction to decide rightly or wrongly and the High Court will not interfere with it in revision. AIR (Vol 9) 1922 Pat 376: 62 Ind Cas 927: 1922 PHCC 76: 3 PLT 29: 1 Pat 48 (DB).

——S. 115 (S. 622 old Code) — Charter Act, S. 15 — Revisional powers of High Court in final orders of Collector under Bengal Rent Act.

The High Court has powers either under S. 622 C. P. C., or if not, under S. 15 of the Charter Act, to interfere in case where the lower Courts have not acted correctly in accordance with law. Where a plaintiff failed to secure the production of an important document from the records of another Court though he took all reasonable steps for that purpose and the suit was disposed of by both the Court of first instance and the appellate Court without reference "to that document" the High Court in revision set aside the judgments of both the Courts. (1907) 11 CWN 112 (114): 8 CLJ 43 (DB).

(l) Misconstruction.

——S. 115 — Appeal decided on wrong principle of law.

The mere fact that the lower Court has decided the appeal upon a wrong principle of law does not justify interference by the High Court in revision. AIR (Vol 30) 1943 All 21 : (1942) ALJ 634 : 1942 AWR (HC) 350 : 204 Ind Cas 610.

——S. 115 — Court taking wrong view of law — Whether ground for interference in revision.

The decision of the lower Court cannot be interfered with in revision on the ground that the Court has taken wrong view of the law. AIR (Vol 29) 1942 Pat 251 : 8 BR 429 : 21 Pat 197 : 23 PLT 547 : 198 Ind Cas 535 (DB).

——S. 115 — Ss. 115, 92 — Court putting certain construction on the terms of a scheme — High Court, if can interfere under S. 115.

Where a Court places certain construction on the terms of a scheme even if it is an incorrect construction, it cannot be regarded as anything more than a mistake of law, but that cannot be a ground for interference with the order under S. 115 of the Civil P. C. AIR (Vol 24) 1937 Oudh 193 : 1937 OWN (CC) 39 : 13 Luck 81 : 166 Ind Cas 215 (DB).

——S. 115 — Lower Court wrongly construing section, and refusing to entertain application — Revision.

Where the lower Court, under an erroneous construction of a section of an Act, has refused to entertain and decide an application which the statute directs it to decide, the matter is clearly within the purview of S. 115 of the Civil P. C. AIR (Vol 23) 1936 Cal 275 : 39 CWN 1176 : 62 Cal LJ 356 : 63 Cal 49 : 163 Ind Cas 72 (DB).

——S. 115 — Court not assuming jurisdiction due to misconstruction of section.

Where a Court having jurisdiction to decide an election petition, under the Bengal Municipal Act, misconstrues a section of the Act in deciding it, it does not exercise its jurisdiction illegally or with material irregularity as to call for interference in revision under S. 115, Civil P. C. (1936) 163 Ind Cas 573 : 39 CWN 910 : 62 CLJ 349.

——S. 115 — Wrong interpretation of compromise deed.

The wrong interpretation of a deed of compromise filed in the execution proceedings does not amount to a material irregularity in the exercise of jurisdiction. AIR (Vol 22) 1935 Lah 971 : 160 Ind Cas 521.

——S. 115 — An alleged misconstruction of a document cannot be interfered with in revision. (1934) 1934 MWN 160.

——S. 115 — Erroneous view of point of law.

During the pendency of proceedings for sale of mortgaged property in pursuance of a decree for sale, the decree-holder applied for attachment before judgment. The Court directed the mortgagor to furnish security or to show cause why order of attachment should not be made. After hearing the parties, the Court, acting on the view that an application under O. 38, R. 5 cannot be made before an order under O. 34, R. 6 is passed, dismissed the application for attachment:

Held, that the lower Court could not be considered to have failed to exercise a jurisdiction vested in it by law, and that the utmost that could be said was that in deciding the case which the lower Court had jurisdiction to decide, it took an erroneous view on a question of law involved in the case, that the order could not be interfered with in revision. AIR (Vol 20) 1933 All 557 : (1933) ALJ 1269: 146 Ind Cas 838 (DB).

——S. 115 — If a Court refuses to exercise a jurisdiction vested in it by law upon a misapprehension of the law or an erroneous construction of a statute, the High Court can interfere in revision. (1930) 34 CWN 733.

——S. 115 — Where the Court interpreted the words "on roads or streets within half a mile of a public or private market" appearing in Ss. 28, 52 as not necessarily meaning the edge of either side of, or part of roads or streets, the error of the Court is more than an error in law for he has overlooked the canon of interpretation that any statutory provision in the nature of a taxation clause should be interpreted literally in favour of the subject and so the High Court will interfere in revision. 120 Ind Cas 698 : AIR (Vol 16) 1929 Rang 210.

——S. 115 — Misconstruction of a document (even if established) is not sufficient ground for interference in revision. 108 Ind Cas 373 : AIR (Vol 15) 1928 Lah 713.

——S. 115 — Where the lower court erroneously decided that an award be filed, overruling the objection that the arbitrators made private inquiries on the ground that the agreement to refer authorised such enquiry, the High Court can interfere in revision where the agreement does not in fact so authorise. 110 Ind Cas 833 : AIR (Vol 15) 1928 Lah 550.

——S. 115 — Wrong construction of a section is not a question of jurisdiction. 112 Ind Cas 608 : 1928 MWN 479 : AIR (Vol 15) 1928 Mad 983.

——S. 115 — Where a lower appellate Court misconstrued the law on which the judgment of a trial Court was based, i. e., where it wrongly held from the tenor of trial Court's judgment that the trial Court's order was under O. 21, R. 92, whereas its judgment was equally consistent with an order under S. 151 which was appropriate to the case; or where it also omitted to decide the question (which was material to the case), whether the word "interests" in O. 21, R. 90, includes the interests also of an intending auction-purchaser.

Held, that a revision would lie. 101 Ind Cas 520 : 28 PLR 130 : AIR (Vol 14) 1927 Lah 808.

——S. 115 — Where a Court proceeds on misunderstanding of the pleadings, revision lies. 95 Ind Cas 294 : AIR (Vol 14) 1927 Lah 44.